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REPORTS OF CASES
DECIDED IN THE
SUPREME COURT OF APPEALS
OF VIRGINIA.

BY PEACHY R. GRATAN.

VOLUME XXX.
FROM JANUARY 31 TO NOVEMBER 1, 1878.

JUDGES
OF THE
SUPREME COURT OF APPEALS
DURING THE TIME OF THESE REPORTS.

R. C. L. MONCURE, PRESIDENT.

JOSEPH CHRISTIAN,
WALLER R. STAPLES,

FRANCIS T. ANDERSON,
EDWARD C. BURKS.

Attorney General, JAMES G. FIELD.

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CASES

DECIDED IN THE

Supreme Court of Appeals of Virginia.

Grandstaff, Late Sheriff & als. v. Ridgely, Hampton & Co.

January Term, 1878, Richmond.

1. **Sheriffs—Execution—Action on Official Bond—Pleading.**—In an action by an execution creditor against the sheriff and his sureties upon his official bond, for the failure to pay over the money he had collected on the execution which had gone into the hands of one of his deputies, the declaration not stating that the plaintiff did not reside in the county of the sheriff, it is not necessary to aver that a demand had been made upon the sheriff, as prescribed by the statute, before the action was instituted.
2. **Same—Same—Same—Payment—Demand upon Sheriff Where Creditor resides in Another County.***—If it appears upon the trial that the plaintiff in the execution did not reside in the same county with the sheriff, then unless the plaintiff proves that such demand was made on the sheriff, his action must fail.
3. **Same—Same—Same—Levy after Return Day—Liability on Official Bond.†**—A sheriff or other officer has no authority to receive payment under an execution after the return day thereof, unless the execution has been previously levied. Such payment would not *bind the creditor; nor would it impose any liability upon the sureties of the sheriff in his official bond. Although the sheriff may be responsible in his private capacity for money so received, no responsibility would attach to him in his official character, on that account.
4. **Same—Same—Fieri Facias as Lien after Return Day.**—The act of 1849, Code of 1873, ch. 184, §§ 3, 4, though it gives to a *fieri facias* the effect of a continuing lien after the return day, upon all the personal estate of the execution debtor (except as therein stated), does not enlarge the powers of the sheriff with respect to executions, and were not so intended. They simply extend the lien for the benefit of the creditor.
5. **Same—Same—Authority to Collect.**—The authority of an officer to collect money in discharge of an execution does not result from the lien, but is a consequence of the right to levy and sell the debt-

or's property under the execution. So long as the right to sell continues, the right to receive remains; but no longer.

6. **Same—Same—Same—Sales.**—If the officer levies before the return day of the writ, he may sell after the return day has passed; and as a necessary consequence he may receive payment without selling. But if he fails to levy before the return day, his authority to sell afterwards ceases, and with it the right to receive payment in discharge of the writ. He may receive payment at any time before the return day without a levy.
7. **Same—Same—Action on Official Bond—Pleading.**—A count in a declaration in an action by an execution creditor against the sheriff and his sureties, avers that the execution went into the hands of a deputy of the sheriff, and became a lien on all the personal property of the debtor, and that the deputy collected the whole amount of the execution; but does not aver that the execution was levied, or that the money was paid before the return day of the writ. The count is fatally defective.
8. **Same—Same—Same—Fines.**—Although a sheriff is liable to a fine, at the discretion of the proper court, for his failure to make due return of an execution, he is also liable to an action on his official bond by the party injured by his failure. The fine is in the nature of punishment for a personal offence, and is not considered as any satisfaction for the damage sustained by the creditor in being unjustly kept out of his money by the default of the sheriff or his deputy.
9. **Same—Same—Same—Same—Credits.**—When the fine is paid by the sureties of the sheriff, in any subsequent proceeding against them on the judgment or decree upon which the execution issued, they will be entitled to a credit on *the judgment or decree for the amount of the fine or fines so paid. Code of 1873, ch. 49, § 28.
10. **Same—Same—Same—Pleading.**—In an action by an execution creditor against the sheriff and his sureties, one count in the declaration, after stating that said execution was in the hands of the deputy, and was returnable on a date stated, avers that neither the deputy sheriff or the said sheriff of S. county made such return since that time, but such return of said execution to make, have wholly neglected and refused, &c. The count is substantially sufficient.
11. **Same—Same—Same—Execution Debtor as Witness.**—In an action by R, the execution creditor of K & B, against the sheriff and his surviving sureties, for a failure to pay over money collected on the execution, the plaintiff offered B as a witness, stating that he, R, expected, among other things, to prove by this witness payment of money to said sheriff or his deputy on the execution of R against K & B—Held: B was not so directly interested in the result of the suit, or in the verdict and

***Executions — Payment — Demand upon Sheriff Where Creditor Resides in Another County.**—See 4 Min. Inst. (2nd Ed.) 937; Ballard v. Thomas, 19 Gratt. 25; 15 Enc. Pl. & Pr. 119.

†Same—Levy after Return Day—Liability on Official Bond.—See also 4 Min. Inst. (2nd Ed.) 937 et seq.; 11 Am. & Eng. Enc. Law (2nd Ed.) 648.

That a levy after a return day is void and does not bind creditor, see O'Bannon v. Saunders, 24 Gratt. 138; Chapman v. Harrison, 4 Rand. 336; Cockrell v. Nichols, 8 W. Va. 159.

judgment to be rendered, as to render him incompetent to testify in the cause.

12. Same—Same—Same—Payments—Evidence.—B having stated that there were sundry executions against K & B; that the sheriff and his deputies had been at their place of business, and made levies of executions, but he could not say whether or not the execution in this case was ever levied by the sheriff or any of his deputies, the plaintiffs then propounded the following question: Did you make any payments on this execution to the sheriff or his deputies either before or after the return day of this execution; if so, when; to whom, and how much? To this question witness said: "I made a payment on the 3d of April, 1862, of \$500, according to this receipt: Received April 3d, 1862, of James M. Bradford, \$500, in part of claims in my hands. J. G., S. S. C., G. G., D. S."—**Held:** This testimony was clearly admissible at that stage of the trial to prove the payment, because the plaintiffs might adduce evidence tending to show the levy before the return day of the execution. If they failed to do so it was competent for the defendants to move to exclude all that the witness said with respect to the payment made by him.

13. Same—Same—Same—Same—Question for Jury.—The payment made to the deputy G was intended to be handed by him to M, another deputy, who had the execution. A few days after the payment B saw M, and he directed M to apply the same to the execution of R, to which M made no objection (no reply)—**Held:** This evidence was properly left to the jury to determine whether the officer had acquiesced in the direction of the debtor, and whether, under the circumstances, the officer *could properly apply any part of the money to other claims in his hands against the debtor.

14. Same—Same—Same—Competency of Witnesses—Interest in Result.*—In an action by an execution creditor against the sheriff and his surviving sureties in his official bond to recover damages for the failure of the sheriff and his deputies to levy and make due return of the execution, or to pay over money collected under the execution, it appeared that the execution went into the hands of the deputy M, and it was his conduct that was involved in the case. The defendants offered M as a witness on their behalf, and he was objected to by the plaintiffs, on the ground that some of the sureties of the sheriff were dead, and the witness was interested in the result of the suit, arising out of his liability over to his principal—**Held:** The transaction which was the subject of investigation in the case was the alleged default of the deputy sheriff. All the parties to that transaction were living and competent to testify in the cause. The sureties of the sheriff, though liable on their bond for the default of the sheriff and his deputies, were no parties to the transaction which was the subject of investigation. M was, therefore, a competent witness.

***Competency of Witnesses—Interest in Result.**—See generally 4 Min. Inst. (2nd Ed.) 772; 29 Am. & Eng. Enc. Law 564. And see *Wagner v. Barbour*, 84 Va. 422; *Mutual Life Ins. Co., etc., v. Oliver*, 95 Va. 445, citing principal case and *Martz v. Martz*, 25 Gratt. 364; *Huffman v. Walker*, 26 Gratt. 314; *Grigsby v. Simpson*, 28 Gratt. 348; *Simmons v. Simmons*, 33 Gratt. 461; *Hughes v. Harvey*, 75 Va. 207; *Wagner v. Barbour*, 84 Va. 419; *Hall v. Rixey* 84 Va. 790.

15. Same—Same—Same—Evidence.—After All the evidence was introduced the sheriff and the deputy M asked to be allowed to withdraw and make a return on the execution of R against K & B, a copy being left of said execution, it being then in evidence, stating that as soon as returned to the county court clerk's office (from whence it was issued) they would offer said return in evidence—**Held:** It was not error to refuse the application.

16. Same—Same—Same—Demand of Payment Where Sheriff Resides in Another County.—When the creditor proceeds against the sheriff for money collected under an execution, the demand of payment in the sheriff's county is absolutely essential if the parties reside in different counties. But when the creditor is also suing for a failure to make due return of an execution, no demand is necessary previous to a judgment for such breach. The gist of the action is the failure to return the execution.

This case was heard in Staunton, but was decided in Richmond. It was an action of debt brought in the county court of Shenandoah in September, 1871, but afterwards transferred to the circuit court of that county, in the name of the Commonwealth of Virginia, suing at the costs, &c., of Ridgely, Hampton & Co., against John J. Grandstaff, late sheriff of Shenandoah county, *and the surviving sureties in his official bond. The declaration contained five counts. The first set out the official bond, and the qualification of said Grandstaff, and the entry upon his office of sheriff on the first of January, 1859, which continued for two years; and that the plaintiffs had recovered a judgment in the county court of the county in 1860 against David McKay and James M. Bradford, partners, for \$556.53 with interest, &c., and costs; that on the 21st of March, 1860, they had sued out an execution of fieri facias on said judgment, which on the same day was delivered to George J. Grandstaff, deputy of the said John J. Grandstaff, sheriff, &c., and that on the 23d of April George J. Grandstaff made endorsement thereon: "Received April 23d, 1860, at 11 o'clock A. M." as required by law; whereby and by reason whereof the said execution became a lien from said date upon all the personal estate of, or to which said judgment debtors were possessed or entitled (although not levied on nor capable of being levied on), except such personal estate of said judgment debtors as was exempt by law from distress or levy, which said lien has never ceased or been suspended by a forthcoming bond being given and forfeited, or by a supersedeas or other process up to the time of the institution of this suit. And the said plaintiffs aver that afterwards, to-wit: On the 23d of April, 1860, the said execution was delivered by said George J. Grandstaff, deputy sheriff for John J. Grandstaff, to B. F. Murray, another deputy of said John J. Grandstaff, sheriff of Shenandoah county, and held by him as such deputy from that time until the institution of this suit. And the plaintiffs further aver that at said time, to-wit: on the 23d of April, 1860, at the county aforesaid, and from that time until the institution

in this suit, said defendants had large personal estate over and above such as was exempt by law, more than enough to have paid said execution of plaintiffs, upon which said execution, by virtue of said endorsement, *became a lien; and the plaintiffs aver that while said execution was so in the hands of said last-mentioned deputy sheriff, and a lien upon said personal estate of said defendants, the said defendants, to-wit: on the — day of —, 186—, paid to the said last-mentioned deputy sheriff the whole amount of said execution in money, in satisfaction and discharge thereof; which said money so paid, the said deputy sheriff aforesaid to pay to the said plaintiffs, or either of them or their authorized agents or attorneys, wholly neglected and refused; to the damage, &c.

The second count charged the failure by the sheriff and his deputies to levy the execution. The third count charged the levy of the execution, but the failure to sell the property or collect the money; and the fourth count charged the levy of the execution and the collection of the money, and the failure to pay it to the plaintiffs.

The fifth count followed the first down to and including the averment that the debtors in the execution had large personal estate—more than enough to have paid said execution to the plaintiffs, and then proceeded: And the plaintiffs aver that although said execution was so in the hands of said deputy sheriffs, and they were required by law and by the terms thereof to make return thereof, and to have said money mentioned therein before the justices of the county court of Shenandoah county aforesaid on the Monday before the second Tuesday in May next, after the date thereof, to-wit. 1860, to render to the plaintiffs of the debt and costs aforesaid; yet neither the said deputy sheriffs, or either of them, or the said sheriff of Shenandoah county, made such returns of said executions on said return day, nor have they, or either of them, made such return since that time, but such return of said execution to make have wholly neglected and refused, and still do, &c.

The defendants plead "conditions performed," and non *damnificatus; on which pleas issues were joined. And they afterwards demurred to the declaration and each count thereof; but the court overruled the demurrer.

On the trial of the case the jury found a verdict in favor of the plaintiffs for five hundred dollars, and the defendants moved the court for a new trial, which motion the court overruled, and rendered judgment on the verdict. To which the defendants excepted.

In the progress of the trial the defendants took ten bills of exception to rulings of the court.

The first is as follows: To prove the issue on their part the plaintiffs called James M. Bradford, who being examined on his voir dire, stated he was a member of the firm of McKay & Bradford, and one of the judgment debtors in the suit of Ridgely,

Hampton & Co. v. McKay & Bradford; and the plaintiffs stated that they expected, among other things, to prove by this witness payments of money to said Grandstaff, or his deputy, on the execution of said Ridgely, Hampton & Co. v. McKay & Bradford. To the said Bradford's being examined as a witness, the defendants objected on the ground of interest, and for other reasons (it being proved that several of the sureties in the official bond of the sheriff were dead). But the court overruled said objection, and held that said witness was competent, and allowed the said witness to be examined. His evidence is set out in exception No. 10, which is made a part hereof. To which ruling of the court the defendants excepted.

The second exception states that the witness, Bradford, proved, among other things, that there were sundry executions against McKay & Bradford, of which firm he was a member; that the sheriff and his deputies had been at their place of business, and made levies of executions; but he could not and would not say whether or not the execution in this case was ever levied by the sheriff or any of his deputies. And the plaintiffs then propounded *the following question: Did you make any payments on this execution to the sheriff or his deputies, either before or after the return day of the execution? If so, when, to whom, and how much?

To this question the defendants objected, on the ground that the sheriff could not receive money on a fi. fa., so as to bind his sureties in his official bond, after its return day, unless a levy was made, and for other reasons. But the court overruled the said objection, and allowed the witness to answer; and his answer was: "I made a payment on the 3d of April, 1862, as per receipt I hold in my hand, of five hundred dollars, which receipt is as follows: Received April 3d, 1862, of James M. Bradford, five hundred dollars, in part of claims in my hands against him. John J. Grandstaff, S. S. C., Geo. J. Grandstaff, D. S. And the witness was also examined at great length in reference to said payment and receipt. The ruling of the court on the said question and admitting said answer was excepted to by the defendants.

Third exception. After the plaintiffs had introduced the said receipt they asked the witness on what debt he paid the said \$500; to which the defendants objected. But the court overruled the objection, and allowed the witness to answer the question; and witness said that at the time of payment he said little, but a few days later, in a conversation with B. F. Murray, another deputy of said John J. Grandstaff, sheriff, to whom the execution and the money had been transferred by the deputy, George J. Grandstaff, and who then held the same, he directed the application of the same to the execution of Ridgely, Hampton & Co., and to which the said Murray made no objection (no reply). To which answer the defendants objected, and asked to have the said answer excluded. But the court overruled the motion; and the

defendants excepted to the admission of both the question and the answer.

9 *It is unnecessary to state the fourth exception.

Fifth exception. The defendants, to prove the issue on their part, offered B. F. Murray as a witness, who, on the voir dire, said he was deputy sheriff of John J. Grandstaff from January, 1859, to 1861, but had executed no bond, and had the execution in question as such deputy, and as such had received of George J. Grandstaff, the other deputy, the \$500 paid by Bradford on the 3d of April, 1862, as per receipt copied in the second exception. And thereupon the plaintiffs objected to the introduction and examination of said Murray, on the ground of interest in the result of the suit arising out of liability over to his principal, and that the plaintiffs could not be witnesses because of the death of sundry of the sureties of John J. Grandstaff, sheriff of Shenandoah county, and defendant in this suit, and for other reasons. And the court sustained the objection; and the defendants excepted. Grandstaff then executed a release to Murray and George J. Grandstaff, from all liability on account of any acts of theirs done in connection with the execution of the plaintiffs against McKay & Bradford; and the defendants again offered Murray as a witness, when the court again refused to allow him to be examined. To which the defendants again excepted, and embraced both rulings in one bill of exception.

Sixth exception omitted as unnecessary.

Seventh exception. After all the evidence of plaintiffs and defendants, except that of P. Hoshour, had been offered, and when the case was closed upon the evidence, except the returns proposed to be offered and the evidence of said Hoshour, the sheriff, John J. Grandstaff, and the deputy, B. F. Murray, asked to be allowed to withdraw and make a return on the said execution of Ridgely, Hampton & Co. v. McKay & Bradford, leaving a copy of said execution, it being

10 then in evidence, *stating that as soon as returned to the county court clerk's office they would offer the said return in evidence, the said Bradford still being in the court-room. But the court refused to allow said execution to be withdrawn, or any return to be written on the same (the defendants stating their return would be "no property found on which to levy this execution, all the property of McKay & Bradford, and each of them, being covered by prior liens to its full value.") And the defendants again excepted.

Eighth exception omitted.

Ninth exception. After all the evidence had been introduced the plaintiffs moved the court to give to the jury four instructions, of which the first three are as follows:

First. If the jury believe from the evidence that the defendant, John J. Grandstaff, late sheriff of Shenandoah county, either by himself or deputy, or deputies, was guilty of the breaches alleged in the plaintiffs' declaration, then they must find for the plaintiffs and assess such damages as will compensate

the plaintiffs in said execution for any injury they have sustained in consequence of such breaches.

Second. If the jury believe from the evidence that the execution described in the declaration in this suit was received on the 23d of April, 1860, by George J. Grandstaff, one of the deputies of the defendant, John J. Grandstaff, then sheriff of Shenandoah county; that said execution subsequently passed into the hands of Benjamin F. Murray, another deputy of said John J. Grandstaff, sheriff as aforesaid; that James M. Bradford, one of the defendants in said execution, on the 3d of April, 1862, paid to said George J. Grandstaff, deputy as aforesaid, the sum of \$500 in Confederate money, for which the said George J. Grandstaff gave to said Bradford a receipt in the words and figures following: Received April 3d, 1862, of James

11 M. Bradford, five hundred dollars in part *of claims in my hands against him. John J. Grandstaff, S. S. C. George J. Grandstaff, D. S., and requested the said George J. Grandstaff to pay the same to the said Benjamin F. Murray, the other deputy; that the money on the same day was so paid to said Murray; that in about three weeks thereafter the said Bradford requested said Murray to apply said money to the execution of Ridgely, Hampton & Co. v. McKay & Bradford, stating that it would nearly pay the principal of said execution, and that he did not wish to divide it, to which said Murray made no objection; and that neither the said John J. Grandstaff, sheriff as aforesaid, nor either of his said deputies, has paid the same or any part thereof to said Ridgely, Hampton & Co., or to their attorney or attorneys, they must find for the plaintiffs in this suit; and in assessing the damages for the breaches assigned in the declaration, must take into consideration the said sum of \$500, paid as aforesaid by said Bradford to said George J. Grandstaff, and by him to the said Benjamin F. Murray, deputies as aforesaid, and allow such damages as will be equivalent to the value of the same at the time it ought to have been paid by the said sheriff, or his deputies to the said Ridgely, Hampton & Co., or to their attorney or attorneys, less the sheriff's commission and the sheriff's and clerk's fees in said execution.

Third. That it was the duty of the sheriff (Grandstaff), either in person or by deputy, to levy the execution of the plaintiffs upon the personal property of the partnership of McKay & Bradford, if any, and sell the same subject to older executions, if any, previously levied on the same and unsatisfied.

The defendants asked for nine instructions. The first and second were given by the court. The fourth and sixth are omitted as unnecessary.

Third. That in order to hold the defendants responsible for any money paid by 12 McKay & Bradford, or either *of them, on the execution in question, the jury must find either that the execution against McKay & Bradford was levied, or that the

money was paid before the return day of the execution.

Fifth. That no officer receiving money under an execution, when the party to whom it is payable resides in a different county from that in which the officer resides, is liable to have any judgment rendered against him and his sureties, for the non-payment thereof, until a demand of payment be made of such officer in his county, by such creditor, or his attorney-at-law, or some one having the written order of said creditor; and if the jury believe that plaintiffs reside out of this county, and no demand for the same is established by the evidence in this case, they must find for the defendants as to said money so paid, should they find any was so paid.

Seventh. The jury are instructed that if they believe from the evidence, that the receipt to James M. Bradford for the \$500 paid April 3d, 1862, which purports to be signed by John J. Grandstaff, in his official capacity as sheriff of Shenandoah county, was made by George J. Grandstaff, after the expiration of his term of office as deputy for John J. Grandstaff, sheriff as aforesaid, and when he did not have the execution of Ridgely, Hampton & Co. v. McKay & Bradford in his hands, then such payment to him was invalid, and the said George J. Grandstaff had no power to bind the said sheriff and his sureties by receiving the same and executing the receipt aforesaid.

Eighth. If the jury believed from the evidence that the payment of \$500 made April 3d, 1862, was intended to be and was actually paid into the hands of B. F. Murray, who was then sheriff of Shenandoah county, and had sundry executions against James M. Bradford, and the firm of McKay & Bradford, which executions had originally come

into his hands as deputy for John J. Grandstaff, and which he continued to hold after he qualified as sheriff as aforesaid, that the said Murray, as sheriff aforesaid, and his sureties, are responsible for said sum of money, and the jury must find for the defendants as to that payment.

Ninth. The jury are instructed that a sheriff is not authorized to receive anything in discharge of an execution but gold and silver and legal tender notes, unless the plaintiff authorizes him to receive something else. And if they believe from the evidence that the payment to the sheriff of \$500 on the 3d of April, 1862, was made in Confederate money, then such payment was invalid, and its receipt unauthorized, unless consented to by the plaintiffs.

The court gave the instructions asked for by the plaintiffs, and the first and second instructions asked for by the defendants, and refused all the rest, and in lieu of the fifth instruction asked for gave the following:

That no officer receiving money under execution, when the party to whom it is payable resides in a different county from that in which the officer resides, is liable to have any judgment against him or his sureties for the non-payment thereof, until a demand of payment be made of such officer in his coun-

ty by such creditor, or his attorney-at-law, or some one having a written order of said creditor; and if the jury believe from the evidence that the plaintiffs resided out of this county when the money was collected by the defendant, or his deputy, and that no such demand for the said money was made, they cannot find for the plaintiffs as for money collected. But the jury, in investigating the alleged breach of the condition of the bond for failure to return the execution of the plaintiffs against the defendants, may consider whether, from the evidence, the fact that no demand was made (if such was the fact) resulted from ignorance of *the collection of the money growing out of the failure to return the said execution.

The tenth bill of exception was to the refusal of the court to set aside the verdict and grant a new trial. The bill of exception set out the facts proved, but it is unnecessary to state them. The defendants applied to a judge of this court for a writ of error and supersedeas; which was awarded.

Williams & Brother, and John E. Roller, for the appellants.

Moses Walton, for the appellees.

STAPLES, J., delivered the opinion of the court.

The court is of opinion it was not necessary to aver in the declaration that payment of the execution was demanded of the defendant, John J. Grandstaff, in his county before the commencement of the action. The statute provides that an officer receiving money under an execution, when the creditor resides in a different county, shall not be liable to have any judgment rendered against him or his sureties for the non-payment of the money until a demand of payment shall be made of such officer in his county or corporation. Code of 1873, ch. 183, § 37.

If the declaration had averred the non-residence of the plaintiffs, it might be contended, with some reason, it should also aver a demand of payment. But the declaration does not show where the plaintiffs resided. For aught that appears to the contrary they resided in the same county with the sheriff. It will be so intended unless the evidence shows the fact to be otherwise. If it appears on the trial that the plaintiffs and the sheriff are residents of different counties, it will devolve on the *former to prove the demand in accordance with the provisions of the statute. The court is therefore of opinion that this ground of error is not well taken. *O'Bannon v. Saunders*, 24 Gratt. 138.

The court is further of opinion that a sheriff or other officer has no authority to receive payment under an execution after the return day thereof, unless the execution has been previously levied. Such payment would not bind the creditor, nor would it impose any liability upon the sureties of the sheriff on his official bond. Although the sheriff may be responsible in his private capacity for money so received, no responsibility

would attach to him in his official character on that account. 1 Rob. Prac. 532; *Chapman v. Harrison*, 4 Rand. 336; *Herman on Executions*, 464, 336; *O'Bannon v. Saunders*, 24 Gratt. 138. This was the settled doctrine prior to the revisal of 1849. The provisions then adopted gave to the writ of fieri facias an absolute lien upon the debtor's personal estate, not limited to the time during which the execution was to run, but continuing until the right to levy a new execution ceases or is suspended by a forthcoming bond being given and forfeited, or by a supersedeas or other legal process, subject, however, to certain exceptions which do not apply to the present case, and need not now be considered. *Charron & Co. v. Boswell & als.*, 18 Gratt. 216, and cases there cited; Code of 1860, ch. 189, §§ 3, 4.

These provisions do not enlarge the powers of the sheriff with respect to executions, and were not so intended. They simply extend the lien for the benefit of the creditor. The authority of an officer to collect money in discharge of the execution does not result from the lien, but is a consequence of the right to sell the debtor's property under the execution. So long as the right to sell continues, the right to receive payment remains, but no longer. If the officer levies before the return day of the writ, he may sell, notwithstanding the return day has
16 *passed; and, as a necessary consequence, he may receive payment without selling. But if he fails to levy before the return day, his authority to sell afterwards ceases, and with it the right to receive payment in discharge of the writ. He may, of course, receive payment at any time before the return day without a levy.

Tested by this principle, the first count in the declaration must be held to be deficient in proper averments. It alleges that while the execution was in the hands of the deputy and a lien on the property of the debtor, the latter paid the deputy the whole amount of the debt in discharge of the execution. It does not, however, aver that the payment was made before the return day, or indeed when it was made; nor does it aver that the execution had ever been levied; so that every fact stated in the declaration may be true, and yet no liability may attach to the sheriff and his sureties by reason of the payment made to the deputy. The court is therefore of opinion that the demurrer to the first count ought to have been sustained.

The court is further of opinion that, although a sheriff is liable to a fine, at the discretion of the proper court, for his failure to make due return of an execution, he is also liable to an action on his official bond by the party injured by such failure. The fine is in the nature of a punishment for a personal offence, and is not considered as any satisfaction for the damage sustained by the creditor in being unjustly kept out of his money by the default of the sheriff or his deputy. When the fine is paid by the sureties of the sheriff, in any subsequent proceeding against them to enforce the judgment or decree upon which the execution

issued, they will be entitled to a credit upon the judgment or decree for the amount of the fine, or fines, so paid. Code of 1873, ch. 49, § 28, page 475. See also *McDonald v. Burwell*, adm'r, 4 Rand. 317; *Pardee v. Robertson*, 6 Hill's R. 550.

17 *The fifth count of the declaration is founded upon an alleged breach of duty in failing to make due return of an execution in the hands of the deputy. This count, although not so specific in its averments as it might have been, is substantially sufficient upon general demurrer. The circuit court did not, therefore, err in overruling the demurrer to that count, nor in overruling the demurrer to the remaining counts in the declaration.

The court is further of opinion that the circuit court did not err in overruling defendants' objection to the witness, James M. Bradford, introduced by the plaintiffs, as set out in the first bill of exceptions, nor in overruling defendants' objection to the testimony of the same witness, as set out in the second bill of exceptions. Although the witness was the judgment debtor, and was offered to prove, among other things, a payment made by him to the defendants' deputy, he was not so directly interested in the result of the suit, or in the verdict and judgment to be rendered, as to render him incompetent to testify in the cause. His testimony was clearly admissible at that stage of the trial, to prove the payment, because the plaintiffs might adduce evidence tending to show the levy before the return day of the execution. If they failed to do so, it was competent for the defendants to move to exclude all that the witness said with respect to the payment made by him.

The evidence set out in the third bill of exceptions was offered to show that the debtor, a few days after the payment, had directed that it should be applied to the plaintiffs' execution, and that the officer made no objection. This evidence was properly left to the jury to determine whether the officer had acquiesced in the direction of the debtor, and whether, under the circumstances, the officer could properly apply any part of the money to other claims in his hands against the debtor.

18 *The court is further of opinion that the circuit court did not err in refusing to admit in evidence the execution set out in the fourth bill of exceptions. The return thereon showed it had been satisfied as far back as the 8th November, 1861. It was issued long after the plaintiffs' execution. It had, therefore, no apparent relevancy to the matter in controversy, and its only effect was to confuse the jury by multiplying collateral issues. The bill of exceptions does not show what was the amended return defendants proposed to make on the execution. Whatever it was, the application to amend ought to have been made to the county court from which the execution issued, and not to the circuit court in which the case was then being tried.

The court is further of opinion that the circuit court erred in refusing to permit B.

F. Murray, the deputy sheriff, to testify as a witness in behalf of the defendants. The action was against the sheriff and his sureties for the default of this deputy in failing to pay over money collected under an execution. Second, for failing to levy and make due return of the execution. The witness was excluded upon the ground of interest in the result of the trial, arising out of his liability over to his principal, and because some of the sureties upon the official bond of the sheriff being dead, the plaintiffs could not testify under the statute.

The language of the section of the statute relied on is as follows: And where one of the original parties to the contract or other transaction, which is the subject of investigation, is dead or insane, or incompetent to testify by reason of infamy or other legal cause, the other party shall not be permitted to testify in his own favor, or in favor of any other party having an interest adverse to that of the party so incapable of testifying, &c.

In the case of *Grigsby v. Simpson*, assignee, decided by this court and reported in 19 the April number, 1877, of *the Virginia Law Journal*, pp. 230, 232 (28 Gratt. 348), this court, Judge Christian delivering the opinion, held that the test of competency under the section just quoted is the cause of action in issue and on trial, not the fact to which the party is called to testify. If the cause of action was a matter transacted with a person who has deceased, the other party to that transaction is not admitted at all, and cannot testify to any fact in the case, otherwise he is admitted as a witness. The object of the statute is to put the parties (to the contract or other transaction) on the terms of equality, so that when the lips of one of them are closed by death, or other cause, the adverse party shall not be heard.

The case of *Mason v. Wood et als.*, 27 Gratt. 783, is not at all in conflict with this view. There the witness was called on to testify as to matters occurring after the death of one of the obligors, and of which the latter of course knew nothing; but this court held the witness incompetent. Judge Anderson, delivering the opinion of the court, said that under the statute there was no limitation of the incompetency as to the subject matter of the testimony. The witness could not be heard at all as to any fact. The reason was the obligor, who had died, was a party to the contract which was the subject of investigation.

In this case the transaction which was the subject of investigation was the alleged default of the deputy sheriff. All the parties to that transaction were living and competent to testify in the cause. The sureties of the sheriff were liable on their bond for the default of the principal and his deputy, but they were not parties to the transaction which was the subject of investigation. They are neither within the letter nor spirit of the statute. Without, therefore, enquiring into the operation and effect of the release executed by the sheriff, the court is of opinion 20 *that the deputy is a competent witness for the defendants in this case.

The court is further of opinion that the circuit court committed no error in refusing the application set forth in the seventh bill of exceptions, or in permitting the witness to testify as stated in the eighth bill of exceptions.

The court is further of opinion that the circuit court did not err in giving the first, third and fourth instructions asked for by the plaintiffs. The second instruction affirms the erroneous proposition already adverted to in connection with the first count of the declaration, and that is, that a payment made to the sheriff is valid to bind him and his sureties upon the official bond, although made after the return day of the execution, and although the execution was not levied upon the property of the debtor. This subject has been already discussed, and need not be further considered. For the reasons heretofore stated, this instruction is erroneous, and ought not to have been given. And for the same reason the circuit court erred in refusing to give defendants' third instruction.

The court is further of opinion that the circuit court did not err in refusing to give the defendants' fourth instruction. It is the duty of an officer receiving money to apply it in satisfaction of the oldest execution in his hands. But in this case it did not necessarily follow that because the sheriff may have had older executions in his hands than the plaintiffs', it was his duty to apply to them the money received from the debtor in 1862. The plaintiffs had offered testimony tending to show that a short time after the payment was made the debtor requested the deputy to apply the money to the plaintiffs' execution; to which the deputy made no answer. This evidence was properly left to the jury, upon the question of the application of the payment with the consent of the deputy. The court could not, therefore, give the 21 *defendants' fourth instruction without a manifest disregard of this evidence.

The court is further of opinion that the circuit court did not err in giving to the jury the instruction substituted by the court for the defendants' fifth instruction. Both instructions, the defendants' and that given by the court, informed the jury that an officer receiving money under an execution, but residing in a different county from the creditor, is not liable to have a judgment rendered against him or his sureties, for the non-payment thereof, until a demand of payment is made of such officer in his county or corporation, by the creditor or his attorney, or some person having a written order from the creditor; and in this case if the jury believed from the evidence that the plaintiffs resided out of the county (the sheriff's), and that no such demand for the said money was made, they cannot find for the plaintiffs as for money collected.

To this the court made the following addition: "But the jury, in investigating the alleged breach of the condition of the bond for a failure to return the execution of the 'plaintiffs against defendants,' may consider whether from the evidence the fact that no demand was made (if such was the fact) re-

sulted from ignorance of the collection of the money, growing out of the failure to return the said execution."

This addition was, perhaps, calculated, in some degree, to confuse the jury. When the creditor proceeds against the sheriff for money collected under an execution, a demand of payment in the sheriff's county is absolutely essential if the parties reside in different counties. In such case it does not matter whether the execution is or is not returned, or whether the creditor is or is not ignorant of the collection of the money. But when the creditor is also suing for a failure to make due return of the execution, as in

the fifth count, no demand of payment ²² is necessary previous to a judgment for such breach. The gist of the action is the failure to return the execution. The circuit court might, therefore, have told the jury that so far as the action was for the failure to make return of the execution, no demand of payment was required. It was not necessary to encumber the instruction with the qualification in regard to the ignorance of the plaintiffs. This qualification, however, was not prejudicial to the defendants, and affords no just ground of complaint on their part.

The court is further of opinion that the circuit court committed no error in refusing the seventh, eighth and ninth instructions asked for by the defendants. But for the errors already stated, the verdict and judgment must be set aside, and the cause remanded to the circuit court for a new trial, in conformity with the views herein expressed.

The judgment was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the circuit court erred in overruling the demurrer to the first count in the declaration, and in refusing to permit B. F. Murray, the deputy sheriff, to testify as a witness in behalf of the plaintiffs in error, and in giving to the jury the second instruction of the defendant in error, and in refusing to give the third instruction of the plaintiffs in error, and that there is no other error in said record. It is therefore considered by the court that for the errors aforesaid the said judgment of the circuit court be reversed and annulled, and that the defendants in error do pay to the plaintiffs in error their costs by them incurred in the prosecution of their writ of error and supersedeas aforesaid here. And this court proceeding to render such judgment as the

said circuit court ought to have rendered, it is considered by the ²³ court that the verdict of the jury be set aside, and a new trial awarded; that the demurrer to the first count in the declaration be sustained, and leave given to the plaintiffs to amend their declaration, if they shall so desire, and upon any new trial to be had the said circuit court to conform to the judgment.

And the cause is remanded to the said circuit court for further proceedings in conformity with the views herein expressed.

Judgment reversed.

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*Burch v. Hardwicke.

[32 Am. Rep. 640.]

March Term, 1878, Richmond.

1. **Municipal Officers—Chief of Police.***—The chief of police of a city is the officer of the state, and not of the municipality in which he exercises his office.
2. **Same.**—For what officers performing their duties in a city are state, and what are municipal officers, see the opinion of STAPLES, J.
3. **Same—Removal of Officers.**—Though under the constitution of the state, article 6, § 20, the mayor has authority to remove the officers of the municipality, the constitution does not invest him with the power to remove state officers, though they are elected by the people of the municipality or appointed by the municipal authorities, and are paid by them.
4. **Same—Same—Liability of Mayor.**†—The charter of a city having provided for a board of police commissioners, and vested in them the power of removing the chief of police, only giving to the mayor the power of suspending the said officer for a short time, if the mayor removes the officer from his office he exceeds his power and is responsible to the officer in a civil action for damages.

This was an action on the case in the circuit court of the city of Lynchburg, brought in July, 1873, by W. W. Hardwicke against George H. Burch. Burch had been for some time, and continued to be, mayor of the city, and Hardwicke was chief of police of the city. In May, 1873, Burch, acting under the authority claimed by him as mayor of the city, removed Hardwicke from his office of chief of police. The complaint in the declaration was, that Burch had, from malice and without any probable cause, removed the plaintiff from his office. The defendant

***Police Officers, Whether State or Municipal.**—See Dil. Mun. Corp. (4th Ed.) 102, *note*; 19 Am. & Eng. Enc. Law 562j. In *Winchester v. Redmond*, 93 Va. 716 and *Wallace v. Richmond*, 94 Va. 220, the court quoted with approval the remark of JUDGE STAPLES in the principal case "When the mob rages in the streets, when the incendiary and assassin are at work, they do not offend against the city but against the state."

†**Liability of Mayor for Judicial Acts.**—The principal case is distinguished in *Johnston v. Moorman*, 80 Va. 131, where it is said in the opinion. "In *Burch v. Hardwicke*, 30 Gratt. 41, it was held that the mayor of Lynchburg had no jurisdiction to remove Hardwicke, who was not a municipal, but a state officer, and that he was prompted by malice in making the removal, and that, therefore, the mayor was liable in damages to Hardwicke. It is evident that that case was intended by the able judge who delivered the opinion to rest on the distinction taken in *Bradley v. Fisher*, *supra*, between a case where the judge or other officer had no jurisdiction of the subject matter, and a case where the judge or other officer acted in excess of his jurisdiction—and not on the difference between the judges or other officers as respects whether their courts were of superior or of inferior jurisdiction."

See also 19 Am. & Eng. Enc. Law 486 *et seq.* And see *Calhoun v. Little* (Ga.), 1 Mun. Corp. Cas. 146, and *note*, 156.

demurred to the declaration, and filed the plea of not guilty, and also two special
 25 pleas, in which he *claimed that, as mayor, he was, under the constitution, the executive officer of the city, and as such had the authority to remove from office any officer of the police for misconduct in his office; that Burch had been tried before him on specific charges of misconduct, which he set out in his pleas; and the defendant holding and believing the charges, or some of them, to be sustained, had removed him from his office, as it was his duty to do.

The court overruled the demurrer to the declaration; and on the trial of the cause there was a verdict and judgment for the plaintiff for \$1,600.

The defendant took three bills of exceptions to rulings of the court. The first was to the admission of certain evidence. After the plaintiff had introduced evidence to prove the malice of the defendant, and that he had determined to remove the plaintiff from his office under color of the authority of his office of mayor in consequence of his personal enmity and dislike, whether there was any cause for removal or not, and did afterwards wilfully prefer the charges mentioned in the declaration, and try the plaintiff upon them and remove him from office; the plaintiff then offered to introduce evidence to show that the said charges were false and malicious; but the court refused to allow him to introduce said evidence. But the court did allow him to introduce evidence to show what was the proof before the mayor on the trial of the plaintiff before him on said charges and specifications, in order that it might be shown whether or not there was any probable cause for the said charges and the removal of the plaintiff thereon. And to the admission of this evidence the defendant excepted.

The second exception is to an instruction given in answer to an enquiry by the jury. Two instructions had been previously given to the jury on the motion of the defendant.

The substance of the two given at the
 26 instance *of the defendant, and that given in answer to the enquiry of the jury, are stated by Judge Staples in his opinion.

The third exception was to the refusal of the court to set aside the verdict and judgment, on the ground that the verdict was contrary to the instructions of the court and the evidence relating thereto.

Upon the application of Burch a writ of error and supersedeas was allowed him by this court.

J. Alfred Jones and Don P. Halsey, for the appellant.

Thomas J. Kirkpatrick and E. P. Goggin, for the appellee.

STAPLES, J. The question presented by the demurrer to the declaration may be more satisfactorily disposed of in passing upon the instructions and the motion for a new trial. Two of the instructions were given on the motion of the defendant, and of course there is no complaint with respect to them. The third was given by the court in answer

to a question propounded by the jury. In order properly to understand the bearing of this instruction, it will be necessary to recur briefly to the facts upon which it was based. It seems that one of the charges preferred by the defendant, as mayor, against the plaintiff, as chief of police, and upon which the removal of the latter was partly founded, was, that the plaintiff "had continued to act as agent for Dr. W. O. Owen, contrary to the express written and verbal order of the defendant, as mayor." When this charge was under investigation before the defendant, the plaintiff was examined on oath by the defendant, and admitted that he "was agent of Dr. Owen, to collect his medical accounts and keep his books;" but he also proved that he had not neglected any of his duties

as chief of police by reason of his being such *agent, and that he had not
 27 been occupied more than five minutes of his time any day in a year in attending to Dr. Owen's business; nor was there any evidence that he had ever neglected any of his duties as chief of police in consequence of such employment. The plaintiff also proved that he had been told by James W. Cobbs, the former mayor, John W. Carroll, president of the council, and James Garland, judge of the hustings court, members of the former police board, that he might act as such agent for Dr. Owens when it did not interfere with his official duties as chief of police, and that he had a like permission from two of the present board of police commissioners. It further appeared that while under examination before the mayor the plaintiff said that he had acted, and would continue to act, as agent of Dr. Owen, notwithstanding the order of the mayor. These matters, as they occurred before the mayor, were proved during the progress of the trial in the court below. The jury having retired to consult of their verdict, came into court and enquired of the court whether or no the mayor had a right to prevent the plaintiff from acting as agent of Dr. Owen. To this, the following answer was made by the judge in writing: "If the chief of police had a license by an order or permission from the board of police commissioners to act as collector or agent of Dr. Owen, or if by so acting his official duties as such chief of police were or could in no wise be interfered with, and his efficiency as a public officer in nowise impaired thereby, then the mayor had no right to inhibit him from so acting as collector or agent. But on the other hand, if he had no such license or permission from the police board, and his so acting did in any wise interfere with his duties as chief of police, or render him in any way less efficient as a public officer, then the mayor had a right to inhibit him from so acting, if he in good faith
 28 *believed that the public interest would be promoted by so prohibiting him."

The main objection to this instruction is based upon the idea that the mayor is the chief executive officer of the city of Lynchburg, and as such has the supervision and control of the chief of police; that the pro-

priety of his orders to that officer, or to any other subordinate, cannot be called in question in any other tribunal; that this rule is essential to the enforcement of discipline and the preservation of order; that the judge of the circuit court ought so to have told the jury, and that his answer in the form in which it was given, was calculated to lead the jury to the erroneous conclusion that they had the right to pass upon the propriety of the order in question.

Without undertaking now to concede or to controvert the soundness of this proposition, I think it is sufficient to say that the learned judge of the circuit court, on the motion of the defendant's counsel, and in the very language selected by him, had already fully stated the law applicable to this branch of the case. He had declared that the gist of the action is want of probable cause; and although the jury should believe the defendant was hostile to the plaintiff, and was actuated by malice, still, unless each one of the charges of the defendant was unsupported by any evidence tending to prove it, or the charge was in itself so frivolous that the defendant did not and could not reasonably regard it as a real offence, they must find for the defendant; provided the matter so charged related to the official duty of the plaintiff, and was a misconduct in office or a neglect of official duty, or such as the defendant might reasonably believe, and did honestly believe, was such misconduct or neglect of official duty.

And the judge further told the jury, that if they believed from the evidence that any one of the specifications on which the defendant found the plaintiff guilty
 29 *was a misconduct in office or neglect of official duty, proved to the reasonable satisfaction of the defendant, and being so proved, was, in his opinion, just cause for the removal of the plaintiff from office, they must find for the defendant.

Now, if these instructions, instead of preceding, had followed the answer given by the judge to the enquiry made by the jury, it is impossible there could have been any ground for misapprehension. The court gave the defendant all he asked. It laid down the law in his favor in the most liberal manner; and we must suppose the jury had the intelligence to comprehend and to remember what was said in the first as in the last instruction. Taking them altogether, how are they to be construed? Plainly, as declaring that, although the jury might believe the plaintiff was not guilty of any neglect of duty in collecting Dr. Owen's accounts, and although the defendant had no right to prohibit him from so acting, and although the defendant may have removed the plaintiff for a violation of his orders in that particular, the defendant could not be held liable if the conduct of the plaintiff was such as the defendant might reasonably believe, and did honestly believe, was a neglect of duty. In other words, however erroneous may have been the orders of the defendant, and however malicious his motives, he is exempt from all liability if the alleged misconduct

or neglect of official duty was proved to his reasonable satisfaction, and being so proved, was, in his opinion, just cause for the removal of the plaintiff from office.

It is rarely that a case occurs in which the law is so fully and favorably expounded for one of the parties upon a question of this character.

Under such instructions it might well be supposed that the jury would have found a verdict for the defendant, and it is very probable they would have so found,
 30 but *that the plaintiff produced evidence tending to show that before any of the charges were preferred against him the defendant had determined to remove him from office, under color of his authority as mayor, in consequence of personal enmity and dislike, whether there was any cause for removal or not; and he also offered to show that the said charges were false and malicious, but was stopped by the court upon objections made by the defendant. Under all the these circumstances, it is plain that the defendant did not and could not sustain any injury by the instruction given in answer to the question propounded by the jury. It is equally apparent, for the same reasons, that the court did not err in overruling the motion for a new trial.

But there is another and more satisfactory reason which applies equally to the demurrer, to the instruction, and to the motion for a new trial; and that is, that the defendant, as mayor, had no power under the constitution and laws to remove the plaintiff from his office of chief of police. This question has been very ably argued by counsel, and has received the careful consideration of the court. The provision of the constitution under which this power is claimed as belonging to the mayor is found in section 20, article 6, of that instrument. (Code of 1873, page 88.) It provides that the mayor shall see that the duties of the various city officers are faithfully performed. He shall have power to investigate their acts, have access to all books and documents in their offices, and may examine them and their subordinates on oath. He shall have power to suspend or remove such officers, whether they be elected or appointed, for misconduct in office or neglect of duty, to be specified in the order of suspension or removal.

On the other hand, the amended charter of the city of Lynchburg (found in Acts of 1871-72, page 118), provides for a police department, to be under the control
 31 *and management of police commissioners, consisting of the mayor, the president of the city council, and the judge of the corporation court.

It is made their duty to appoint the chief of police, through whom they may promulgate all rules and regulations and orders to the whole police force of the city. The said chief of police holds his office during the term of two years, or until said board, for malfeasance or misfeasance shall remove him; but in case of misconduct on his part, he may be removed by the votes of two-thirds of the city council. The mayor, at

any time upon charges being preferred, or upon finding said chief of police to have been guilty of misconduct, shall have power to suspend him from office until the board of commissioners shall convene and take action in the matter; such suspension, however, not to last longer than ten days without affording the party an opportunity of being heard in his defence; and upon hearing the proofs a majority of the commissioners may discharge or restore him. See sec. 36, paragraphs 1, 2, 3 and 4, pages 128-9.

It will be perceived there is an apparent conflict between these provisions of the Lynchburg charter and the clause of the constitution already cited. For if the chief of police be a city officer within the meaning of the constitution, he is subject to removal by the mayor only, and the provision of the charter taking the power from him and vesting it in the police board is null and void.

This court has been repeatedly called on to pronounce legislative enactments void upon the ground of their repugnancy to the constitution, and it has always declined to do so unless this repugnancy is, in its judgment, beyond all reasonable doubt. It has always proceeded upon the idea that the opposition between the constitution and the law is such that the judge feels a clear and strong conviction of their incompatibility with each

other. Whenever a statute can be so construed and applied as *to avoid conflict with the constitution such construction will be adopted. In the language of Mr. Justice Washington: "It is but a decent respect due to the wisdom, the integrity and the patriotism of the legislative body by which any law is passed, to presume in favor of its validity until its violation of the constitution is proved beyond all reasonable doubt." *Ogden v. Saunders*, 12 Wheat. R. 213, 270; *Cooley's Const. Limitations*, page 182, 183.

In the present case this rule of construction deserves special consideration, because the same provisions in regard to the appointment, control and removal of the chief of police are found in the charters of the cities of Richmond and Norfolk, and perhaps other cities, and the effect of an adverse decision by this court will be to annul important and salutary laws carefully framed for the government and security of the chief cities and towns of the commonwealth. Are we to declare these charters null and void? Are we to overthrow institutions deemed by the legislature and the people of the cities of the greatest value? I think not, unless upon very convincing reasons.

It must be borne in mind that cities and towns are mere territorial divisions of the state, endowed with corporate powers to aid in the administration of public affairs. They are instrumentalities of the government acting under delegated powers, subject to the control of the legislature, except so far as may be otherwise expressly provided by the constitution.

Although the mayor is invested with the power of removing city officers, it will not

be denied, I imagine, that the legislature may establish an office and appoint the incumbent, who, although exercising his jurisdiction exclusively in the city limits, is not yet a city officer within the true intent and meaning of the constitution. This distinction

is recognized in the clause of the constitution *already cited relating to the powers of the mayor. It is there declared that all city, town and village officers, whose election or appointment is not provided for by this constitution, shall be elected by the electors of said cities, towns and villages, or of some division thereof, or appointed by such authorities thereof as the general assembly shall designate. "All other officers, whose election or appointment is not provided for by this constitution, and all other officers whose offices may hereafter be created by law, shall be elected by the people, or appointed as the general assembly may direct." Thus recognizing a distinction between those who are technically "city officers" and others whose jurisdiction and functions may be limited to cities, and yet are not considered "city officers." In the former case the appointment is always made by the electors of the city, or some authority of the city. In the latter case it is made in such mode as the general assembly may direct. Indeed it would be a most remarkable condition of things that the legislature, by the mere act of creating a municipal corporation, thereby divests itself of all jurisdiction and control of every officer elected or appointed for such corporation.

Who, then, are the "city officers," in the true and literal sense of the term? It is not easy to define them in all cases; but there are many such provided for in the charter of the city of Lynchburg, and in the charters of other cities. Among these are, perhaps, city engineers and surveyors, officers having superintendence and control of streets, parks, water-works, gas-works, hospitals, sewers, cemeteries, city inspectors, and no doubt many others well known in large cities. Their duties and functions relate exclusively to the local affairs of the city, and the city alone is interested in their conduct and administration.

On the other hand, there are many officers, such as *city judge, sergeant, clerk, commonwealth's attorney, treasurer, sheriff, high constable, and the like, some of whom are recognized by the constitution, while others are not. All these are generally mentioned as city officers, and they are even so designated in the constitution; but no one has ever contended that either of them is in any manner subject to the control and removal of the mayor. The reason is, that while they are elected or appointed for the city, and while their jurisdiction is confined to the local limits, their duties and functions, in a measure, concern the whole state. They are state agencies or instrumentalities operating to some extent through the medium of city charters in the preservation of the public peace and good government. However elected or appointed, however paid, they are as much state officers as constables, justices of the peace

and commonwealth's attorneys, whose jurisdiction is confined to particular counties.

That the chief of police is within the influence of the same principle is apparent from the most cursory reflection. Under the charter of the city of Lynchburg—and the same is true elsewhere—he has generally the power to do whatever may be necessary to preserve the good order and peace of the city. It is his duty at all times to see that the police force preserves the public peace, to prevent the commission of crime, and arrest offenders, and protect the rights of persons and property. (Sec. 36, §§ 1, 2, 3, 4, page 128, Acts of 1871 and 2; Police Regulations, § 14.) Among the thousands of citizens and strangers that enter a great city in the course of a year, in pursuit of business or pleasure, there is not one that is not interested to a greater or less degree in this officer, not only as a conservator of the peace generally, but in the special protection he affords against violence and wrong. When the mob rages in the streets, when

the incendiary and the assassin are at work, they do not *offend against the city, but against the state. When they are detected and arrested it is by the chief of police and his subordinates, under the authority of the state laws and as an officer of the state; and when they are tried and convicted, it is by officers representing the state and her sovereign power.

This distinction has been recognized and enforced in a number of well considered cases, and by able commentators. It is important, says Judge Dillon, to bear in mind the distinction between state officers—that is, officers whose duties concern the state at large or the general public, although exercised within defined territorial limits, and municipal officers whose functions relate exclusively to the particular municipality. The administration of justice, the preservation of the public peace, and the like, although confided to local agencies, are essentially matters of public concern, while the enforcement of municipal by-laws, the establishment of gas-works, of water-works, the construction of sewers, and the like, are matters which pertain to the municipality, as distinguished from the state at large. And it has been several times determined that the legislature may, unless specially restrained in the constitution, take from a municipal corporation its charter powers respecting the police and their appointment, and by statute itself directly provide for permanent police for the corporation, under the control of a board of police not appointed or elected by the corporate authorities, but consisting of commissioners appointed by the legislature. *Baltimore City v. Board of Police*, 15 Maryland R. 376; *People v. Mahaney*, 13 Mich. R. 481; *People v. Draper*, 15 New York R. 532, where the act to establish the Metropolitan police district was held constitutional; *Police Commissioner v. City of Louisville*, 3 Bush. Kentucky R. 597; *Diamond v. Cain*, 21 La. Ann. R. 309; *State of Louisiana v. Levi*, Id.

538. The cases concur in holding that the police officers are *in fact state

officers, and not municipal, although a particular city or town be taxed to pay them. 1 Dillon on Municipal Corporations, §§ 33, 34; § 773 and note 1, where the foregoing views are expressed.

In *Buttrick v. City of Lowell*, 1 Allen's R. 172, it was held that a city is not liable for an assault committed by its police officers, even though it was done in an attempt to enforce an ordinance of the city. Bigelow, Chief Justice, delivering the opinion of the whole court, said: "Police officers can in no sense be regarded as agents or officers of the city. Their duties are of a public nature, their appointment is devolved on cities and towns by the legislature as a convenient mode of exercising a function of government, but this does not render them liable for their unlawful or negligent acts. The detection and arrest of offenders, the preservation of the public peace, the enforcement of the laws, and other similar powers and duties with which police officers and constables are entrusted, are derived from the law, and not from the city or town under which they hold their appointment."

In the case of the *People v. Hurlbut*, 24 Mich. R. 44, the question was as to the constitutionality of a statute creating a board of public works for the city of Detroit, appointed by the legislature, and having charge of the city buildings, with authority to make contracts on behalf of the city, and to do many other things of a legislative character which generally belong to the common councils of cities alone. The whole subject was discussed by Chief Justice Campbell and Judge Cooley, in opinions evincing profound research and ability. Chief Justice Campbell drew a distinction between the police act under which a board of police commissioners was appointed for the cities, and the act then under consideration, which was known as the public works acts. He said: "The general purposes of the police act were such

*as appertain directly to the suppression of crime and the administration of justice. There is therefore no constitutional reason for holding it to be other than a regulation of matters pertaining to the general policy of the state and subject to state management. The police board is clearly an agency of the state government, and not of the municipality, whereas the purposes of the public works act were directly and evidently local and municipal." 81-83.

Judge Cooley said in the course of his opinion: "For those classes of officers whose duties are general, such as the judges, the officers of militia, the superintendent of police, of quarantine, and of ports, by whatever name called, provision has, to a greater or less extent, been made by state appointment. But these are more properly state than local officers; they perform duties for the state in localities, as collectors for the general government, and a local authority for their appointment does not make them local officers when the nature of their duties is essentially general. In the case before us the

offices in question involve the custody, care, management and control of the pavements, sewers, water-works, and public buildings of the city, and the duties are purely local."

In *Cobb v. City of Portland*, 55 Maine R. 381, the same question was presented, and was decided in the same way. Dickerson, J., delivering the unanimous opinion of the court, said: "But the plaintiff was not agent or servant of the city of Portland, nor was the policeman whom he arrested. Both were acting under the authority of the state, as the conservators of the public peace, the peace of the state, not the peace of the city of Portland alone. It is true they derived their authority immediately from the city of Portland, but that was done by the legislature as a matter of convenience."

38 *While engaged in the service stated (preserving the peace), they represented the authority and dignity of the state, and not that of the city of Portland.

The cases of *Fisher v. Boston*, 104 Mass. R. 87; *Cobb v. City of Portland*, 55 Maine R. 381; *The People v. Draper*, 25 Barb. R. 341, 374; *Mayor of Baltimore v. State Board of Police*, 15 Maryl. R. 376, are in entire accord with the decisions already cited. See also 2 Dillon, sec. 773, and notes, and numerous cases there cited. The distinction recognized in all of them is between officers whose duties are exclusively of a local nature and officers appointed for a particular locality, but yet whose duties are of a public or general nature. When they are of the latter character they are state officers, whether the legislature itself makes the appointment or delegates its authority to the municipality. The state, as a political society, is interested in the suppression of crime and in the preservation of peace and good order, and in protecting the rights of persons and property. No duty is more general and all-pervading than this. It extends alike to towns and cities as to the country. It looks to the preservation of order and security in the state, at elections, and at all public places; the protection of citizens, strangers, travelers at railway stations, at steamboat landings; the enforcement of the laws against intemperance, gambling, lotteries, violations of the Sabbath, and, in fine, the suppression of all those disorders which affect the peace and dignity of the state and the security of the citizen. The instrumentalities by which these objects are effected, however appointed, by whatever name called, are agencies of the state, and not of the municipalities for which they are appointed or elected. The whole machinery of civil and criminal justice, says a learned judge, has been so generally confided

39 to local agencies, it is not strange if it has sometimes been *considered as of local concern. But there is a clear distinction in principle between what concerns the state and that which does not concern more than one locality.

These are the principles established by the cases already cited. Against them not a decision, not even the dictum of a writer has been produced, except a single observation contained in the opinion of this court, in

Burch, Mayor, v. Hardwicke (the same parties now before the court, reported in 23 Gratt. 51), where Judge Bouldin seems to concede that the power of removing the chief of police is vested in the mayor. It is, however, but just to say that the question received but little consideration by this court in that case; nor was there anything in the case itself requiring a decision of the point. The real contention was, whether the writ of prohibition would lie in the case. Judge Bouldin laid down the rule as well established, that the writ of prohibition is a proceeding between courts bearing the relation of supreme and inferior, and that it does not lie from a court to an executive officer. The case was disposed of upon that ground alone, and all that was said outside of it was an obiter dictum of the court. That decision, therefore, does not preclude us from determining the present case according to our best convictions. If the view already taken be correct, it is plain that the defendant, in removing the plaintiff from his office of chief of police, exceeded his powers. This being so, it is quite immaterial to enquire whether the instruction of the circuit judge be strictly correct. Plainly the defendant could not be prejudiced by it; for if it be conceded that the plaintiff was not justified in disobeying the order given him, the defendant exceeded his powers in removing him on that ground. All that the defendant could do was to suspend the plaintiff until the matter could be investigated by the board of police commissioners.

40 It is no part of our duty to enquire into the motives of *the legislature in creating a board of police for the city of Lynchburg, or any other city, and in clothing it with the absolute control of the chief of police. The legislature may have supposed that the mayor being elected by the popular vote, might be under strong temptation to use the police force for the purpose of securing his own promotion and success. It is not to be denied that in a large and populous city such a body of men, dependent upon the will of one man, may become a political engine of mischief in times of high political and party excitement.

On the other hand, a board of police composed of the mayor, the president of the common council, and the judge of the hustings court, would be equally as efficient as the mayor in the control of the police department, especially when the latter is invested with the power of suspension for a disobedience of orders or other misconduct. Three of the largest cities of the state have been acting under the same system for several years, and no complaint has been made of the want of discipline, insubordination and good government in either of them. In such case nothing would justify the interference of the courts except the clearest conviction that the constitution had been violated.

Another question argued before this court is, whether the mayor of a city, in exercising the power of removal of a subordinate, can in any case be held liable for damages, however malicious or corrupt may have been

his motives. Upon this question a great number of authorities have been cited on both sides. Some of these maintain the doctrine that no public officer is responsible in a civil suit for a judicial determination, however erroneous it may be, or however malicious the motive which produced it; and this rule extends to judges, from the highest to the lowest, and all public officers, whatever

41 name they may bear, in the exercise of judicial powers. *On the other hand, there are numerous authorities which hold that this exemption from civil liability is confined exclusively to those judges of general jurisdiction whose proceedings are matters of record, and has no application to inferior judges and others whose acts are not verified by record evidence.

Whatever may be the conflict of judicial opinion on this point, all the authorities are agreed that when the judge or other officer has no jurisdiction over the subject matter, and when the act of which complaint is made is maliciously or corruptly done, he is liable in damages to the party aggrieved by his conduct. This whole question is discussed in a very able opinion of Mr. Justice Field, in *Bradley v. Fisher*, 13 Wall. U. S. R. 335. I do not deem it necessary to refer to any other authority upon this point.

In the present case it is clear that the defendant exceeded his jurisdiction in removing the plaintiff; and it must be assumed that he was prompted by malice in doing so, for the plaintiff offered to prove the fact, but was prevented by the objection of the defendant; and the defendant cannot now be heard to deny the existence of malice on his part. There is no doubt but that the defendant believed that the power of removal was vested in him by the constitution, and for an innocent mistake in assuming that power, under all the circumstances, no jury or court would be inclined to hold him responsible in damages. It is only when the power is used for the gratification of personal hostility and dislike, that the question assumes an entirely different aspect and in that aspect alone it is now presented to this court.

It has been suggested, however, that the action is based upon an actual removal of the plaintiff from his office by the defendant; and according to the present view, the proceeding of the defendant was a mere

42 nullity, and the *plaintiff was still the incumbent of the office. It is sufficient to say that the plaintiff, as a matter of fact, was removed from his office and denied the privilege of exercising its functions by the defendant; and however illegally it may have been done, it was a power exercised under color of the office of mayor, and it does not lie in the mouth of the defendant to evade liability for his acts upon the ground that he exceeded his powers and jurisdiction.

The plaintiff attempted to restrain the defendant from removing him from his office by judicial process; but was denied relief upon the ground that the courts had no power to award a writ of prohibition against an officer exercising merely executive functions. After this the plaintiff, instead of

continuing an angry and unseemly contest with the defendant, perhaps to the injury of the city of Lynchburg, might well acquiesce in his ejection from the office, and resort to the courts for redress of any wrong he had sustained. The defendant has certainly no cause to complain that this course has been pursued.

As all the testimony is not before us, it is impossible to say that the damages are excessive. This may be said, however, that the case was tried by an intelligent and impartial jury, before an able and impartial judge, all of whose rulings were of the most favorable character for the defendant. It is scarcely necessary to add that the circuit court did not err in overruling the motion for the new trial, either upon the merits of the case generally, or upon the special grounds upon which the motion was based in the lower court. My opinion, therefore, is to affirm the judgment.

MONCURE, P., and ANDERSON and BURKS, J's, concurred in the opinion of STAPLES, J.

CHRISTIAN, J., dissented.
Judgment affirmed.

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*White v. Owen & als.

March Term, 1878, Richmond.

Absent, BURKS, J.

1. Homestead Exemption—Priority of Deed of Trust by Husband and Wife.*—

A deed of trust to secure a debt executed by the grantor and his wife conveying real and personal property which had been previously set apart by the husband as his homestead, has priority over the homestead exemption, and the said property may be subjected to satisfy the debt.

2. Same—Priority of Deed by Husband—Quære.—Whether a deed of trust by the husband, in which his wife did not join, would have priority to the homestead exemption.

This was a suit in equity in the circuit court of Mecklenburg county, brought in March, 1865, by R. T. Owen to enforce a judgment which he had recovered against Luther Pixley, by subjecting certain real estate which Pixley and wife had conveyed in trust to secure a debt due to W. T. White. It appeared that by deed dated the 9th of June, 1874, Pixley set aside certain personal property valued at \$816, and so much of his real estate, which consisted of a house and lot, as would make up the sum of \$2,000 as his homestead exemption. And by deed bearing date the 1st of August, 1874, Pixley and his wife conveyed to William E. Homes the said house and lot and all the personal

*Homestead Exemption—Priority of Deed of Trust by Principal—Husband and Wife.—See *Linkenkoker's Heirs v. Detrick et al.*, 81 Va. 44, where the principal case is cited approvingly; 2 Min. Inst. (4th Ed.) 911; *Williams v. Watkins*, 92 Va. 684; *Moran v. Clark*, 30 W. Va. 375.

property mentioned in his deed of homestead, in trust to secure a debt of \$2,888.97 to W. T. White. The bill charged that this deed was fraudulent and the debt usurious; and if it was not, the plaintiff insisted that White should be required to go against the property embraced in the deed of homestead *so as to enable him to have satisfaction of his judgment out of the real estate. White and Pixley denied the fraud and the usury, and upon the hearing the court held the charge was not sustained; and there was no appeal from that part of the decree.

Pending the cause Pixley filed his petition claiming his homestead exemption as against the deed to secure White. And the cause coming on to be heard on the 6th of December, 1876, the court held that the deed of homestead was entitled to preference over the deed of trust to Homes, and this deed being prior in date to the judgment of Owen, was entitled to priority over it; and a commissioner was appointed to sell the house and lot, and certain accounts ordered. And thereupon White applied to this court for an appeal; which was allowed.

William J. Robertson, for the appellant.

Edgar Allan, for the appellee.

ANDERSON, J. Luther Pixley, one of the appellees, on the 9th day of June, 1874, executed his deed of homestead, setting apart certain personal property which he valued at \$816, and claiming the residue of what he was entitled to under the homestead law out of his hotel situate in Clarksville, which he valued at \$3,000, which deed was afterwards, on the 11th of June, admitted to record.

Afterwards, on the 1st of August, 1874, the said Luther Pixley and Nannie, his wife, united in a deed conveying in trust to W. E. Homes, trustee, to secure a debt due from the said Luther Pixley to W. T. White by bond for \$2,888.97, with interest thereon from the 1st of September, 1874, till paid, and also "a further amount to said White, not now recollected," the said hotel in the town of Clarksville, with all of the real estate thereto attached; also all of his personal property "except what is known as the poor debtor's exemption under the laws of 1860." *The personal property is specified, and embraces all that is contained in his homestead deed, and likewise all of the real estate.

At the September term, 1874, of the Mecklenburg circuit court, T. R. Owen obtained a judgment against George A. Reardon and Luther Pixley for \$612.50, with interest and costs, and subsequently brought his bill in chancery to set aside the said deed of trust as usurious and fraudulent, and to subject the property conveyed by it to the satisfaction of his judgment, making Pixley and wife, Homes and White parties defendant. Pixley, White and Holmes answered severally, and each of them denied the allegations of fraud and usury. Afterwards the deposition of Pixley was taken by the plaintiff Owen to contradict his answer, but it is unsupported

by any other witness, and is contradicted by the depositions of Homes and White, the former of whom does not appear to have any interest. The allegations of fraud and usury are not sustained by the proofs in the cause, nor by the decree of the court, and there is no appeal from the decree on that ground.

But a petition was filed in the cause by Luther Pixley, setting up his homestead deed aforesaid, and claiming the full benefit of it, both against Owen's judgment and W. T. White's deed of trust. And the court held by its decree of the 6th of December, 1876, that the deed of homestead is entitled to precedence over the said deed of trust, and that the deed of trust preceding in date is entitled to priority over the judgment in favor of plaintiff. From so much of said decree as gave precedence to the homestead deed over the deed of trust, this appeal was taken by W. T. White and W. E. Homes, the trustee, and it presents the question for the decision of this court: Can property which has been set apart by a householder and head of a family, by his deed of homestead,

duly recorded, be subjected by his subsequent deed of *trust, his wife uniting therein, to the payment of his debts? In other words, is property, after it has been so set apart, exempted by the constitution of this state from sale under the deed of trust? This question can only be determined by a right understanding of Article XI of that instrument.

To construe this article aright, it will not do to assume that the framers of the constitution had an object in view in the homestead provision, or ought to have had, which the language they employ does not import, and then to supply terms to attain the supposed or desired object. Thus whilst it plainly appears that it was their purpose to enable the householder or head of a family to set apart and hold such portion of his property as does not exceed \$2,000 in value, exempt from execution or other legal process, if there is no language employed conveying the idea that it should be so held by him as to be thereafter exempt from sale or incumbrance by his own act, we cannot assume that such was the intention of the framers of the constitution, even though we should think it was proper and reasonable to have imposed such a restriction upon his right to dispose of his property by his own act, or because we can see no good reason why the constitution should authorize the householder to exempt his property from execution, and allow him the unrestricted right of disposing of it by his own act. They may have had reasons for the distinction which were satisfactory to themselves, though not satisfactory to us. We cannot be responsible for the reasons which influenced the framers of the constitution; nor is it incumbent on us to show that in proposing one object, as for instance the exemption of the debtor's property, or a part of it, from sale under execution or other legal process, that the other object, to leave the owner unrestricted in his right to dispose of it by his own act, was not inconsistent or unreasonable.

But whilst I hold these to be sound principles of construction, *I do not think that there is anything unreasonable or inconsistent in the object and intention of the framers of this article to authorize the householder or head of a family to set apart and hold his property, or a part of it, exempt from sale under execution or other process, and at the same time to leave him the unrestricted right of disposing of it by his own act.

Let us now, by an inspection of the article, ascertain from its language what was the intention of its framers. Though it may be a labor barren of interest and attractiveness, yet it seems to be necessary. Section 1 provides that every householder or head of a family shall be entitled to hold his property, to be selected by him, not exceeding the value of \$2,000, in addition to what is exempted by the poor laws, "exempt from levy, seizure, garnisheeing, or sale under any execution, order or other process." It does not declare that his property shall be exempt absolutely as by the laws known as "the poor laws." But he shall be entitled, not required, to hold it exempt. If he chooses he may hold it exempt. He cannot be compelled to do it. There is no power vested in his wife or children, or other member of his family, to require him to hold it exempt.

He shall be entitled to hold exempt. Not his wife or children shall be "entitled," but he personally. It is a discretion or privilege wholly conferred on him.

And it does not entitle him to hold it exempt in general, but only from sale under any execution, order or other process. It evidently has reference to sales by judicial procedure, or under legal process, as contradistinguished from sales by his own act, as by mortgage, deed of trust, pledge, or other security created by his own act.

This is made plain by section 3, where it is expressly declared that "nothing contained in this article (in no section of it, nor in all the sections taken together) in this article,

shall be construed to interfere with the sale of the *property aforesaid, or any part thereof, by virtue of any mortgage, deed of trust, pledge or other security thereon."

But it is contended that this third section means only sales made under mortgages, &c., which were executed prior to the setting apart of the property by deed of homestead; or if subsequent, not for antecedent debts. My answer is, there is no such restriction or qualification in the language of the instrument, and no language employed which implies such an intention as either by the framers of the constitution. The language is general, "any mortgage, deed of trust, &c.," which embraces all mortgages or other securities, whether given before or after the deed of homestead, and whether given for antecedent or subsequent debts. And it is further objected that the section does not apply to property which has been set apart by deed of homestead, so as to inhibit an interference with its sale under deed of mortgage, &c. The language is, "of the property

aforesaid, or any portion thereof." In section 2, next preceding, it is provided that "the foregoing section (section) shall not be construed as subjecting the property hereby exempted, or any portion thereof, to any lien by reason of any execution levied on property which has been subsequently restored to the defendant," or to other lien described in the section.

The property herein mentioned, which shall not be subjected to the liens described in the section, is unquestionably the same property which is referred to in the third section as the "property aforesaid." The property, which is not to be subjected to the liens mentioned in section 2, is "the property hereby exempted," which can only be the property which has been selected and set apart by the householder by his deed of homestead, for until that is done it is not exempted. And this is the property which, as declared in the third section, that nothing in the homestead article shall be construed to interfere with the sale of, under mortgage, deed of trust, &c.

*But if the provision is not made with reference to the property exempted by the homestead, to what property of the householder can it apply? If it should be said that it applies to the property which by the first section he is entitled to hold exempt from execution, that cannot be known as exempted property, and it is not, in fact, exempted property until it is set apart by the deed of homestead, and after being so set apart and exempted, it may be sold under any mortgage, deed of trust, pledge or other security, whether given before or after it is so set apart by the owner; for the language is broad enough to embrace both descriptions, and there is no exception or qualification. And I think it will be seen in the further investigation of the subject that this interpretation is consistent with the whole scope of the homestead article, and with all its parts.

I find nothing contained in this article which shows an intention to divest the householder and head of a family of his property, and of the unrestricted right to dispose of it as he chooses—nothing, which by express terms or by implication, divests him of his title, and vests it in his wife and children, severally or jointly with himself. If it could be construed to divest him of his property and to vest it in others, it would operate to vest in persons, if he had no wife or children, who bore to him no such relation—to any who might constitute his family, though not even of his kindred. Such can hardly be conceived to have been the intention. It is plain that the whole purpose and intent of the article was to enable the owner of the property, if he desired, for the benefit of his family, to hold so much of it exempt from execution or other legal process as did not exceed in value \$2,000. There is not a sentence or syllable in the whole article which indicates a purpose to deprive the owner of the property of his jus disponendi, or to hold it exempt *from seizure and sale, except under execu-

tion, order or other judicial process. Nor is there in the deed of homestead which he is authorized to make by the act of assembly pursuant to the fifth section of this article of the constitution. It is not an alienation of his property. It does not divest him of his title and vest it in others. It is merely designed to set apart—to designate the portion of his property which he claims to hold under the homestead provision of the constitution, exempt from seizure and sale under any execution, order, or other legal process, and to give notice of it to the world.

But it is contended that although the title does not pass by his deed of homestead from himself to others, it is a covenant on his part to hold it for himself and others, and that he cannot afterwards alien or encumber it. There is no express trust. If it can be implied, what is the object and purpose of the trust? It cannot exceed the powers vested in the householder by the constitution; that is, to hold it exempt only from execution or other legal process. He is not required to hold it for the uses of the trust, exempt from sale under mortgage, deed of trust, pledge or other security, to which he may choose in the exercise of his *jus disponendi* to subject it. The sale or encumbrance of the property by the owner himself, after he has executed the deed of homestead, is not incompatible with such a declaration of trust. His agreement to hold it exempt from levy, seizure and sale under execution for the benefit of himself and family, as he is authorized to do by the constitution, does not forbid his making sale of it, or encumbering it. Such an inhibition might not be for the benefit of his family. It might be seriously to its advantage. The right to alien or encumber might be necessary to give him credit, or the means of providing for his family's subsistence, whilst a sale under execution or other process would take it away from his family without yield-

51 ing anything in return *to contribute to its support. The effect might be the same of a sale under mortgage to satisfy antecedent debts. But that would be no worse than a sale under mortgage which was executed prior to his deed of homestead. And it is conceded that he could not hold his homestead exempt from sale under prior mortgage. The framers of the constitution seem to have considered that there were grounds for a distinction between sales under execution or other legal process and sales made under mortgage or deed of trust, or other securities created by the act of the party. Hence they authorized the owner of the property to hold it exempt in the one case whilst they did not in the other. And now, if after the execution of the deed of homestead, the householder must be regarded as holding the property in trust for the benefit of himself and family, it is only that it may be exempt from sale under execution, or other process (for no other exemption is authorized by the constitution) and does not and was not intended to interfere with his right to alien or encumber the same.

The fifth section does not vest the homestead in his family. It only authorizes the legislature to prescribe in what manner and on what conditions he may set apart and hold for the benefit of himself and family a portion of his property exempt from execution or other legal process. This section was designed to provide for carrying into execution the homestead provision, which the legislature has done by chapter 183, Code of 1873, page 1168. After authorizing every householder and head of a family, almost in the precise language of the constitution, to hold a portion of his property not exceeding in value \$2,000, to be selected by him, exempt from execution or other process—which evidently means judicial or legal process—it provides in section 3, that nothing in this act shall be construed to interfere with the sale of said property, or any portion thereof, by virtue of any mortgage, 52 *deed of trust, pledge, or other security thereon. "Other security" means, of course, security of a like character; that is, such as is created by his own act. This provision of the act is in exact conformity with the constitution.

But the legislature has gone beyond the requirements of the constitution, it seems to me, in restricting the rights of the owner of the property, by section 7 of this act, where it provides that a homestead so set apart "shall not be mortgaged, encumbered or aliened by the owner, if a married man, except by the joint deed of himself and wife, executed and acknowledged after the manner of conveyance of lands of a married woman," &c. This provision seems to be designed to protect the wife against alienations or encumbrances by the husband without her consent, whilst such purpose is not contained within the article of the constitution, but only to entitle the husband to afford that protection against sales under execution or other process of his property, or so much of it as was necessary for the use of his family. But, as in this case, the wife united with her husband in the deed of trust, it is unnecessary to decide this question.

It is also provided in said third section that, "in all cases where a debtor or contractor shall declare in the body of the bond, note or other evidence of the debt or contract, that he waives as to such debt or contract the exemptions from liability of the property which he may be entitled to hold exempt under the provisions of this act, the said property, whether previously set apart or not, shall then be liable to be subjected for such debt or contract, under legal process, in like manner and to the same extent as other estate of the said debtor or contractor," &c. If a mere waiver by the householder of his right to exemption, after he had set apart the property which he claimed in his deed of homestead, would render the property so set apart subject to the payment of his 53 debt, the *conveyance of said property by mortgage or deed of trust for the payment of the said debt, would effectually subject it to the payment of the debt. For it is in effect, and to all intents and pur-

poses, a waiver of his right to exemption.

The constitutionality of this clause of the said third section of the act aforesaid was brought in question in *re Joseph Solomon*, 2 Hughe's R. p. 164, and was held to be constitutional. It is true that the waiver in that case was made prior to the deed of homestead, and the decision was only in reference to the validity of the waiver prior to the setting apart the property claimed as the homestead; yet Chief Justice Waite, in considering the question as to the constitutionality of this provision of the act, makes no distinction between prior and subsequent waivers. And his reasoning tends to sustain the waiver, whether made before or after the homestead deed. And the reasoning of this court in the recent decision of *Reed v. The Union Bank of Winchester*, 29 Gratt. 719, Judge Christian, delivering the opinion, fully sustains the views which I have taken of the constitutional provision in relation to the homestead. Judge Christian says, speaking for the whole court: "The *jus disponendi* is one of the most valuable incidents of property. Without it property is of little or no value. The value which this right gives to property is a benefit to the family as well as to the head of the family. In the impoverished condition of this state the great majority of householders and heads of families do not own over \$2,000 worth of property. If this could not be the basis of credit; if the head of the family is prevented by the fact that he cannot waive his homestead from obtaining credit, his family must of course suffer by it. So far from being a benefit to his family, it would seem to me a positive disadvantage to allow him to hold \$2,000 worth of property upon which *he could never raise

a dollar for the support of his family, or the education of his children. The true interest and real benefit to the family is, I think, to utilize the property exempted and to make it the basis of credit. This reasoning is as appropriate and as persuasive to enforce the right of the householder to dispose of his property, after it has been set apart, as before."

These conclusions have been drawn from the homestead article of the constitution itself, seeking only to arrive at the intention and design of the instrument and its framers from the language they employed. And if it be said that the design and purpose are different from what was supposed to have been intended by the framers of the constitution, our only reply is, *ita lex scripta est*, and that must be our guide. It is not the province of the courts to make constitutions and laws, but to expound and enforce them as they are written.

I have deemed it unnecessary to go outside of Virginia to consider the decisions upon the homestead provisions of other states, or to reconcile them with the foregoing views, there being essential differences in our homestead law and that of several of the states, as shown by Judge Christian, *supra*, to which I beg to refer.

Upon the whole I am of opinion to reverse the decree of the circuit court so far

as it gives precedence to the homestead deed over the deed of trust, and to affirm it so far as it is not inconsistent with this opinion.

STAPLES, J., was of opinion that a conveyance of or encumbrance upon the homestead by the husband, his wife uniting therein, is effectual to divest the title to the homestead, and as that was done in the present case by the deed of trust, the property is liable to the claim of the trust creditor. Whether the husband may alien or encumber the homestead without the concurrence of the *wife, is a question which does not arise in this case. He did not desire, therefore, to be understood as expressing any opinion upon that question.

MONCUE, P., concurred in the opinion of STAPLES, J.

CHRISTIAN, J., concurred in the opinion of ANDERSON, J.

The decree was as follows:

Upon the motion of the appellant, by his counsel, it is ordered that so much of the decree entered in this cause on the 22d day of March, 1878, as remands the cause to the circuit court of Mecklenburg county, be set aside; and this court proceeding to render such decree as ought to have been rendered by the said circuit court, it is decreed and ordered that the plaintiff's bill be dismissed with costs.

Decree reversed.

56 *Cheatham v. Hatcher & als.

[32 Am. Rep. 650.]

March Term, 1878, Richmond.

1. **Appeal—Review.**—Where the whole matter of law and fact is submitted to the court below, and its decision is based upon the mere credibility of the witnesses, it will not be disturbed by the appellate court, unless palpably wrong.
2. **Same—Same.**—But this principle has no application in a case where the decision of the lower court proceeded, not upon the credit to be given to the witnesses, but upon a rule of law supposed by it to be correct, but in fact erroneous.
3. **Wills—Witnesses.**—A will must be subscribed, but need not be proven, by two attesting witnesses.
4. **Same—Same.**—The testimony of a subscribing witness invalidating the will which he attested, ought to be viewed with suspicion.

***Appeal—Review.**—The principal case is cited, and its rule on the subject embraced in the first headnote is followed in *Smith v. Hutchinson et al.*, 78 Va. 683. See also *Board of Supervisors, etc. v. Dunn et al.*, 27 Gratt. 608.

Proof of Will—One Attesting Witness.—The statement of the third headnote that a will must be subscribed but need not be proven by two attesting witnesses is sustained in *Lamberts v. Cooper*, 29 Gratt. 61, citing *Pollock v. Glassell*, 2 Gratt. 439; *Dudleys v. Dudleys*, 3 Leigh 436; also see *Webb v. Dye*, 18 W. Va. 389; *Davis v. Davis*, 43 W. Va. 302.

Testimony of Subscribing Witness.—That the testimony of a subscribing witness invalidating the will which he attested, ought to be viewed with suspicion is held in *Lamberts v. Cooper*, *supra*, and *Webb v. Dye*, 18 W. Va. 389, citing the principal case.

5. Same—Same—Sanity—Opinion Evidence.*

—The opinion of a physician on a question of sanity, is entitled to peculiar weight, particularly where he had special opportunities of observation.

6. Same—Validity—Draftsman as Beneficiary.

—The fact that the draftsman of a will takes a benefit under it, while it imposes upon the court the duty of careful scrutiny does not invalidate the will.

7. Same—Execution—Witnesses—Request of Testator.†

—A request to a witness to subscribe the will, made by a third person in the hearing of the testator, is, in law, the request of the testator, if he is conscious and does not dissent therefrom.

8. Same—Same—Sufficiency of Evidence.—

In this case the due execution of the will and the sanity of the testatrix was proven by one of the attesting witnesses, whose testimony was confirmed by other witnesses and the circumstances surrounding the transaction. The other subscribing witness, on the other hand, denied the due execution, and the consciousness of the testatrix; but his testimony was impaired by the circumstance that it was in conflict with statements made by him soon after the execution of the will, and was inconsistent with his act in attesting the will—*Held*: That the will was duly executed, and should be admitted to probate.

57 *Mrs. Ann P. Hall, of Chesterfield, upon her marriage with Edward Hatcher, in February, 1870, conveyed, with his assent, all her estate to a trustee, for her separate and exclusive use, with full power to dispose of it, either in her lifetime or by will. She died in August, 1871; and after her death a paper was propounded as her will to the circuit court of Chesterfield for probate. Her heirs and next of kin being many and scattered over the country, it took some years to get all of them before the court; but in May, 1876, the case was ready to be heard, and the parties waiving a jury, submitted the whole matter of law and fact to the court. The paper is signed by Ann P. Hatcher, and is attested by R. P. Grymes and J. M. Clarke. These two and several other witnesses were examined, and the testimony was taken down as it was given in. And the court, for reasons stated in a written opinion, which is made a part of the order, held that the paper propounded was not the will of Ann P. Hatcher, and refused to admit the same to probate. And thereupon Thomas M. Cheatham, the propounder of the will, and the other devisees and legatees mentioned therein, excepted to the opinion and decision of the court, all the evidence being set out in the exception; and obtained an appeal to this court. The case is sufficiently stated in the opinion of Judge Staples.

F. W. Christian, C. C. McRae, for the appellants.

***Testamentary Capacity—Testimony of Physicians.**—The principal case, on this subject, is cited and followed in *Montague et ux v. Allen's Ex'or et al.*, 78 Va. 592.

See also *Jones v. McGruder*, 87 Va. 368, where the principal case is cited with approval.

†Wills—Execution—Witnesses—Presence of Testator.—The principal case is cited approvingly in *Baldwin v. Baldwin's Ex'or*, 81 Va. 405.

John Hunter, for the appellees.

STAPLES, J. This is a controversy concerning the probate of a paper purporting to be the last will of Mrs. Ann P. Hatcher. The parties in the court below waived a trial by jury and submitted the whole matter 58 to the *determination of the judge, who, after hearing all the evidence, was of opinion that "the paper writing in question is not the last will of Ann P. Hatcher," and refused to admit the same to probate. From that order an appeal was taken to this court. The only question in the case we have to determine is, whether the will was subscribed by the witnesses in the presence of the testatrix, in the manner required by the statute. Upon this question there is some conflict in the testimony, and if the learned judge of the circuit court had based his decision upon the credit given by him to the witness against the will rather than to those in its favor, this court, upon familiar principles, would not undertake to reverse that decision, unless, indeed, in case of a plain and palpable mistake or error. It is obvious, however, that the learned judge proceeded upon no such grounds. His written opinion, which is part of the record, shows that, according to his view, it is necessary to a valid will that every fact relating to the execution of the instrument and the sanity of the testatrix, shall be proved by the two subscribing witnesses.

After citing the statute and a decision of Chancellor Walworth, in *Scribner v. Crane*, 2 Paige R. 147, he proceeds as follows: "Judge Brooke, in the case of *Dudleys v. Dudleys*, 3 Leigh 436, reiterated in *Clarke and others v. Dunnavant*, 10 Leigh 13, 29, says: 'that however full the testimony of one witness may be to prove a will, our statute requires two witnesses to the facts which are necessary to be proved.' Let us, then, apply these principles to the case before us." The learned judge then comments upon the evidence of the two subscribing witnesses—first of Dr. Grymes, and then of Clarke. He declares that they are at points; that Clarke says that he never at any time heard Mrs. Hatcher acknowledge the will; that he did not see her sign or make her mark as a signature; she did not speak while he 59 (Clarke) was *in the room, nor is it pretended that she ever spoke afterwards; and, to use his own language, she was in a "dying condition," and her eyes set in death. The learned judge then asks: "Is it necessary, then, that two witnesses should certify to their knowledge of the mental capacity of the testatrix at the time the paper is completed; that it was executed by her freely and understandingly, with a full knowledge of its contents? Surely Clarke could not so testify."

After these explicit avowals, I cannot see how it is possible to avoid the conclusion that the learned judge was of opinion that the two subscribing witnesses must prove the proper execution of the will and the capacity of the testatrix; and his rejection of the will was based upon the absence of such

proof in this case. This view is strongly confirmed by the fact that, although there is other testimony in the record besides that of the two subscribing witnesses, bearing directly upon the question of the due execution of the will and the capacity of the testatrix, no allusion is made to that testimony. It is impossible for this court to say what would have been the decision of the circuit judge had he felt himself at liberty to consider the evidence of the other witnesses, or had he been of opinion that a will may be proved by one of the subscribing witnesses only. It is fair to presume that he had believed that Mrs. Hatcher was unconscious at the time of Clark's attestation, or had he believed upon the whole evidence that the will was not duly executed, that he would have so declared, instead of confining his view to the testimony of the two subscribing witnesses as affected by the particular rule of law announced by him. At all events, a careful reading of the opinion would satisfy every one that the judge of the circuit court refused the probate, not because he be-

60 lieved the statement of Clarke in preference to the other evidence, *but because he held to the idea that the will must be proved, as also the capacity of the testatrix, by the two subscribing witnesses.

I have thus dwelt upon this point because it is necessary to understand precisely the ground upon which the will was rejected in the court below. For all will agree that if that decision was based, not upon the weight and credibility of all the evidence, but upon an erroneous principle announced, with respect to the number of witnesses required to establish a particular fact, the parties have a right to insist that the case shall be reviewed in this court. The farthest this court has gone is to declare that the decision of the trying court for or against the will, is to conclude all mere questions of fact depending upon the credit to be given to the witnesses. *Jesse et als. v. Parker's adm'rs*, 6 Gratt. 57. The question then arises, Is the construction of the statute correctly given by the learned judge of the circuit court? The opinion of Judge Brooke, in *Clarke et als. v. Dunnavant*, from which the extract is given, was not concurred in by the two other judges who sat in that case. Judge Parker said: "The law regulating devises requires reasonable proof that every statutory provision has been complied with, but it does not prescribe the mode of proof, nor that the will shall be proved, as well as attested, by two or more credible witnesses, nor that frail memory shall change its nature and perform impossibilities." And this was the view taken by Judge Tucker.

In *Pollock and wife v. Glassell*, 2 Gratt. 439, 462, Judge Baldwin said: "The statute does not prescribe the number of witnesses by whom a will shall be proved, but the number only by whom it shall be attested. Any one of the subscribing witnesses may prove the execution of the will and its due attestation by himself and the others, and if his testimony be satisfactory, it is suffi-

cient. If this were otherwise, then the proof of a duly attested *will might be defeated by the death or forgetfulness of some of the other witnesses." In this part of the opinion I understand all the judges as concurring, including Judge Brooke.

In *Jesse v. Parker's adm'rs et als.*, 6 Gratt. 57-64, Judge Allen, delivering the opinion of the whole court, said that, "Although there must be satisfactory proof that every statutory provision has been complied with, in order to establish a will, the law does not prescribe the mode of proof, nor that the will shall be proved, as well as attested, by a specific number of witnesses. If such proof were to be required from each subscribing witness, validity of wills would be made to depend upon the memory and good faith of a witness, and not upon reasonable proof that all the requirements of the statute had, in fact, been complied with."

The authorities elsewhere are equally explicit in support of the same doctrine, as may be seen by reference to the cases cited in Judge Baldwin's opinion, and in *Tarrant v. Ware*, 25 New York 425; *Nelson v. McGiffert*, 3 Barb. Ch. R. 158; *Jauncey v. Thorne*, 2 Barb. Ch. R. 40.

The law would seem, therefore, to be too well settled to be called in question.

It is now to be considered whether the will in this case was properly executed. I think it may be regarded as proved beyond controversy that the will was written at Mrs. Hatcher's request; that every word of it was dictated by her; that it is in conformity with her wishes; that it was subscribed by Dr. Grymes in her presence and at her request, and that she was at that time possessed of sound and disposing mind and memory.

It may be assumed also, as fully established by the evidence, that Clarke, the other attesting witness, was present in the room when the will was written, when it was signed by the testatrix, acknowledged 62 by her and attested *by Dr. Grymes; and was a witness to these acts as they were successively performed. In regard to these matters there can be no solid ground for dispute. The real difficulty in the case is in ascertaining whether Clarke subscribed the will "in the presence of Mrs. Hatcher." Was she at that time in a condition to know and understand that the paper he was attesting was the same she had caused to be written and had signed and acknowledged as her will? When she was told by her physician that she must die very soon, she said she wished Mr. Brooks, an attorney, sent for. She was told he could not get there. She again peremptorily said, I want Mr. Brooks sent for. Being told it was useless, he could not reach there in time, she called Mr. Cheatham and asked him to bring pen, ink and paper, which he did, and the will was written as she dictated. She was asked if that was the disposition she desired of her property? She said yes; except she wished to leave Bettie Ferguson \$1,500, and to Desdie Lester her gold watch. This clause

being added, the will was read over to her a second time. She said it was as she wished it. She was asked if she was ready to sign. She said no; she wanted to read it—called for her glasses and seemed to be reading it—then called for a pen. It was suggested that Mr. Cheatham would sign for her. She said no; she generally did that sort of business herself. She took the pen and her hand trembled; she then handed it to Cheatham, saying, you sign my name and I will make my mark; which was done. Dr. Grymes then said, do you wish me to sign it as a witness? She said she did. And he then subscribed his name in her presence.

All will agree that up to this period Mrs. Hatcher displayed good sense, clearness of mind, and a resolute purpose, with regard to the disposition of her property. After Dr. Grymes had signed the will, Mr. Cheatham said to Clarke, who was in the room, **63** you can also act as a *witness. And there is no doubt that Clarke then expected to become a subscribing witness. He was, however, not then further called on. The reason was that none of those present supposed it to be necessary for two witnesses actually to subscribe the will.

Immediately after these occurrences, Clarke was sent for a Mrs. Morris, a lady living a mile and a half distant, to assist in attending to Mrs. Hatcher. During his absence it was ascertained, by a message from Mr. Lester, that two subscribing witnesses were necessary. It became the subject of conversation in the room in the presence of Mrs. Hatcher. To use the language of the witnesses, it was talked about that it was necessary for Clarke to sign. A messenger was at once dispatched for Clarke. When he returned and entered the room Dr. Grymes remarked it was necessary for him to sign, saying to Clarke, you were present and saw Mrs. Hatcher sign it, and heard her acknowledgment when I signed it? He said yes, he was. He was told it was necessary to sign in the presence of Mrs. Hatcher. The will was taken from a chair and subscribed by Clarke within a few feet and directly in front of her. Dr. Grymes says he is satisfied she was then entirely conscious; that she could see, and knew what we were doing when he signed; that he had a conversation with her just before Clarke came in, and that she retained her consciousness for some time after the will was subscribed by Clarke. He took it for granted on calling for Clarke she wanted her will, which disposed of her property, properly attested, and if she disapproved of the attestation by Clarke she was in a condition to show her disapprobation if she chose.

Clarke, on the other hand, says her eyes were set in death. He admits, however, "he did not know anything about her mind at the time." "He had reason to think it was not good." The reason he assigns is she **64** did not *say anything when he signed and when the will was read to her. He further says that when Dr. Grymes and Mr. Cheatham called upon him to sign, Mrs.

Hatcher could hear—everybody could hear—and if she was conscious, she must have known they called upon him to sign the paper as her will; and she was in a position to see, as he was in front of her, only about three feet from her. The testimony of Clarke, it will thus be seen, does not show Mrs. Hatcher's want of capacity or unconsciousness at the time. It merely suggests a doubt upon that subject. Whatever weight it might otherwise have had in this case is impaired, if not wholly destroyed, by the circumstances surrounding him. In the first place, it is apparent he is a very illiterate witness, whose mere opinion upon a question of testamentary capacity is of but little value. In the second place, by his act of subscribing the will, he solemnly attested the capacity of the testatrix, and when he undertakes to invalidate the will his testimony is to be received with suspicion. It was said, in *Kinleside v. Harrison*, 2 Phill. R. 449, that no fact stated by such a witness can be relied on when he is not corroborated by other witnesses.

In the third place, it is certain that his testimony on the trial was directly at variance with his previous statements made shortly after the will was executed. He is proved to have said, on several occasions, that he agreed with Dr. Grymes in regard to the acknowledgment of the will by the testatrix, and also with regard to her condition when he subscribed the will. Either he had been tampered with or he had forgotten what had occurred at the time of the execution of the will.

I do not accuse him of falsehood wilfully uttered; his conduct shows the wisdom of the rule which authorizes the material facts to be proved by one of the subscribing witnesses, or even by any other competent testimony, **65** *and if it were otherwise the proof of a duly attested will might be defeated by the forgetfulness or perjury of some of them.

On the other hand, Dr. Grymes was at the time, and had been for several years, Mrs. Hatcher's family physician. He had been in constant attendance upon her during the three weeks' illness preceding her death. He is proved to be a man of high character and unquestioned veracity. In every view his evidence is entitled to the highest consideration.

In *Burton v. Scott*, 3 Rand. 399, 403, Judge Carr said: "The opinion of a witness as to the sanity of a person, depends for its weight on the capacity of the witness to judge, and his opportunity. Physicians are considered as occupying a high grade on such questions, both because they are generally men of cultivated minds and observation, and because, from their education and pursuits, they are supposed to have turned their attention more particularly to such subjects, and therefore to be able to discriminate more accurately, especially a physician who has attended the patient through the disease which is supposed to have disabled his mind."

The evidence of T. M. Cheatham confirms that of Dr. Grymes in every particular.

Throughout they fully concur in their statements and recollection of the occurrences at the time the will was signed and acknowledged by Mrs. Hatcher, and when it was attested by Clarke. Speaking with reference to the latter occurrence, this witness says: "I saw nothing to lead me to believe she was not conscious then. She had been talking just before he (Clarke) came; it was talked about the necessity of Clarke signing in her presence; don't know whether she engaged in the discussion; my conclusion and impression were that she heard the discussion, and that Clarke was sent for with her approbation and according to her wishes."

66 *It is very true that Mr. Cheatham is a devisee under the will, and that fact detracts somewhat from the force and value of his statements. But his conduct throughout seems to have been characterized by good sense and absolute fairness. His testimony is remarkably clear and consistent, and bears the impress of truth.

We have, therefore, the evidence of two competent witnesses (one of them the family physician) in support of the capacity of the testatrix, and the formal execution of the will. We have proof of that capacity in the intelligent conversation of the testatrix but a few minutes before the attestation of Clarke, and all the presumptions in favor of its continuance. Against all this, we have the doubtful opinions of another witness in contradiction of his previous opinion, expressed soon after the will was executed. Here, then, is a will executed in conformity with all the requirements of the statute, signed and acknowledged in the presence of two witnesses, whose attestation was in the presence of the testatrix.

If it is to be defeated it is solely upon a mere presumption that the testatrix was in an unconscious state at the time the last attesting witness subscribed his name. This presumption is based mainly on the fact that she did not speak at the time, or request the witness to attest the will.

The cases are numerous in which wills have been established although the testator did not request the witness to sign—when the request was made by some one in his presence, and therefore, presumably with his consent.

In the case of *Inglesant v. Inglesant*, 3 Law Reports, P. & D. 1872-75, p. 172, the testatrix was an old lady ninety years of age, whose will was executed in the house of a Mrs. Lee, and the question there, as here, was, whether the witness had attested the will at the request of the testatrix. Sir J. Hannen, in commenting upon the evidence,

said: "The peculiarity of this case is,

67 that *the two attesting witnesses agree in this, that the signature of the deceased was put to the will before one of them came into the room. Both agree that Mrs. Lee, in the presence of the testatrix, upon the second witness coming into the room, requested him to put his name under the name of the testatrix. Both also agree that the testatrix did not say anything or do any act in reference to the will after the

two witnesses were there, and consequently the question turns upon this, Whether the words used by Mrs. Lee can be taken to be the words of the testatrix." After some discussion of the authorities, after citing and commenting upon the case of *Faulds v. Jackson*, decided by Lord Brougham, the learned judge proceeds to say, "That case, therefore, is, as nearly as can be, parallel with the present, and the only question is, Is there evidence which leads me to conclude that the words used by Mrs. Lee were heard by Mrs. Inglesant, the testatrix? If so, the case applies. As the evidence stands, I must adopt the view that the words were heard by the testatrix. Mrs. Greaves had just before been conversing with her, and no question has been put to any witness to raise a doubt that the testatrix did hear the words used by Mrs. Lee. Moreover the execution was undoubtedly in furtherance of the wishes expressed by the testatrix when she sent for the witness."

In *Rutherford v. Rutherford*, 1 Denio R. 33, it was held that the jury might have found a sufficient request to one of the witnesses, where it was made by the draftsman of the will, in the presence of the testatrix. In *Peck v. Cary*, 27 New York R. 9-10, Denio, C. J., said: "Thereupon Morgan, the draftsman of the will, and who was attending to its execution, called upon three persons who were within hearing, to come forward and witness the will, and they came. I think they should be held to have signed at the request of the testatrix." See also *Nelson v. McGiffert*, 3 Barb. Ch. R. 163.

68 *In *Smith v. Smith*, 2 Lansing R. 266, the supreme court of New York said: "The witnesses signed, knowing what paper they were attesting. The testatrix was present when they signed, and made no objection. The person whom she had employed to draw the will requested the witness to sign, and the request being made in her presence, is, in law, her request." See also *Moore v. Moore*, 2 Brad. Surrogate R. 261. Some of these are decisions by the highest courts of New York, where there is a statute expressly requiring that the witness must attest the will at the request of the testatrix.

The authorities, I think, are almost uniform in holding that a request made by a person in the presence of the testatrix will be held to be the request of the latter, if no objection is made; and an attestation thus made is presumed to be with the concurrence and wishes of the testatrix. See *Williams on Ex'ors*, top p. 117, marg. 99, and cases there cited. *Rogers v. Diamond*, 13 Ark. R. 475; *Trustees, &c., of Auburn v. Calhoun*, 25 New York R. 422.

In the present case it is true that the testatrix at no time requested Clarke to attest her will—neither did she request Dr. Grymes to do so until she was asked the question. It is very probable she did not know that a subscribing witness was necessary, and no doubt she supposed, as did the others, that the attestation of one was sufficient, until the subject was discussed in her presence. There is no doubt she heard Mr. Cheatham say to

Clarke he could also act as a witness. There is no doubt she was well aware of the information received from Lester, that another witness was necessary, as it was the subject of conversation about the time she is proved to have conversed with persons in the room. There is no doubt that when Clarke entered the room she heard Dr. Grymes and Mr. Cheatham request him to sign the will—she

heard and she understood all this if she was conscious—*and that she was conscious, I have already attempted to show from the testimony of unimpeached witnesses, and from the surrounding circumstances; that all the witnesses and friends so thought at the time, is evident from the fact that Clarke was requested to take his position directly in front of Mrs. Hatcher, so that she could plainly see him subscribe the will.

An unfavorable inference is sought to be drawn from the remark made by Dr. Grymes to Clarke, that Clarke was present when Mrs. Hatcher signed the will and heard her acknowledgment. It is said that Clarke was sent for and reminded of what had occurred in his presence, because it was well understood that Mrs. Hatcher was then in an unconscious state. The evidence shows that although Clarke did not actually sign his name, he was considered as a witness to the transaction—he was requested to witness the reading of the will. He was not then requested to sign because it was thought that one subscribing witness was sufficient; but when it was ascertained that two were necessary, it very naturally occurred to them, that as Clarke had witnessed the previous proceedings, including the reading, the signature and acknowledgment, he was the proper person to attest them by the actual subscription of his name.

This view is borne out by the evidence, and is consistent with the integrity of the witnesses.

The other view supposes they are not only guilty of perjury, but that they conspired to use Clarke as an instrument to accomplish a gross and palpable fraud.

Again, it is said that Cheatham, the chief legatee, was the draftsman of the will. That circumstance does not invalidate the will; it simply imposes upon the court the duty of increased vigilance in seeing that the will was fairly executed, and that it does in fact carry out the wishes of the testatrix with respect to her property. See *Riddell v. Johnson*, 25 Gratt. 152. It is perfectly cer-

tain *that this will is in conformity with the wishes of Mrs. Hatcher. It is the precise disposition she desired to make of her property. She had no children or descendants—her relations were very numerous, scattered over several states, the names and even residences of many of them, probably unknown to her—for most of whom she could have no sort of affection. Her property, divided among so many, could be of little value to any one. Nothing was more natural than that she should prefer to give it to those who had been kind to her, and who were bound to her by the ties of affection,

blood and long continued service and devotion.

Very unexpectedly to herself and friends, she was suddenly taken dangerously ill. So soon as she was apprised of her condition, she manifested the most eager wish to make her will. She would not be denied or delayed. No one had suggested it; no one had even hinted at any special bequest; it was written as she dictated, without comment or remark. And when, as she supposed, the instrument was complete, she quietly composed herself to die. If her wishes are to be defeated by the courts, it will be upon an inference. Lord Mansfield once said that in such a case as this, the courts lay hold of a very light presumption.

In *Van Alst v. Hunter*, 5 John. Ch. R. 169, Chancellor Kent, after quoting from Voet, in his Commentaries on the Pandects: "*Licet enim non santi tantum sed et in agone mortis positi seminece ac balbutiente lingua voluntatem promentes, recta testamenta condant si modo mente ad hunc valeant*," proceeds to say: "It is one of the painful consequences of extreme old age that it ceases to excite interest, and is apt to be left solitary and neglected. The control which the law gives to a man over the disposal of his property is one of the most efficient means which he has in protracted life to command the attention

due to his infirmities. The will of such an aged man ought *to be regarded with great tenderness, when it appears not to have been procured by fraudulent means, but contains those very dispositions which the circumstances of his situation and the course of the natural affections dictated." I think these just and noble sentiments fully apply to the case in hand, and I am for admitting the will to probate.

CHRISTIAN and BURKS, J's, concurred in the opinion of Staples, J.

ANDERSON, J., doubted as to the consciousness of the testatrix at the time Clarke signed the paper, but waived his doubt and concurred in the opinion of Staples, J.

MONCURE, P., dissented.

The judgment was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the paper writing bearing date the 16th of August, 1871, purporting to be the last will and testament of Ann P. Hatcher, offered for probate in the circuit court of Chesterfield county, is the last will and testament of the said Ann P. Hatcher, and the said circuit court erred in rejecting the same. Wherefore it is considered by the court, that for the error aforesaid the said sentence of the circuit court be reversed and annulled, and that the appellees pay to the appellants their costs by them expended in the prosecution of their appeal aforesaid here. And this court, proceeding to pronounce such sentence as the said circuit court ought to have pronounced, it is ordered that the said paper writing be established and recorded as the last will and testament of the said Ann P. Hatcher.

Judgment reversed.

72 *Universal Life Ins. Co. v. Cogbill & als.

Same v. Dupuy & als.

March Term, 1878, Richmond.

1. **Insurance—Failure of Company—Recovery of Premiums—Parties.**—C takes out a policy of insurance on his life for the benefit of his wife. The insurance company fails in the lifetime of C. C may sue in his own name to recover the premiums he has paid.
2. **Foreign Insurance Company—Recovery of Premiums—Parties.**—A foreign insurance company has deposited bonds with the treasurer of the state in pursuance of the statute, and fails. A policy holder may sue the company in the circuit court of the city of Richmond, and make the treasurer a party defendant to subject the bonds in his possession to satisfy the premiums he has paid upon the policy. See act of April 4, 1877, amending § 32, ch. 36, Code of 1873, p. 368.
3. **Same—Same—Same.**—If in such case the Commonwealth is made a defendant, it is not cause for dismissing the bill on demurrer; but the bill should be dismissed as to the commonwealth.
4. **Same—Same—Same—State Officers—Jurisdiction.**—In such case the treasurer represents the commonwealth as a public officer, and the case is embraced in the statute, Code of 1873, ch. 44, § 7, giving to the circuit court of the city of Richmond exclusive jurisdiction in cases in which certain state officers named are necessary or proper parties.

In August, 1877, John R. Cogbill and Marcus A. Cogbill, of Chesterfield county, in behalf of themselves and all other creditors of like class, filed their bill in the circuit court of the city of Richmond against the Universal Life Insurance Company, a corporation chartered by the *state of New York, but doing business in Virginia under the laws of this state, and R. M. T. Hunter, treasurer of the state of Virginia, in which they set out that each of the plaintiffs had obtained a life policy for the benefit of his wife, in said company, the one for \$1,500, and the other for \$2,000, upon which they had regularly paid the premiums as they fell due, on the one to \$81.20, and the other to \$174.06. That the company had deposited, as required by the statute, securities to the amount of \$10,000, with the treasurer of the state, and had become insolvent. And they pray that the securities in the hands of the treasurer may be sold, and the amount of the premiums they had paid on their policies might be repaid to them out of the proceeds of the sale, and for general relief.

Powhatan H. Dupuy, of Virginia, filed in the same court a similar bill against the same parties, and also the commonwealth of Virginia. And in it he states that he had sued out an attachment against the real and personal estate of the company. And he prays for a report as to the amount due by said insolvent company to its creditors and policy-holders in Virginia, and the assets available to pay said amount; and that the fund in the treasurer's hands, and the realty attached, may be sold, if necessary, and the

proceeds applied to the payment of the claims of the plaintiff and others, according to their respective rights; and for general relief.

R. M. T. Hunter, the treasurer, answered in both cases, admitting that he held, as treasurer, \$10,000 of registered stock of the United States, deposited by the Universal Life Insurance Company, in accordance with the laws of Virginia.

The two cases were consolidated, and the Universal Life Insurance Company demurred, and answered. And the cause coming on to be heard on the 10th of November, *1877, the court made a decree overruling the demurrer. And thereupon the said company applied to this court for an appeal; which was allowed. The case is stated by Judge Christian in his opinion.

Ould & Carrington, for the appellant.

Hunter, Hundley, Taylor, and Wise, for the appellees.

CHRISTIAN, J., delivered the opinion of the court.

These two cases were heard together, and both are before us on appeal from a decree of the circuit court of the city of Richmond overruling a demurrer to each bill.

The grounds on which the appellants claim that said demurrers should have been sustained are in part applicable severally to said bills, and are, in part, applicable to both bills.

1. Grounds applicable to the bill in the suit of John R. and Marcus Cogbill:

That it appears from the policies of insurance which are filed as exhibits, and are specially made parts of the bill, that said policies were issued for the benefit, respectively, of the wives of John R. Cogbill and Marcus Cogbill, and that the said John R. Cogbill had no pecuniary interest whatever in the policy on his life, and that the said Marcus Cogbill had no interest whatever in the policy on his life; and yet these policies are the sole subject of the suit brought by John R. and Marcus Cogbill. If any one has the right to recover on account of these policies from your petitioner the right to such recovery was in the wives of the said John R. and Marcus Cogbill.

2. Grounds of demurrer to the bill in the suit of Dupuy:

The commonwealth of Virginia is made a party defendant to this bill. A state cannot be sued. There is *no law of Virginia authorizing this state to be sued in any court. Jurisdiction of this suit by the circuit court of Richmond could not be acquired by naming the commonwealth of Virginia a party defendant.

3. Grounds of demurrer common to both bills:

The object of these suits is to subject the deposit made by this company with the treasurer of Virginia, under the provisions of section 28 of chapter 36, p. 367 of the Code of 1873. Jurisdiction is claimed for the circuit court of the city of Richmond under section 7, chapter 44, p. 417.

It will be seen by reference to this last act, that it is provided that all suits shall be brought in the circuit court of the city of Richmond in which it may be necessary or proper to make any of the following public officers a party defendant as representing the commonwealth, viz: the treasurer, &c.

It is not enough that the treasurer may be a proper party, but he must be a party "as representing the commonwealth."

The 4th and principal ground of demurrer is, that the deposit required by law to be made by foreign insurance companies with the treasurer of this commonwealth, is not subject to the claims set up by the plaintiffs, but is a fund specially dedicated to the payment of death losses, and none other.

The cases are therefore before us, only upon the points suggested by the demurrers, and the merits of the controversy are not to be at all considered.

In passing upon these demurrers, this court, as did the court below, must of course consider all the averments contained in the bills as true, and admitted to be true.

1. As to the first ground of demurrer, to-wit: that the wives of John R. and Marcus Cogbill ought to have been made parties plaintiffs, because the policies of insurance

76 filed as exhibits were issued for their benefit, the *court is of opinion that this was no good ground of demurrer.

The object of the bill filed by these parties, was upon the alleged and (by the demurrer) admitted, insolvency of the Universal Life Insurance Company, to recover back the premiums, or such portion thereof as they were entitled to recover, which they had paid up to the 15th day of July, 1877, the date of the alleged insolvency. These premiums were paid by John R. and Marcus Cogbill, and in such a claim by them for repayment of their premiums by the company, they alone are interested. In this demand their wives had no interest. Indeed, the wives of these parties had, under the contract of insurance, no claim or demand upon the company until after the death of the insured, as is shown by the contract of insurance, which is as follows:

This policy of insurance witnesseth, That the Universal Life Insurance Company, in consideration of the representations made to said company in the application herefor and of the sum of eleven dollars and sixty-six cents, lawful money of the United States, first in hand paid by John R. Cogbill, and of the payment of a like amount on or before the 31st days of January and July, in every year, during the continuance of this policy, at the office of said company in the city of New York, or to their agents, as hereinafter provided, do hereby promise and agree to pay to Marv H., wife of John R. Cogbill, the assured under this policy, her heirs, executors or assigns, at their office aforesaid, the sum of fifteen hundred dollars, lawful money of the United States (the balance of the current year's premium, if any, being first deducted therefrom), in thirty days after due notice and satisfactory proof of the death of John R. Cogbill, of Manchester, in the county of

Chesterfield and state of Virginia, whereupon this policy shall cease and determine.

The premiums under this contract were to be paid, and were actually paid, in each 77 case, by the assured, and *he alone had a right to demand repayment. The wife could make no demand against the company till after the death of the husband, and she was, therefore, neither a necessary or proper party.

2. The second ground of demurrer insisted upon, applies to the bill of Dupuy only, which is, that the commonwealth of Virginia is made a party defendant, and that no suit can be brought against the commonwealth without her consent. It is true that in this bill the plaintiff "prays that the commonwealth of Virginia, the said Universal Life Insurance Company, and R. M. T. Hunter, treasurer of Virginia, may be made parties defendant hereto, and duly summoned to answer the same." And it is also true that the commonwealth of Virginia cannot be sued without her consent. But the fact that a party who cannot be sued, and against whom no decree can be rendered or enforced, is joined with other parties who are proper parties, and against whom the decree of the court can and ought to be enforced, is no ground for sustaining a demurrer to the bill. As to such party, the plaintiff may dismiss his bill and assert his claim or demand against the other parties who are the proper and real parties defendant.

3. The third ground of demurrer applies to both bills. It is founded upon an objection to the jurisdiction of the court. It is insisted that the circuit court of the city of Richmond has no jurisdiction in chancery causes, except that which is specially conferred by statute; that such jurisdiction can only be claimed under the 7th section of chapter 44, Code of 1873, and that this provision of the statute does not confer jurisdiction in the cases now under consideration. The section referred to provides that "there shall be brought and prosecuted, in the circuit court of the city of Richmond all suits in which it may be necessary or proper to make any of the following public officers a party defendant,

78 ant, as representing the *commonwealth, to-wit: the governor, attorney-general, treasurer, &c., &c. It is insisted that it is not sufficient that the treasurer be a proper party, but he must be a party representing the commonwealth, and that as the custodian of the deposits required by statute to be made by foreign insurance companies with the treasurer, he does not represent the commonwealth, but is simply a trustee representing the company on the one hand, who owns the deposit, and the policyholders, on the other hand, who are secured by the deposit. The court is of opinion that this objection to the jurisdiction is not well taken. The defendant, R. M. T. Hunter, who happens to fill the office of treasurer at the time of the institution of this suit, is not merely a trustee holding these deposits for the company and the policyholders, but he holds them as treasurer of the commonwealth, designated by the com-

monwealth as the custodian to whose charge the commonwealth has committed these deposits for the benefit of her citizens. As such custodian, the treasurer represents the commonwealth, as one of her important and trusted officers, to whom he is responsible for the faithful discharge of this duty, as well as all other duties which the laws impose on him. The learned counsel for the appellant argues that the treasurer represents only the company and the policy-holder, that he cannot represent the commonwealth because the commonwealth has no interest in the matter, in any way whatsoever. This is a great mistake. It is true that the state has no pecuniary interest, but she has an interest, and a very deep interest, which may be represented by one of her public officers. The statute gives jurisdiction to the circuit court, not only in cases where the state has a pecuniary interest, but in every case where certain public officers therein named (and among them the treasurer), representing the commonwealth, are necessary and proper parties. The interest which the common-

79 wealth has in *cases like these, and which is represented by one of her public officers, is demonstrated by numerous enactments upon her statute books, for the protection of her citizens who may insure their lives or property in foreign insurance companies. Among these enactments is one requiring them to deposit with her treasurer, whom she has designated as a safe and reponsible custodian, at least ten thousand dollars of certain securities, to meet the claims and demands of her citizens against such foreign insurance companies. In this respect the treasurer of the commonwealth comes within the category of the statute as a public officer representing the commonwealth. Another obvious reason for giving jurisdiction alone to the circuit court of the city of Richmond, where certain public officers representing this commonwealth are necessary or proper parties, is because those officers reside at the capitol, and it would be very inconvenient to require their attendance in different parts of the state to defend suits against them.

The court is therefore of opinion that the circuit court of the city of Richmond had jurisdiction to try and determine these causes, and that the demurrer for want of jurisdiction was properly overruled.

There is but one other question raised by the demurrer, and that is, whether the plaintiffs in these causes have asserted such a claim as will entitle them to get the benefit of the deposit made by this company with the treasurer of the state. This question depends upon the construction to be given to the statutes on this subject.

The provision of the statute relied upon by the appellants, as decisive of the question, is the 32d section of chapter 36. Code of 1873, which is as follows: "If said company (i. e. a foreign insurance company) shall fail to pay any of its liabilities on said policies of insurance, according to the terms of the said policies, when the same shall have been

adjusted between the parties in the 80 *mode provided in the policies, if a mode is specified therein, or when the same shall have been ascertained in any mode agreed upon by the parties, or by the judgment, order or decree of a court having jurisdiction thereof, the treasurer shall, upon the application of the party to whom the debt is due, proceed to sell at auction such an amount of said bonds (required to be deposited under the 28th section) as will pay the amount due," &c.

Now, it is argued with much ingenuity and force by the learned counsel for the appellants, that under this section the deposit with the treasurer can only be subjected to claims which arise upon liabilities, according to the terms of the policies of insurance, after adjustment between the parties, or under judgment or decree of a court of competent jurisdiction. It is insisted, that according to the terms of the policies in the cases before us, the deposit with the treasurer can only be subjected to death losses, and to no other claim by those insured, inasmuch as the contract of the company is to pay in the event of death. There would be much force in this suggestion if the section relied on stood alone, though we think it by no means conclusive; for even under this section and those which follow, and independent of the amended act now to be referred to, under the general principles of equity, the plaintiffs' demand might probably be maintained. But by an act approved April 4, 1877, the 32d section relied on was amended and re-enacted. In this act there is the following material amendment of section 32 above quoted: "And the holders and owners of all policies made in this state, shall have a lien on all bonds so deposited (with the treasurer) as aforesaid, for all amounts due them by said companies, under or in consequence of such policies for losses, equitable values, return premiums, or otherwise, and shall be entitled to be paid equally and ratably out of the proceeds of such bonds; and whenever any company depositing bonds

81 *with the treasurer as aforesaid, shall have become insolvent or bankrupt, or made any assignment for the benefit of its creditors, then and in that case any holder of a policy made in this state, shall have the right to file a bill in the circuit court of the city of Richmond to enforce said lien for the benefit of holders of claims arising out of policies made in this state, and the treasurer shall be a party to such proceedings, and the fund shall in that case be distributed by the court."

Now, it will be noticed that while the original section 32, chapter 36, as found in the Code of 1873, limits the authority to sell the bonds deposited with the treasurer, to a liability incurred by the company, according to the terms of the policy when adjusted, or under a decree or judgment of a court of competent jurisdiction, the amended act gives a lien on said bonds, for claims, "under or in consequence of such policies, for losses, equitable values, return premiums or otherwise." It is true this act retains the

language of the original act as to liabilities arising "according to the terms of the policies," but adds thereto the clause above quoted.

Now, the well recognized, safe and established rule of the construction of statutes is, that the intention of the law-giver, and the meaning of the law, are to be discovered and deduced from the whole and every part of a statute compared together. It is the most natural and genuine exposition of a statute to construe one part by another of the same statute; for that best expresses the meaning of the makers, and such construction is *ex visceribus actus*. And this construction of itself imports *ex vi termini*. Deems on Statutes, 698, 703; Fox's adm'r v. Commonwealth, 16 Gratt. 9.

Applying this rule of construction to the statutes before us, the court is of opinion that the claims asserted by the plaintiffs are

such as, if established, may be paid
83 *out of the bonds deposited by the

Universal Life Insurance Company with the treasurer of this commonwealth, in such ratable and equitable proportions as the circuit court may properly determine.

The court is therefore of opinion that the decrees of the said circuit court overruling the demurrers to the plaintiffs bills respectively, be affirmed. In coming to this conclusion the court does not intend to pass upon any question involved in the merits of the controversy. All we mean to decide is, that upon the admission, by the demurrer, of the insolvency of the company, the court did not err in overruling the demurrers.

Decree affirmed.

83 *Gregory & als. v. Gate & als.

March Term, 1878, Richmond.

Absent, MONCURE, P.

I. **Wills—Election.***—G, by his will, directs that his estate shall be kept together for the support of his wife and children; until his widow shall marry, or die, or until his youngest child comes to the age of twenty years. And he directs that a certain sum shall be paid to a child who shall marry and thus cease to be supported out of the profits of the estate. The widow renounces the will—**Held:** This does not authorize a division of the estate, but it is to be kept together until one of the contingencies mentioned in the will occurs.

II. After directing that his estate shall be kept together, as above stated, G empowers his executor to sell, if he shall think it would be to the interest and benefit of his wife and children, any part of the estate, "except the homestead known as Seguire, and the mills and appurtenances thereto attached." And he directs an equal division of his estate among his five children. Three of the children were by a former wife, who had inherited one-third of Seguire. G bought the other two-thirds, lived upon it, and during the first wife's life, expended some

\$9,000 in improvements upon it. In 1864, the Confederate government impressed the timber standing on 289 acres of Seguire, and G, having received payment for it, he, with that money and some of his own, bought two tracts of land which he owned at his death, and which passed under his will—**Held:**

1. **Same—Same.**—The will does not make a case of election as to the one-third of Seguire; but the three children by the first wife are entitled to take that third by inheritance from their mother, and to share equally with the other two children in the estate of their father G.

84 *2. **Same—Same.***—The will does make a case of election as to the one-third of the price of the timber taken from Seguire, and the said three children cannot claim that and take under the will.

William B. Gates, of Chesterfield county, died in 1868, leaving a widow and five infant children surviving him. Of these children three were by a former wife. He left a will which was duly admitted to probate in the county court of Chesterfield, and Robert G. Bass qualified as his executor. In the second clause of his will he says: "I wish my estate kept together, and managed by my executors as if I were living, for the joint benefit and common good of my wife, Bettie Gates, and my children, Blanch C., Lillie W., Judith F., Maria T., and William Beverly Gates, so long as my widow remains unmarried. Should my executors, however, at any time believe that it would be to the interest and benefit of my wife, and children to sell any part of the real and personal estate, they are hereby invested with full power to sell and convey any portion thereof, except the homestead known as Seguire, and the mills and appurtenances thereto attached." And he directed that all the income and profits of his estate should be used, if necessary, for the common support, maintenance and education of his children. And he directed that if any of his children should marry before a general division of the estate, thereby withdrawing from her support from the general income of the estate, such child should receive \$1,000 within ninety days after the marriage, and \$1,000 in five years thereafter, to be accounted for, without interest, on a final division of the estate.

In a subsequent clause he says: "If, however, my widow shall at any time marry again, thereby making it necessary for a general division of my estate, my will and desire is, that after taking her thirds, the balance of my estate shall be equally
85 divided between my children, *each accounting for what money they may have drawn from the estate. I further will and desire that no general division of my estate shall take place until my youngest (then living) child shall attain the age of twenty years, or at the death of my widow, or in the event of her marriage again."

The widow of William B. Gates renounced the provision made for her by his will, and she, on her own behalf and as next friend of her two infant children, instituted a suit in equity against the executor and the other children. In the bill the real estate left by

***Wills—Election.**—The principal case is cited, and its views on the doctrine of election are approved in *Penn v. Guggenheimer et al.*, 76 Va. 847. See also 2 Min. Inst. (4th Ed.) 1002. *Moore v. Harper*, 27 W. Va. 371; 11 Am. & Eng. 1ac. Law (2nd Ed.) 68.

William B. Gales is set out, and the prayer of the bill is for a settlement of the accounts of the executor, that dower may be assigned to her; that the will may be construed; that a sale of the real estate, except that called Seguine, may be made, and Seguine may be kept together, &c., &c.

The three children by the first marriage, and Bass, the executor, answered; a commissioner was directed to take the account and make enquiry; which was done; and one of the defendants having married J. M. Gregory, and another John C. Goode, they filed a cross-bill in the cause.

The questions of controversy in the cause, were, first, whether the widow having renounced the will, that authorized a division of the estate, she not having married and the youngest child not having attained the age of twenty years. Second, whether there was a case of election on the part of the three children of the first marriage. It appears that the place called Seguine had been the property of Thomas Belcher, who died intestate, and that it descended to his three children, of whom the first Mrs. Gates was one; and that William B. Gates purchased the shares of the other two. He lived upon the place, and during his first wife's life remodeled the dwelling-house, rebuilt the mill upon it, and

added a sawmill, all at an expense of **86** \$9,492.20. The third *question was as to the liability of William B. Gates' estate for wood cut off the Seguine land. It appears that in 1864, the Confederate government, through an agent, proposed to Gates to purchase the wood standing on a part of the land, but he refused to sell it. It was then impressed by the government, and the price at which it was to be taken being agreed, Gates received \$48,167 in Confederate treasury notes, and \$24,083 in Confederate bonds. He added of his own money to the treasury notes enough to make the sum of \$60,000, with which he purchased two farms in the county of Chesterfield, one named Archer and the other Winfree, which constituted a part of his estate when he died. The bonds perished on his hands. It appears further that much of the timber cut and sawed by the Confederate government, was on the ground when the Confederacy failed, and that the United States government seized it and converted it to their own use. They also seized the timber yet standing on the two hundred and eighty-nine acres which had been impressed, and it was sold for \$675. The commissioner estimates the damage done to the Seguine farm by the cutting and removal of timber at \$600, of which one-third is \$200.

The two causes came on to be heard on the 20th of May, 1873, when the court held that the testator William B. Gates disposed of the farm known as Seguine, by his will, and thereby put his children, Blanch C., Lillie W., and Judith F. Gates, to their election, either to confirm the will as to its disposition of the one-third of Seguine, or to claim against the will; and in the latter event they were to compensate the other two children out of the property devised to them by the

will for what they would lose by said election to claim against the will. And it was further held that the said three elder children could not follow the fund derived from the wood which was invested in the Chesterfield **87** lands, and that they were *not entitled to a division of the estate at that time; no one of the contingencies indicated by the testator as making a general division of the estate necessary, having occurred. And the parties all agreeing that the shares of the said three eldest children in the estate of their father under his will were much more than the one-third of Seguine, an enquiry on that question was waived by them, but their waiver was to be without prejudice to their defence against the plaintiffs' claim of election. From this decree Gregory and wife, Goode and wife, and Judith F. Gates, applied to a judge of this court for an appeal; which was allowed.

McRae and Christian, for the appellants.
Guy & Gilliam, for the appellees.

CHRISTIAN, J., delivered the opinion of the court.

The court is of opinion that there is no error in the decree of the circuit court in declaring that the appellants "are not entitled to a general division of the estate of the testator at this time." The will of the testator contains the following provision: "I further will and desire that no general division of my estate shall take place until my youngest (then living) child, shall attain the age of twenty years, or at the death of my widow, or in the event of her marriage again." None of these contingencies, upon the happening of which the testator indicated as the period when a general division of his estate should be made, or become necessary and proper, have yet occurred. Until at least one of these events happen, no general division of his estate can be made.

The court is further of opinion that there is no error in said decree so far as it declares that the appellants, "Blanch C., Lillie W., and Judith E. Gates, cannot follow the **88** *fund which they claim in their cross-bill was invested in the Archer and Winfree tracts of land by the testator in his lifetime."

The claim asserted by these three appellants, is, that they being entitled to one-third in fee, of the farm mentioned in the will known as Seguine, and that the farms known as the Archer and Winfree tracts, being purchased by the testator with the proceeds of the sale of timber from the Seguine farm, that they have an interest in the said Archer and Winfree tracts to the extent of one-third of the purchase money. The title to these two last named tracts was in the testator, and disposed of by him in his will, and these appellants cannot claim both under the will, and at the same time claim title to those two tracts of land, but would be put to their election. This would be manifestly to their great disadvantage, as, according to the report of the commissioner, their interest in the timber cut off the farm,

Seguine, would be only the sum of about \$200. But it is shown by the record that the permanent improvements put on the farm known as Seguine, by the testator in his lifetime (one-third of which farm is the property of these appellants), far exceed in value the timber which was sold by the testator; these permanent improvements being estimated by the commissioner to whom the matter was referred, at upwards of nine thousand dollars. The court is therefore of opinion that there is no error in the decree of said circuit court in rejecting the claim set up by the appellants in their cross-bill.

But the court is further of opinion that the decree of the said circuit court is erroneous, so far as it declares that "the testator, W. B. Gates, disposed of the farm known as Seguine, by his will, and thereby put his children, Blanch C., Lillie W., and Judith F. Gates, to an election, either to confirm the will as to its disposition of one-third of Seguine, or to claim against the will, and

89 in the latter *event they are to compensate out of the property devised to them, from the said testator's will, the other two children, Maria T., and William Beverly Gates, for what they (the said Maria T., and William Beverly Gates) would lose by said election to claim against the will."

This decree, in effect, declares that the testator (though entitled to but two-thirds of the farm known as Seguine—the appellants before named being entitled to one-third) had by his will disposed of the whole of it, instead of only that portion (two thirds) to which he had title.

The clause of the will upon which this decree is founded is as follows: "Secondly, I wish my estate kept together and managed by my executors (hereinbefore named), as if I were living, to be used for the joint benefit and common good of my wife, Bettie Gates, and my children, Blanch C., Lillie W., Judith F., Maria T., and William Beverly Gates, so long as my widow remains unmarried. Should my executors, however, at any time believe that it would be to the interest and benefit of my wife and children to sell any part of the real or personal estate, they are hereby invested with full power to sell and convey any portion thereof, except the homestead known as Seguine, and the mills and appurtenances thereto attached."

The question to be determined is, whether by this clause (which is the only one referring to Seguine), the three oldest children of the testator, who own, as the record shows, one-third of Seguine, are put to an election?

The doctrine of election may be thus stated: That he who accepts a benefit under a deed or will, must adopt the whole contents of the instrument, conforming to all its provisions, and renouncing every right inconsistent with it. If, therefore, a testator

90 has affected to *dispose of property which is not his own, and has given a benefit to the person to whom that property belongs, the devisee or legatee accepting the benefit so given to him must make good the testator's attempted disposition; but if, on the contrary, he choose to enforce his propri-

etary rights against the testator's disposition, equity will sequester the property given to him, for the purpose of making satisfaction out of it to the person whom he has disappointed by the assertion of those rights. 1 Jarman on Wills, 384 (marg.), and cases there cited. And it is immaterial whether the testator, in disposing of that which is not his own, is aware of his want of title, or proceeds upon the erroneous supposition that he is exercising a power of disposition which belongs to him; in either case, whoever claims in opposition to the will must relinquish what the will gives him. *Ib.* 387.

But in order to raise a case of election, there must appear in the will itself a clear intention on the part of the testator to dispose of that which is not his own. See 1st Lead. Cas. Eq. (*Noys v. Mordaunt*); *Hare & Wallace's Notes*, p. 284 (marg.), and numerous cases there cited. As was said by Lord Eldon, in *Rancliffe v. Parkyan*, 6 Dow, P. C. 149: "Prima facie it is not to be supposed that a testator disposes of that which is not his own. It must be by demonstration plain, by necessary implication, meaning by that the utter improbability, that he could have meant otherwise, that the case (of election) is raised. It rests upon those contending for a case of election, to show that there is that manifest, plain demonstration and utter improbability." He further says (p. 185): "It is difficult in any case to apply the doctrine of election, where the testator has some present interest in the estate disposed of, though it may not be entirely his own." See also *Higginbotham v. Cornwell*, 8 Gratt. 83; and *Dixon v. McCue*, 14 Gratt. 540. These last

91 were cases as to the necessity of a widow electing between her *right of dower and the provisions of her husband's will; but the principles therein declared are the same as those which govern the case before us. In the first case Judge Baldwin, delivering the opinion of the court, says: "The conclusion against the claim of the widow ought to be as satisfactory as if it were expressed." In the latter case, Judge Daniel, after commenting on the former case, and remarking that Judge Baldwin had stated the doctrine somewhat too strongly, says: "I think it fairly results from the authorities, that wherever the inference against the widow's right is clear beyond reasonable doubt—wherever the implications against her are so strong that to defeat them resort must be had to a forced, far-fetched or unreasonable construction of the will, a case is made to put her to her election."

Applying these principles to the will before us, it is plain that no case of election is raised. Here the testator had an interest to the extent of two-thirds in the farm known as Seguine. There is nothing on the face of the will, taking all its provisions, and construing it as a whole, which indicates clearly or by necessary implication, that the testator intended to dispose of any part of Seguine not his own, or that his disposition as to Seguine was not confined to the two-thirds which he owned in fee simple.

It is to be particularly noticed that the tes-

tator nowhere in his will disposes of Seguine specifically. If disposed of at all it is by general words. Indeed, Seguine is not mentioned in the will at all, except in the second clause, in which the testator empowers his executors (if to the interest of his wife and children), to sell and convey any portion of the real and personal estate, "except the homestead known as Seguine." It cannot be said, upon any fair construction or necessary implication, that the testator, in using this language, or in directing a general division of

92 his whole estate upon the death or marriage *of his widow, or the arrival at the age of twenty years of his youngest child, disposed of that part of Seguine which was not his own, but which belonged to his children. Indeed, it may be fairly presumed that the very consideration which influenced the testator to "except the homestead known as Seguine" from the sale by his executors, was the fact that he knew that he was the owner of but two-thirds, while his children were the owners of the remaining third. At any rate, it is clear that no such plain and unequivocal intention on the part of the testator to give away that which is not his own is indicated, as constitutes, under all the authorities, a case of election.

In *Miller v. Thrugood*, 33 Beavan, reported also in 42 Law Journal, 1864. Eq. p. 511, the doctrines on the subject of election are stated in language which has peculiar force in application to the case before us. Sir John Romilly says: "The cases upon the subject of election resolve themselves into this: If the testator has a partial interest in the particular property, and he disposes of the whole specifically, and then gives the owner of the other portion some interest under the will, a question of election arises, and the owner of the other portion must elect to take under or against the will. But if the testator does not dispose of the property specifically—if he uses general words, then no question of election arises, as the language he employs applies to his own interest in the property, and does not imply an intention to dispose of any other property than his own. These principles are to be collected from the cases."

In the will before us there are no words disposing of Seguine specifically, but only general words disposing of the testator's whole estate at a certain period, the only mention of Seguine being to except it from the provision of the will empowering his executors to sell his real estate, and that

93 "exception" is entirely consistent with *the intention of the testator to dispose of the interest only which he had in the property.

The court is therefore of opinion that the decree of the said circuit court, so far as it puts the appellants to an election, be reversed, and in all other respects be affirmed.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the said decree of the said circuit court, so far as it declares that "the testator, W. B. Gates,

disposed of the farm known as Seguine by his will, and thereby put his children, Blanch C., Lillie W., and Judith F. Gates, to an election, either to confirm the will as to one-third of Seguine, or to claim against the will," is erroneous. It is therefore decreed and ordered that the said decree to this extent, be reversed and annulled, but in all other respects affirmed; and that the appellants recover against the appellees their costs by them expended in the prosecution of their appeal and supersedeas here. And this court now proceeding to render such decree as the said circuit court ought to have entered, it is adjudged, ordered and decreed, as the opinion of this court, that the testator, W. B. Gates, did not dispose of the whole of the farm known as Seguine, but only the two-thirds thereof to which he had title; and that, therefore, the appellants, Blanch C., Lillie W., and Judith F. Gates, were not put to an election, either to confirm the will as to its disposition of one-third of Seguine, or to claim against the will, as declared by the decree of the circuit court of Chesterfield. All of which is ordered to be certified to said circuit court. Decree reversed.

94 *Patteson & als. v. Bondurant's Ex'ors & als.

March Term, 1878, Richmond.

I. In 1860, B executes his bond, with G as his surety, to P, for \$12,000, payable January 1, 1864, in part of the purchase money of a tract of land. P died in 1862, and directed that his estate should be kept together until his youngest child came of age, and appointed his widow his executrix. B died soon afterwards, and his son, A, was one of his executors. In 1864, Mrs. P was informed by the Confederate assessor that she must take an oath or pledge herself to receive payment of *ante-bellum* debts in Confederate money, or pay her taxes in gold or silver. In December, 1864, A, knowing that Mrs. P thought if she refused to receive payment of the debt in Confederate money she would have to pay her taxes in gold or silver, that she was unwilling to receive such payment, that she had no use for the money, but if received she would have to invest it, called on her and paid her the money and took in the bond; the depreciation of the currency being then as twenty for one in gold—HELD:

1. **Payments to Fiduciary in Confederate Currency—Devastavit.**—Mrs. P in receiving payment of the debt in Confederate currency, committed a *devastavit* of her testator's estate. **Same—Same—Liability of Debtor.***—A, knowing the constraint under which Mrs. P was

***Payment to Fiduciary in Confederate Currency—Liability of Debtor.**—In *Helsley et al. v. Fultz*, 76 Va. 671, where the principal case is cited with approval, the court said: "There are a number of cases in which it has been held by this court, that although the fiduciary who received depreciated Confederate currency in payment of a well secured specie debt was guilty of a *devastavit*, yet the debtor who made the payment was protected, be-

acting, that she had no use for the money, but would have to invest it, participated in the devastavit, and his testator's estate is primarily liable to pay the debt.

This was a suit in equity in the circuit court of Buckingham county, brought in September, 1869, by Walker J. Patteson, and others, devisees and legatees of James M. Patteson, against the executors, devisees and legatees of Thomas M. Bondurant, deceased, and Willie Ann Patteson, in her own right and as executrix of James M. Patteson, deceased, to subject the estate of 95 said Thomas *M. Bondurant, and especially a tract of land called Oaklawn, to pay the amount of a bond of \$12,000, which Bondurant had executed to James M. Patteson, in 1860, with Grandison Mosely as his surety, as a substitute for a bond for the same amount executed by T. M. Farrow, in 1857, to said Patteson, in part payment of the purchase money of the tract of land called Oaklawn. The first bond was payable in eight years, with interest payable annually, and the bond of Bondurant was made payable at the same time. In November or December, 1863, this bond was paid by Alexander J. Bondurant, one of the executors of Thomas M. Bondurant, deceased, to Mrs. Willie Ann Patteson, the executrix of James M. Patteson, the payment being made in Confederate money, which at that time was as twenty to one in gold. The court below dismissed the bill. And the plaintiffs thereupon applied to this court for an appeal. The case is stated by Judge Anderson in his opinion.

William J. Robertson, Southall and John D. Moon, for the appellants.

William M. Cabell, for the appellees.

ANDERSON, J., delivered the opinion of the court.

The doctrine has been well settled by several decisions of this court, that a fiduciary is not justified in receiving greatly depreciated currency in payment of a gold debt, or a debt which was equivalent to gold, unless it was necessary for the payment of debts or legacies, or unless other circumstances in relation to the safety of the debt or the condition of the estate made it expedient and proper. *Hannah's adm'r v. Boyd & wife*, 25 Gratt. 692, 701-2; *Tosh v. Robertson*, 27 Gratt. 270; *Bedinger v. Wharton*, Ib.

96 857. It has also been *held that a fiduciary had no right to collect a specie debt in Confederate money when

cause, as a general rule, the debtor did not know the state of the executorial accounts, and he had the right to presume that the money is needed for the purpose of paying debts or legacies, or for some other object advantageous to the estate. But it is equally well settled that if the debtor is appraised at the time that the money is not needed for any of these purposes, if he is aware that the collection was made merely for investment in Confederate bonds, and the safety of the fund thus hazarded upon issues of the war, he is equally guilty with the fiduciary who receive the money, and like him is answerable to the parties interested."

greatly depreciated, for the purpose of investment. *Campbell's ex'ors v. Campbell's ex'or*, 22 Gratt. 649; *Crickard's ex'or v. Crickard's legatees*, 25 Gratt. 410. That it would be a devastavit and breach of trust in an executor. It is also the settled doctrine of this court that the debtor, or he who pays the money to the executor, in discharge of the obligation, knowing that it was not needed for the payment of debts or legacies, or that the safety of the debt did not require its collection, but that if received it would be for investment, and would involve the executor in a devastavit and breach of trust, will be held to be a participant in the devastavit and breach of trust. *Pinkard v. Woods*, 8 Gratt. 140; *Cocke & al. v. Minor & als.*, 25 Gratt. 246; *Jones' ex'or v. Clarke*, Ib. 642; and *Tosh v. Robertson*, supra.

The court is of opinion that the bond of Thomas M. Bondurant, deceased, and Grandison Mosely, involved in this suit, was for a gold debt or its equivalent. It was executed to James M. Patteson, prior to the late war, for a tract of land in Buckingham county, known as Oaklawn. The tract of land was sold by the said Patteson to Thomas M. Farrow, in 1857, for \$12,000, and the said Farrow executed his bond, with security therefor, on the 23d of January, 1858, payable six years after date, with interest from the 1st of January, 1858. The said Farrow, some time in 1860, sold the same tract of land to Thomas M. Bondurant, for a fraction less than \$13,000; and by agreement between the parties, Bondurant executed his bond jointly with Grandison Mosely for \$12,000, part thereof, to James M. Patteson, which he received in place of Farrow's bond, which he surrendered to him. The Bondurant bond was payable at the same time, the 23d of January, 1864. In 1862, James M.

97 Patteson died, and by his will appointed his wife, *Willie Ann Patteson, his executrix, requesting that she should not be required to give security. He directed that his estate should be kept together until his youngest child attained twenty-one years of age, for the purpose of raising and educating his children, unless his representatives should think it practicable to advance his children, as they became of age or married, not exceeding in any case their distributive shares of his estate respectively. He also authorized his three sons to qualify as his executors, as they respectively attained twenty-one years of age. It does not appear that either of them ever qualified. He left five children, all of whom were infants at his death.

Thomas M. Bondurant also died the same year, and Thomas and Alexander J., his sons, and William P. Hall, qualified as his executors. In the month of December, 1863, Alexander J. Bondurant, as executor, paid the executrix the amount of said bond of \$12,000, in Confederate money, dollar for dollar, and took up the bond. At that time Confederate money was so depreciated that twenty dollars of it was worth only one in gold, and the said executor discharged a gold debt of \$12,000 in a currency which was

worth only one-twentieth of its value, or \$600.

It appears that less than twelve months before, this same executor, when he paid to Mrs. Patteson, the executrix, the interest then due on said bond, proposed to pay her in a short time the principal in Confederate money, when she informed him that she was unwilling to receive it, and had no use for it. Confederate money was then of much greater value, being in relation to gold as three to one, than it was in December following, when she received it.

How can this be explained? It is accounted for by the evidence in the record.

98 Shortly before the Confederate *money was tendered to her by said executor, she had been informed by the Confederate assessor that she was required by the law then in force to receive payment of ante-bellum debts in Confederate money, or pay her taxes in gold or silver, and that unless she would take an oath or pledge her solemn word to receive payment of such debts in such currency, she would have to pay her taxes in gold or silver. She was unable to pay her taxes in gold and silver, and relying upon this representation, as she and her eldest son, George, who was then about seventeen years of age, understood it, she solemnly pledged her word to the assessor that she would receive payment of her ante-bellum debts in that currency. Soon afterwards her said son met the said executor in the road, who asked him if his mother would receive payment of the bond in question in Confederate currency? To which George replied that, as she would have to receive it in that currency, or pay her taxes in gold or silver, which she was unable to do, he supposed she would receive it. And thereupon he sent a message by him to his mother, that he would be down in a few days to pay the money. This is proved by George Patterson, and there is no testimony in conflict with him, and although Mr. Bondurant says in his answer that he does not recollect of sending the message, the testimony of George is corroborated by the circumstances.

He came down, he says, about the 11th of December. Mrs. Patteson and George both testify that it was the Saturday before the second Monday. Mr. Bondurant states affirmatively that he was there previously in November, but there is no testimony to support it, and the testimony of both Mrs. Patteson and George is to the contrary. He is probably mistaken, and confounds the interview with George with an interview with his mother in November. It is probable he intended to call on Mrs. Patteson, and after meeting with George he deemed it

99 *unnecessary. There is some discrepancy in his statement in his answer of what occurred when he called to pay the money and lift his testator's bond, and the testimony of Mrs. Patteson and George; or at least his statement is not as full as theirs. It is doubtless an honest difference in recollection, so far as they differ, and is not material.

It is evident that the executrix, in accept-

ing payment in Confederate money so depreciated, acted under constraint. She did not freely and willingly receive it; but she took it because she felt that there was no help for her, that she was obliged to receive it, or submit to what she regarded as a greater evil. The executor denies that he had any complicity or connection with the statements and representations as laid to the door of William P. Oliver. If these representations had been made by his contrivance, or at his suggestion, it would have been the perpetration of a gross fraud against the representative of James M. Patteson. There is no proof to sustain any such imputation. He does not believe that William P. Oliver made any such statements. That he did, is proved by two witnesses. And he adds, if he did, he was ignorant of it, and is in no manner responsible therefor. He says further, he does not know that he ever mentioned the \$12,000 bond to Oliver, the assessor; if he ever did, it was alone in connection with the lists of his testator's estate. He does not say that it was not mentioned to him by one of his co-executors, nor do they deny having mentioned it to him. He admits that on the rendition of the lists, they indicated a willingness, as executors and as individuals, to receive Confederate States treasury notes for their respective dues. If such a declaration was required of them by the assessor, they might well conclude that it would be required of them by the assessor, they might well conclude that it would be required of Mrs. Patteson. He does not say that he did not know she had pledged her word

100 to the assessor that she would *receive Confederate money in the payment of ante-bellum debts. He must have had some information, or reason, which induced him to enquire of George Patteson if his "mother was ready to receive the money for the \$12,000 bond," when she had refused to receive it months before, when the currency was far less depreciated. At all events he learned from him the reason why she would receive it, if at all, because the lodgment had been made on her mind by some means or other, that if she refused to receive it, she would have to pay her taxes in gold or silver. He learned the same from Mrs. Patteson when he paid her the Confederate money and demanded his testator's bond. He knew that she did not receive it of her free will and accord, but under the impression of constraint and compulsion; that she regarded it as almost worthless; that she had no use for it; that she did not need it for the payment of debts or legacies, because her calculation was that she would have to invest it; for she asked his advice how she had best invest it, and he gave it to her.

Upon this presentation of the case by the record, it appears that for this gold debt of \$12,000, due the estate of her testator, his children and distributees being infants, the executrix received from the executor of the obligor, Confederate money worth only about \$600 in gold, when it was not necessary for her to collect it for the payment of debts or legacies, or for the safety of the debt, but for

investment. The debt seems to have been at that time perfectly secure. The land was bound for it. It was also secured by Grandison Mosely being jointly bound for it with the estate of Thomas M. Bondurant. There is nothing in the record to show that Mosely was not entirely solvent and good for the debt; and the estate of the principal obligor is shown to have been at that time very valuable, both as to the personalty and the realty;

so valuable that his executors, before
101 qualification, were *required to execute a bond in the penalty of \$400,000.

The court is of opinion, therefore, upon the authorities above cited, that the executrix, in receiving payment of the said debt in a currency of so little value, committed a devastavit and breach of trust. There is a class of cases in which this court has not held the payer of the money to an executor or administrator, to be a participant in the devastavit or breach of trust, upon the ground that he could not be presumed to know what was the condition of the estate, or that there might not be uses for which it could be advantageously received and applied for the benefit of the estate, or that there might be a necessity on the executor to receive it for payment of debts or legacies. *Tosh v. Robertson*, supra. But in this case no such presumption can be raised in favor of the executor of the principal obligor, for it is shown that he was informed that the executrix had no use for the money, and that if she received it she would have to seek out some mode of investment, and he required her to take it, though he was aware that she was very averse to it, and only yielded her objections under a wrong impression that if she did not, the estate would be subjected to greater evils.

Under these circumstances, as disclosed by this record, Alexander J. Bondurant, executor of Thomas M. Bondurant, the principal obligor, must be held, not only to have participated in the devastavit and breach of trust, but to be responsible for it, and to be primarily liable therefor to the heirs and distributees of James M. Patteson, deceased, and that the estate of the principal obligor and the surety Grandison Mosely are still liable on said bond, and that there should be a decree in favor of Willie Ann Patteson, executrix of James M. Patteson, against the executors of Thomas M. Bondurant, deceased, de bonis testatoris, for \$12,000, the principal of said bond, with interest thereon

102 at the rate of six per *centum per annum, from the 1st of January, 1864, till payment, subject to a credit as of the first of January, 1864, for \$1,235.65, the value of the tobacco in which a portion of the Confederate money received by the executrix was invested, and which she realized, being more than the scaled value as of that date of the whole of the Confederate money paid to her by the said executor; and that the said tract of land known as Oaklawn, for the purchase money of which said bond of \$12,000 was given, shall be sold and the proceeds of sale be applied to the payment of the balance due on said debt; and if that shall prove insufficient

to satisfy the same, the decree should authorize the executrix to sue out an execution of *fi. fa.* against the assets of the said Thomas M. Bondurant, deceased, in the hands of his executors to be administered for the residue of said debt; and if that should prove unavailing, that she be allowed to apply to the said circuit court for further assistance to obtain satisfaction, of what may remain of said debt, out of the estate of said Thomas M. Bondurant, deceased, and ultimately against the surety, Grandison Mosely, if the estate of said decedent should prove insufficient to satisfy the whole debt and costs, for what may remain to be satisfied.

The court is of opinion, therefore, to reverse the decree of the circuit court of Buckingham, with costs, and to remand the cause for further proceedings to be had therein in conformity with this opinion.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the executrix of James M. Patteson committed a devastavit and breach of trust in receiving Confederate money from Alexander J. Bondurant, executor of Thomas
103 M. Bondurant, in December, *1863, when it was greatly depreciated, in payment of the bond of twelve thousand dollars, executed in 1860 by the said decedent jointly with Grandison Mosely as his surety, for the tract of land situate in Buckingham county, known as Oaklawn; and that under the circumstances of the case, the said Alexander J. Bondurant, as executor as aforesaid, must be held not only to be a participant in said devastavit and breach of trust, but should be held primarily liable therefor.

It is, therefore, adjudged and decreed that the decree of the circuit court dismissing the plaintiffs' bill be reversed and annulled, and that the executors of Thomas M. Bondurant, deceased, out of any assets of said decedent in their hands, do pay to the plaintiffs their costs expended in the prosecution of their appeal here.

And the court, proceeding to render such decree as ought to have been rendered by the court below, it is decreed that Thomas L. Bondurant, Alexander J. Bondurant, and William P. Hall, executors of Thomas M. Bondurant, deceased, do pay to Willie Ann Patteson, executrix of James M. Patteson, out of any assets of the estate of said Thomas M. Bondurant in their hands to be administered, the sum of twelve thousand dollars, with interest thereon at the rate of six per centum per annum from the 1st day of January, 1864, till payment, subject to a credit for \$1,235.65 as of the said 1st day of January, 1864, and the costs of this suit in the said circuit court. And unless the same be paid in a reasonable time, to be determined by said court, that a decree be entered therein for the sale of the tract of land in the bill and proceedings mentioned, known as Oaklawn, upon such terms as the said court may deem reasonable and just, to satisfy the same. And if the proceeds of such sale should be insufficient to satisfy the whole of said debt with interest and costs, and there

is no estate of said decedent out of which the residue thereof can be *satisfied, the said Willie Ann Patteson, executrix as aforesaid, may apply to the said circuit court for a decree against Grandison Mosely, the surety of the said Thomas M. Bondurant in the said bond for \$12,000, for the unsatisfied residue thereof. And this cause is remanded to the circuit court of Buckingham county for further proceedings to be had therein, in conformity with this order and the opinion filed with the record. Decree reversed.

105 *Ayres & als. v. Robins.

March Term, 1878, Richmond.

1. Sale of Land—Specific Performance—

Equity Jurisdiction.—On the 31st of July, 1866, R and A enter into a contract by which R sells to A a tract of land on Cherrystone creek, and covenants that by the 1st of January, 1867, he will convey the land to A by deed, with general warrants at the cost of the vendee by proper deed tendered by A, and will deliver possession free of incumbrance. And A covenants to pay to R \$9,000, of which \$5,000 by the 1st of January, 1867, and sooner if R shall have made the conveyance and delivered possession, and for the balance in one and two years, with lien on the land from the day the conveyance is made and possession given. And R covenanted that he would on or about the 1st of May, 1867, remove or cause to be removed the stakes marking the oyster grounds of S and D, so that these grounds shall be left unencumbered by the latter, and remain to the use of A. A was put into possession and paid the \$5,000 and the first and a part of the second deferred payments; but had not tendered to R a deed to be executed. In October, 1870, R files his bill for the specific performance of the contract, and averring his performance or willingness to perform. On demurrer on the ground that the plaintiff had his remedy by action at law for the balance of the purchase money—**HELD:** That though the plaintiff might have sued at law, that would not have afforded a remedy against the land; and therefore equity had jurisdiction of the case.

2. Dependent Covenants.—A answers and says that R has not complied with his covenant to remove the stakes of S and D, whereby he lost an important part of his inducement to purchase the land, and that the damage thus sustained was fully equal to the balance of the purchase money unpaid, and without asking for a rescission of the contract, claimed an abatement of the price—**HELD:** The

covenants to pay the two deferred payments and to remove the *stakes of S and D, were dependent; and R not having removed them, A is entitled to have an abatement from the pur-

*Vendor's Lien—Enforcement in Equity.

—For authorities supporting the proposition that the possessor of a vendor's lien is not confined to his remedy at law but may enforce his lien in equity, see generally 28 Am. & Eng. Enc. Law, 182. See also *Kane v. Mann*, 93 Va. 248, and *Fayette Land Co. v. R. Co.*, *Id.* 283, citing principal case.

In *Smith v. Henkel*, 81 Va. 524, it was held that the enforcement in equity of a retained vendor's lien is a matter of right.

chase money to the extent of the damage he has sustained by this failure of R to execute his covenant.

3. Appeal—Review—Evidence.—The court directs an issue to be tried at its bar to ascertain whether R has complied with his covenant to remove the stakes of S and D, and if he has not, what damage A has sustained by his failure to do so. The first jury return a verdict that all the stakes have not been removed, and ascertain its damage at \$2,137.50. This verdict is set aside by the court on the motion of the plaintiff, and no exception is taken. The second jury did not agree, and the third found, as did the first, as to the removal of the stakes, but found a verdict for only \$350 damages. A moved the court to set aside this verdict, but the court overruled the motion, and A excepted; but the exception does not contain the facts or the evidence. The court makes a decree for the amount of the purchase money due, after crediting the \$350, and A appeals—**HELD:** An issue was the proper mode of ascertaining the damages; and the bill of exceptions not giving the evidence before the jury, this court must presume, in the absence of the evidence, that the verdict was correct. Though there were depositions in the record, they were taken before the trial of the issue, and it did not appear that they were read before the jury, or if read that they were the only evidence.

This was a suit in equity in the circuit court of Northampton county, brought in October, 1870, by William J. Robins, against Henry H. Ayres and Willis Thompson, to enforce the payment of a balance of purchase money of land sold by said Robins and his brother, Joseph W. Robins, who had since died, to said Ayres and Thompson. There was a decree in favor of the plaintiff; and thereupon the defendants obtained an appeal. The case is fully stated by Judge Burks in his opinion.

J. A. Meredith, for the appellants.

No counsel for the appellees.

BURKS, J., delivered the opinion of the court.

107 *This is an appeal from certain decrees and orders of the circuit court of Northampton county. The bill was filed by William J. Robins in his right and as sole heir and distributee at law of Joseph W. Robins, deceased, against Henry H. Ayres, Willis Thompson, and the wife of said Ayres, for the specific execution of a contract made on the 31st day of July, 1866, for the sale of a tract of land called Salt Grove, in Northampton, bordering on Cherrystone creek.

The contract was in writing, signed and sealed by the parties, and a copy is filed as an exhibit and made a part of the bill. By the terms of the contract, William J. Robins and Joseph W. Robins, the vendors, described as "parties of the first part," covenant, in substance, that they will, on or before the first day of January, 1867, convey the said tract of land (the quantity and general boundaries of which are given), to the said Ayres and Thompson, the vendees, described as "parties of the second part," at the proper costs and charges of the vendees, by such

proper deed of conveyance as shall be tendered by them, and they (the vendors) will guarantee the title to the vendees by a clause of general warranty, and covenant that the land is free from all encumbrance.

This covenant, on the part of the vendors, is followed by other covenants, which will be best understood by giving the language in which they are expressed in the contract: "And it is hereby expressly agreed between the parties, that the said parties of the first part may give such deed of conveyance, as aforesaid, and deliver possession of the premises on the first day of January, 1867, or at any day previously to the first day of January, 1867, at the option of the said parties of the first part, and that the said parties of the second part shall accept and receive the same accordingly. In considera-

tion whereof, the said parties of the second part do hereby covenant *and agree to and with the said parties of the first part, that they, the said parties of the second part, shall and will pay unto the parties of the first part, the sum of nine thousand dollars (\$9,000), to be paid as follows: One hundred dollars (\$100) to be paid in cash on the execution of these presents, five thousand dollars (\$5,000) to be paid on the first day of January, 1867, if the said parties of the first part shall not have executed such deed of conveyance and delivered possession of the premises previously, and sooner if the said parties of the first part shall sooner execute such deed of conveyance and deliver possession as aforesaid, and upon such day as the said parties of the first part shall execute and deliver such deed, deliver such possession upon such deed being tendered as aforesaid, and the balance of said purchase money to be paid in two annual payments of equal amounts, to be secured by bonds and lien on the premises, the first payment to be made twelve months, and the other two years from the day of the said parties of the first part conveying said tract of land and delivering such possession as aforesaid, or being ready and willing so to do, and perform the covenants herein contained, on their part, with interest on said two deferred payments from date of such conveyance and possession. And it is hereby agreed between the parties that the graveyard, as now enclosed, is to be excepted out of such deed of conveyance and delivery of possession, and is to remain to the use of the said parties of the first part and their heirs forever, free from the use and control of the said parties of the second part, and that the said parties of the first part, their heirs and assigns, may and shall have right of way to go to and from the said *graveyard at all times at their will and pleasure. And the said parties of the first part hereby covenant with the said parties of the second part, that

they, the said parties of the first part, shall and will, by or before the *first day of May, 1867, remove, or cause to be removed, the stakes marking the oyster-plantings of Messrs. Stevenson & Dunn, so that the oyster-grounds now staked out and occupied by said Stevenson & Dunn, shall be left unencumbered by the latter, and re-

main to the use of the said parties of the second part."

The bill, admitting that the purchasers had made the cash payment promptly, and had also, in October, 1867, paid the sum of \$4,900 in discharge of the instalment of \$5,000, the latter sum being by agreement abated by \$100, because of payment before delivery of possession, and further admitting that the purchasers had made other payments at subsequent dates, alleges that they had wholly failed and refused to pay the third and last instalment of the purchase money and a part of the second, both of which instalments had been for some time due. It alleges that the purchasers were, under the contract, put into possession of the premises in December, 1867, (a short time after payment of the \$4,900 as aforesaid), and admitting that no deed of conveyance had been made to the purchasers, alleges as a reason for it that the purchasers had never tendered any deed as by the contract they were bound to do, and that the vendors had always been ready and willing to execute such deed when tendered, and the surviving vendor was still ready and willing, as he had always been, to execute the deed when tendered. Besides these specific allegations, the bill alleges in general terms the performance of the contract on the part of the vendors, and readiness and willingness to perform the same, concluding with a prayer for general relief, and particularly for specific execution of the contract, and that the purchasers be required to pay the balance of purchase money remaining unpaid with interest, the complainant offering to convey the land to the purchasers by deed with general warranty and free of encumbrance, upon such deed being tendered *by the purchasers. The purchasers filed a general demurrer, and also a joint answer to the bill.

In their answer they admit the contract filed with the bill and their possession of the land under it. In addition to the payments admitted in the bill, they claim to have made other payments, and that all of the purchase money for the land has been paid, except a portion of the third and last installments, amounting to about \$1,500, principal money, which they aver they are not bound to pay, and do not intend to pay until required by the court to do so.

They refer to the covenant of the vendors, "that they would on or before the 1st day of May, 1867, remove, or cause to be removed, the stakes marking the oyster plantings of Stevenson and Dunn," and aver that "it was chiefly on account of this last mentioned covenant that they agreed to pay the said plaintiff and the said Joseph W. Robins the sum of \$9,000; that it entered into the consideration of the contract, and was a part and parcel of the contract; that said contract was considered by them as a matter entire, and was executed by the parties to it as a whole." They further aver, that this covenant has never been performed by the vendors, or either of them; that the oyster-planting grounds referred to in the covenant are still in the occupancy

and under the control of the said Stevenson, thereby causing a loss and damage to the respondents equal in amount to the sum or sums claimed by the plaintiff to be due him, to-wit: about the sum of \$1,500, in principal money. They further say that the said oyster-planting grounds are located in Cherrystone creek, adjacent to the land purchased by them, and that the privilege of using them was the great inducement for them to purchase the land, and without that privilege they would not have purchased it.

After thus averring non-performance of the covenant by the vendors and the
 111 damages consequent thereon, the *respondents do not ask a rescision of the contract on equitable terms; they do not offer to restore the land, accounting for rents and profits while they had possession, and to have their purchase money repaid to them; nor do they ask that the plaintiff be denied relief in equity and left to his legal remedies on the contract; but they rather submit to specific performance of the contract, with compensation to be allowed them. The language of the answer is, "that there is such a failure of consideration, defect in title, laches and non-performance of covenants, pertaining to said real estate and oyster-planting grounds, on the part of the parties of the first part to said contract, as to entitle them (the respondents) to an abatement of the purchase money, at least to the amount of the sum claimed by the said plaintiff to be due from them—that is to say, about \$1,500 in principal money, and to relief in a court of equity."

They admit that they have never tendered a deed of conveyance, assigning as a reason that the vendors had never complied with the contract on their part, and they (the respondents) did not wish to do any act that would amount to a waiver of their rights.

After depositions taken on both sides, the cause matured was brought to a hearing on the 11th day of July, 1871, when the court by its decree overruled the demurrer to the bill, ordered an account of the purchase money and payments, and directed a jury to be empanelled to try the following issue. "Whether the said William J. Robins and Joseph W. Robins, in the lifetime of the latter, or the plaintiff since his death, ever removed or caused to be removed the stakes which on the 31st day of July, 1866, marked the oyster plantings of Messrs. Stevenson and Dunn, both above and below low-water mark, so that the oyster grounds then staked out and occupied by said Stevenson and Dunn, adjacent to "Salt Grove," were left unen-
 112 cumbered by said Stevenson and *Dunn, and if not, what damage have the defendants sustained by the failure of the said William J. Robins and Joseph W. Robins, or either of them, so to do."

On the trial of this issue the jury found a verdict in these words: "We the jury find that the said William J. Robins and Joseph W. Robins, in the lifetime of the latter, did not remove, nor has the plaintiff, William J. Robins, since the death of the said Joseph W. Robins, removed, or caused to be re-

moved, the stakes which on the 31st day of July, 1866, marked the oyster plantings of Messrs. Stevenson and Dunn, below low-water mark; but that the defendants, Thompson and Ayres, purchased the oysters of Dunn, laid out upon the grounds occupied by him on the 31st day of July, 1866; and that the stakes marking the oyster plantings of said Stevenson above low-water mark were removed by said Stevenson. And we further find, that by the failure of the said William J. Robins and Joseph W. Robins so to remove the stakes marking the oyster plantings of said Stevenson below low-water mark, the defendants, Thompson and Ayres, have sustained damage to the amount of two thousand, one hundred and thirty-seven dollars and fifty cents."

This verdict the court, on the motion of the plaintiff (Robins), set aside, on the ground that it was contrary to the law and the evidence, and ordered a new trial. No exception was taken to this ruling, but the defendants, Ayres and Thompson, at a subsequent term of the court, moved to revoke the order setting aside the verdict and directing a new trial, on the ground that the court had no authority to make such an order. The motion was overruled, and the defendants excepted.

The second jury sworn to try the issue, after hearing the evidence, not being able to agree in a verdict, were discharged from rendering a verdict.

On the third trial the jury rendered a verdict, which is substantially the same as
 113 the verdict rendered at the *first trial, with this important difference: that the amount of damages assessed by the last verdict was only \$350, without interest, whereas the amount by the first verdict was \$2,137.50. A motion by the defendants, Ayres and Thompson, to set aside this last verdict, on the ground that it was contrary to the law and the evidence, was overruled by the court, and they excepted. The bill of exceptions does not state either the evidence given or facts proved on the trial.

The cause was last heard on the 17th day of April, 1874, when the court, by its decree, affirming the verdict of the jury last rendered, ordered that the defendants, Ayres and Thompson, for \$350, the amount of damages by the verdict found, should have credit on the balance of purchase money owing by them for land, as shown by a special statement reforming the report of the commissioner, who, under an order of the court, had taken an account of said purchase money and payments thereon. For this balance of purchase money, subject to said credit, the court decreed personally against Ayres and Thompson, and ordered that on payment by them of the amount decreed within four months, the complainant, Robins, upon tender by said Ayres and Thompson of a proper deed of conveyance according to the terms of the contract, should execute the same, and unless such payment should be made within said four months, that the land be sold, by a commissioner appointed for the purpose, to satisfy the sum decreed as aforesaid.

The counsel for the appellants, Ayres and Thompson, have assigned various errors in the decrees and orders of the circuit court, which we now proceed to notice.

The first is, that the demurrer to the complainant's bill was improperly overruled. The demurrer is general for want of equity,

and assigns as special cause, that the
114 *complainant has a plain, adequate and complete remedy at law. The allegations of the bill, admitted by the demurrer to be true, show the case of a vendor who has made a written contract for the sale of a tract of land at a stipulated price, payable in installments; that he has good title, and is, and always has been ready to convey to the purchasers whenever they tender to him a deed of conveyance as required by the contract; that he has put the purchasers of the land in possession, as he agreed to do; that a portion of the purchase money remains unpaid, and he has a lien on the land for its payment; that he has performed the contract in all things required to be performed by him before becoming entitled to demand and receive the balance of the purchase money; that the purchasers refuse to pay the balance, and he prays that they be required to make payment, that the contract be decreed to be specifically executed, and for general relief. Such is the case made by the bill, and of course, on demurrer, we can look only to the bill. It would seem to be a plain case for the relief prayed.

But it was argued with some earnestness, that the only object of the bill is to compel the payment of a sum of money. for the recovery of which the remedy at law is plain. No doubt the complainant might have brought his action at law. He had that remedy, but it was neither adequate nor complete, and it is for that reason that he is admitted into equity. Perhaps the most general, if not the most precise, description of a court of equity, in the English and American sense, is, says Mr. Justice Story, that it has jurisdiction in cases of rights, recognized and protected by the municipal jurisprudence, where a plain, adequate, and complete remedy cannot be had in the courts of common law. The remedy must be plain; for if it be doubtful and obscure at law, equity will assert a jurisdiction. It must be adequate; for

if at law it falls short of what the
115 party is *entitled to, that founds a jurisdiction in equity. And it must be complete; that is, it must attain the full end and justice of the case. It must reach the whole mischief, and secure the whole right of the party in a perfect manner, at the present time, and in the future; otherwise, equity will interfere and give such relief and aid as the exigency of the particular case may require. 1 Story's Eq. Juris. § 33.

Now, an action at law by the vendor against the purchaser on an executory contract for sale to recover the purchase money due him, does fall short of what he is entitled to. It does not reach the whole mischief and secure the whole right of the vendor in a perfect manner. He may have his judgment in a court of law, and by execution pursue the

personal property of the purchaser. He can go no further. He is entitled under his contract to more perfect relief. He has not only the right to a personal judgment against the purchaser and to subject his personal estate, which he may do in a court of law, but he has the right to subject the land for which the purchase money is owing. He has a lien upon it, which a court of law does not recognize and cannot enforce, and which is recognized and can be enforced only in a court of equity. In the latter forum he is entitled to a personal decree, and at the same time and in the same suit to a further decree for the sale of the land, if the personal decree be not satisfied. This is executing the contract fully, according to the agreement and intention of the parties, and this only is giving adequate relief, doing complete justice in the case.

Moreover, there is a peculiar reason why the vendor is admitted into a court of equity. The general rule is, that equity withholds aid by way of specific performance of contracts, unless the remedy is mutual between the parties; and it is the principle of mutuality, it is said, which has led to the practice of compelling specific *performance
116 of contracts for sale against the purchaser, when in fact the claim against him made by the bill is only the sum of money agreed to be paid. Now, equity originally interfered to effect the performance of contracts, in order to give the party the interest contracted for, and at the instance of the purchaser. But when once that jurisdiction was assumed, the principle of mutuality compelled equity to assist the vendor. 2 Lomax Dig. 56 (marg. page).

Passing from the bill to the answer and proofs, including the verdict of the jury approved by the court, it is contended by the counsel for the appellants that the covenant of the purchasers to make payment of the last two installments of the purchase money, is dependent on the covenant of the vendors to remove or cause to be removed the stakes marking the oyster-planting of Stevenson & Dunn, and that the performance of the latter covenant was a condition precedent to the performance of the former; and inasmuch as it clearly appears that the vendors never perform their covenant, they were in no condition to require the purchasers to perform theirs, and it is assigned as error, that they were so required by the last decree of the circuit court.

Certainly, a party seeking the aid of a court of equity to compel another to perform his contract, ought to show himself prompt and ready and willing to perform the contract on his part, and if performance by him is a condition precedent to the right to demand performance of the other, he ought to show such performance, or at least a tender of it. It is often very difficult to determine whether covenants are dependent or independent, and to arrive at just and satisfactory conclusions by applying the rules of construction in such cases. There is, perhaps, no branch of the law, says Judge Daniel in *Roach v. Dickinson*, 9 Gratt. 154, in which is to be found a

larger number of decisions or a greater
 117 apparent conflict *of authorities than
 that in which the effort has been made
 to define the dependence and independence
 of covenants, and to designate the class to
 which any given case in dispute is to be re-
 ferred. The great effort, however, in the
 more recent decisions has been to discard,
 as far as possible, all rules of construction
 founded on nice and artificial reasoning, and to
 make the meaning and intention of the parties,
 collected from all the parts of the instrument
 rather than from a few technical expressions,
 the guide in determining the character and
 force of their respective undertakings.

We think it quite clear that the covenants
 to execute the deed of conveyance when
 tendered and deliver possession of the prem-
 ises, and the covenant to pay the first in-
 stalment of \$5,000, are dependent and to be
 performed simultaneously. It was contemplated
 that these covenants should be performed on
 or before the 1st day of January, 1867, and it
 is provided that the last two instalments should
 be paid at one and two years, respectively,
 from the day the vendors made the deed and
 delivered possession, or were ready and will-
 ing to do so. The stakes were to be removed
 from the oyster plantings of Stevenson and
 Dunn "by or before the 1st day of May, 1867,"
 which would be prior to the time at which
 the second deferred instalment would be-
 come payable, if the covenant for the exe-
 cution of the deed and delivery of posses-
 sion were performed, or performance tendered
 within the time stipulated. This would seem to
 indicate an intention that the removal of the
 stakes was to be a condition precedent to the
 payment of the last two instalments of pur-
 chase money. This construction would seem,
 too, to be required by the language used in
 fixing the time for the payment of these
 two instalments—"the first payment to be
 made twelve months and the other payment
 two years from the day of the said parties

of the first part conveying said
 118 land and delivering *such possession
 as aforesaid, or being ready and will-
 ing so to do, and perform the covenants
 herein contained on their part," &c. The
 last clause of the sentence is awkward in its
 relation to what immediately precedes it;
 but regarding it in the connection in which
 it is used, it would seem to be intended to
 require that the vendors should perform, or
 at least tender performance, of all the cov-
 enants contained in the contract to be per-
 formed on their part before payment of
 these last two instalments should be exacted.
 But taking this construction to be the correct
 one, the purchasers, in their dealings with the
 vendors, do not appear to have insisted on its
 enforcement, but rather to have waived it;
 for, although the stakes had not been re-
 moved within the time stipulated, nor indeed
 removed at all, they nevertheless proceeded
 to make payments from time to time on the
 last two instalments, so that on the 12th day
 of November, 1869, of the \$4,000, aggregate of
 the two instalments, with the interest there-
 on, there remained unpaid only about \$1,700
 principal money. And in their answer to

the bill, as before stated, they do not ask
 for a rescision of the contract, but claim
 damages and indicate a willingness to ac-
 cept performance with compensation.
 Hence the issue directed by the court, a
 proper mode of ascertaining the damages,
 and to which proceeding, it does not appear,
 that any objection was made. See *Nagle v.*
Newton, 22 Gratt. 814.

But it is insisted that the damages allowed
 were inadequate, and that the circuit court
 erred in setting aside the first verdict, and
 also in refusing to set aside the last. As
 has been already stated, no exception was
 taken to the action of the court setting
 aside the first verdict, and the bill of ex-
 ceptions taken to the refusal of the court to
 set aside the last, states neither the evi-
 dence given nor the facts proved on the trial.

It is impossible, therefore, for this court
 to say that error was committed where
 119 none is shown. *Fitzhugh's ex'ors v.*

Fitzhugh, 11 Gratt. 210. In the absence
 of any statement in the record, showing
 what evidence was before either jury, it is
 useless to speculate on the causes for the
 difference in the amount of damages al-
 lowed in the two verdicts. The learned
 judge who directed the issue and presided at
 both trials, was dissatisfied with the first ver-
 dict and approved the last. The presumption is
 that his rulings were right. There is nothing
 in the record to show that they were wrong.
 The depositions in the record were taken be-
 fore the issue was directed. Whether they
 were read on the trial, and if read whether
 there was other evidence before the jury, and
 if so, what that evidence was, does not appear.
 The weight and force of the depositions, so
 far as they relate to the issue, may have been
 impaired, and for ought that appears, en-
 tirely overcome by other evidence not in the
 record. Some of the witnesses, in their dep-
 ositions, on their basis of calculation, put
 the damages of the defendants at high fig-
 ures, while Stevenson, who is presumed to
 be better acquainted with the subject than
 any one else, says that he did not occupy one
 acre in twenty of the oyster-planting grounds
 adjacent to Salt Grove shore, and of the
 grounds not occupied by him, the defend-
 ants occupied three-fourths, the residue being
 unoccupied; that they might plant oysters for
 fifty years, and if they did not plant more on
 an average than they had for the last four
 years, they need not plant any two years
 the same ground, and there would be enough
 ground for them to do so adjacent to the
 Salt Grove shore, unoccupied by him.

There is an assignment of error in the pe-
 tition for appeal—which, however, was not
 much relied on in the argument—and that is,
 that the judge presiding at the first trial of
 the issue was without jurisdiction to set aside
 the verdict of the jury; that the trial was on

the law side of the court, and a motion
 120 to set aside the verdict *and for a new
 trial could only be properly made in the
 chancery cause after the verdict and proceed-
 ings on the trial had been duly certified from
 the law to the equity side of the court.

This assignment of error would seem to

be based on a misconception of the proceedings. The court, in its order made in the chancery suit, directing an issue, uses this language: "That a jury be empanelled at the bar of this court to try the following issue," &c., and the decree reciting the verdict rendered by the jury, recites it as "the verdict of the jury empanelled at the bar of this court," &c. The orders and proceedings during the trials, as disclosed by the record, are such as might have been entered as well on the chancery order-book as on the law order-book, and it is to be inferred that they were entered on the former as a part of the proceedings in the chancery suit, as there is in the record no certificate of the verdict and proceedings from the law side of the court showing that the trials were had on that side.

But practically it can make no difference on which side of the court making the order an issue directed in a chancery suit is tried. It may be tried on either side, (Code of 1873, ch. 173, § 4), and the proceedings would be the same and the orders the same, except that when the trial takes place on the law side, it would be more regular if the proceedings were certified to the court on the chancery side.

Upon a bill filed under the 10th section of chapter 141 of the Code of 1860 (§ 12, ch. 137, Code of 1873), it is provided, that "the court shall cause an issue to be made and tried at its bar by a jury, whether or no the transaction be usurious." The issue ordered under this section in the case of Brokenbrough's ex'ors v. Spindle's adm'r, 17 Gratt. 21, to be tried at the bar of the court which made the order, was tried on the law side of the court, where a new trial was granted and had,

121 and the proceedings *were certified from the law to the chancery side. One of the questions raised in the case, was as to the regularity of the proceedings. Judge Moncure, in his opinion, concurred in by Judge Joynes, said: "The statute seems to contemplate that all the proceedings, including the trial of the issue, are to be had in the chancery cause, instead of having the issue tried on the law side of the court, and the verdict and other proceedings on the trial certified from that to the chancery side of the court, according to the formality observed in the case of an ordinary issue out of chancery. I can see no well-founded objection to the former course, and it seems to be recommended by its simplicity and directness. The latter, however, was pursued in this case. But the difference is only in form, and the substance and effect are the same. All the proceedings were conducted before the same court, and ought to be regarded as proceedings in one and the same suit."

Only one assignment of error remains to be noticed, and that is the refusal of the court on one of the trials of the issue, to permit certain questions to be answered by a witness, to which action of the court a bill of exceptions was taken. It is a sufficient answer to this assignment of error, that it does not appear by the record to which of the trials the bill of exceptions refers. It

may as well refer to one as to another, so far as the record discloses. The verdict on the first trial was set aside, erroneously as the appellants contend; on the second the jury were discharged from rendering any verdict, and there is nothing to show that the bill refers to the last. It is worthy of notice, too, that no such assignment of error is made in the petition for appeal, prepared by the counsel, we presume, who represented the appellants in the court below, and was not the same counsel who argued the case here. The omission of this

122 *assignment in the petition may have been because the counsel knew that the bill of exceptions had reference to the first or second trial, and not to the last. If, however, it appeared that the ruling excepted to was on the last trial, we should still be of opinion that no error was committed in excluding the questions and answers.

The court is of opinion there is no error in the decrees and orders complained of, and that they should be affirmed.

Decree affirmed.

123

*Redd v. Jones & als.

March Term, 1878, Richmond.

Guardian and Ward—Judicial Sale of Land—Validity—Liability of Purchaser's Sureties.*

In a suit by a guardian for the sale of his ward's land, a decree is made appointing commissioners to sell it, and in October, 1859, they sell the land at public auction, when the guardian becomes the purchaser at a full price, makes the cash payment, and executes his two bonds with sureties for the deferred payments. All the papers in the cause were destroyed by the Union forces during the war, except the order-book of the court, extending from 1853 to 1863, and the two bonds of the purchaser, which were found among the scattered papers in the office. The purchaser goes into possession of the land, which he has held ever since without question. Though the order-book does not contain a decree confirming the sale, yet no question having been made as to the purchaser's title down to 1873, when suit is brought by the commissioner and the parties entitled to the proceeds against the purchaser's assignee in bankruptcy, and the sureties of the purchaser to enforce the payment of the purchase money of the land, which had fallen very much in value, the sale will be held to be valid, and the sureties in the bonds held liable.

This was a suit in equity in the circuit court of Nottoway county, brought in July, 1873, by John E. Jones, styling himself surviving commissioner of the circuit court of Nottoway county, in the chancery cause of Williams against Williams & als., sometimes styled Williams' guardian against Street and wife, &c., E. P. Lyon and C. P. Lyon, his wife, formerly C. P. Williams, and a number of other parties, children of Eliza J. Williams, deceased, against Thomas W. Wil-

*See also Niemeyer *et al.* v. Wright, 75 Va. 246, in which the court cited the principal case approvingly, and as having a strong bearing upon the questions involved.

liams, John C. Redd, William H. Alderdice, assignee in bankruptcy of said Thomas W.

Williams and others, the object of
 124 which *was to enforce the payment of two bonds, each for the sum of \$4,257.75, dated the — day of October, 1860, and carrying interest from the first day of October, 1859, which had been given by said Thomas W. Williams, for the purchase of a tract of land sold by commissioners under the decree of the circuit court of Nottoway, and on which said John C. Redd and two others had joined as his securities. The only question in the cause was whether a sale of the land made by the commissioners was valid, and this depended upon the questions, first, whether Thomas W. Williams, who was the guardian of the infants whose land was sold, and as such plaintiff in the suit, could become a purchaser of the land at the sale made by the commissioners; and second, whether the sale had ever been confirmed by the court. All the papers in the cause, except two decrees, had been destroyed by the Union forces, and these bonds were found among the papers of the office, which had been thrown into confusion on that occasion. The defendant, Redd, contended that the sale had never been confirmed, and he proved by the clerk and the production of the order-book, the entries in which extended from 1858 to 1863, inclusive, that no decree confirming the sale was to be found in that book. The nature of the case and the facts as viewed by this court will appear from the opinion of Moncure, P.

It appearing that all the interest in the subject, except one-ninth, the share of Lyon and wife, was held by Redd, by purchase from a number of the parties interested in it, or in Alderdice, the assignee in bankruptcy of Thomas W. Williams, the purchaser of the land, the bill was dismissed as to all the plaintiffs but Jones and Lyon and wife; and the cause coming on to be heard on the 1st of October, 1873, the court being of opinion upon the evidence that the sale by the commissioners was a most advantageous one to the then infants, and they making

125 *no objection to it after coming of age, decreed that the sale should be held firm and stable between the parties, and that unless the defendants, or some one for them, within sixty days from the service of a copy of the decree upon them, paid to receivers named one full ninth of the principal and interest of the purchase money of the land as evidenced by the copies of the bonds filed, that being the portion thereof to which Lyon and wife were entitled, commissioners named should sell upon terms and in the mode stated in the decree, so much of the land as should be sufficient to pay said ninth, &c. From this decree Redd applied to this court for an appeal; which was allowed.

J. P. Fitzgerald, Irving & McKinney, for the appellant.

H. L. Lee, W. H. Mann, and Jones & Bouldin, for the appellees.

MONCURE, P., delivered the opinion of the court.

The main question arising in this case is

presented by the first assignment of error in the decree appealed from: "Because it enforces a purchase made by a guardian of his ward's real estate, sold under a decree of court in a suit instituted in accordance with the provision of the statute for the sale of land of persons under disability."

We think the appellant is right in maintaining that the sale, which is the subject of controversy in this case, was made under a decree in a suit instituted under chapter 128 of the Code of 1849, concerning the sale of lands of persons under disability, and not under a decree in a suit instituted under chapter 124, of the same Code, concerning partition of lands.

But although section 6 of chapter 128 declares that at such sale as may be
 126 made under that chapter, "the *guardian or guardian ad litem, or committee, or trustee, shall not be a purchaser, directly or indirectly," yet that section was enacted for the benefit and protection of the persons under disability, and not of their guardians, committees or trustees. And there may be a case in which a purchase made by a guardian or other fiduciary of the land of his ward or other beneficiary, sold under that chapter, would and ought to be sustained and enforced.

We think that this is such a case.

The sale of land in this case (450 acres) was made by commissioners under a decree of the said court, made at March term, 1859. The day of sale was the 11th day of August, 1859. The terms of the sale were: "Two hundred and fifty dollars cash, balance in equal instalments, payable in one and two years, from 1st October, 1859, and bearing interest from that day, the purchaser to execute bonds with good security for the deferred payments." Thomas W. Williams, the guardian, who, as such, brought the suit, was the highest bidder for, and became the purchaser of said land at said sale, at the price of eighteen dollars and sixty cents per acre. One witness (Joseph A. Jones) proved that that was a good price for the land in 1858 and 1859; and though he could not say that it was a very exorbitant price, yet he considered it a very fine sale. Another witness (J. B. Williams) proved that "it was an enormous price at the time, and most unquestionably was to the advantage of the children." There is not a particle of evidence in the case at all in conflict with the testimony of either of these two witnesses. Thomas W. Williams, the highest bidder for the land, to whom as purchaser it was cried out as aforesaid, entered into possession thereof as such purchaser in October, 1859, the time from which the deferred instalments of the purchase money was to bear interest. It is stated in the deposition

of Thomas W. Williams that he took
 127 possession, "notwithstanding the *protest of J. W. Williams." It is not stated in the record what was the ground of that protest. J. B. Williams was the administrator de bonis non, with the will annexed of his mother, Mrs. Eliza J. Williams, and no doubt as such had possession of the land, and

was unwilling to surrender it to the purchaser until he had complied with the terms of sale. Certainly J. B. Williams did not make the said protest because he thought the price at which the land was cried out as aforesaid was inadequate; for we have seen how different from that was his testimony on the subject. Thomas W. Williams no doubt complied with the terms by making the cash payment of two hundred and fifty dollars; and he certainly did by giving bonds, with good security, for the two deferred payments, amounting each to the principal sum of \$4,257.75. These bonds bear date on the — day of October, 1860; bear interest from the first day of October, 1859, and are payable "to John E. Jones and T. H. Campbell, commissioners of the circuit court of Nottoway county, in the case of Williams' guardian & others v. Williams & others;" one of them on demand, and the other on or before the first day of October, 1861. The appellant, John C. Redd, and William F. Blackwell and James P. Street executed the said bonds with the said Thomas W. Williams, as his sureties and co-obligors. The said purchaser continued in quiet and uninterrupted possession of the said land, and enjoyed the issues and profits thereof from the time he took possession as aforesaid, in October, 1859, until he gave his deposition in this cause on the 24th of September, 1873; and may have ever since been, and yet be in such possession, for ought the record shows. Neither the said Thomas W. Williams, nor any of the sureties in his bonds aforesaid, nor any other party concerned, so far as the record shows, ever questioned his right or liability as purchaser of the land aforesaid until after the institution of this suit, on the 23d

128 *day of June, 1873. During the long period of his possession and enjoyment of the said land as purchaser as aforesaid, a period of more than fourteen years prior to the institution of this suit, it greatly depreciated in value; so that on the 24th of September, 1873, when the testimony in this cause was taken, one of the witnesses (Joseph A. Jones) did not think it would bring more than six dollars per acre, if then publicly sold upon the usual terms; and another of the witnesses (J. B. Williams) did not think it would bring more than five dollars, if then sold at public auction under decree of the court, and on the usual terms of one, two and three years. If the infant owners of the land or their heirs are to be subjected to the consequences of this great depreciation of its value, their loss therefrom would be immense, and they would be subjected to that loss by the act of their guardian, and as a result of a provision of law made for their protection. Instead of a shield of defence for which it was intended, it would be converted into a sword of destruction. For if a stranger, instead of the guardian, had been the purchaser, there could have been no doubt as to his liability.

Then is a court of chancery powerless to avert so great an evil and prevent so great a loss; to prevent wards from being made the

victims of the act of their guardians? If he had not become the purchaser, there would have been another, &c., competent purchaser at the same price, or a few cents less per acre.

We are therefore of opinion that the purchaser by the guardian, under the circumstances of this case, ought to be enforced in favor of the owners of the estate, just as much as would have been a similar purchase by a disinterested person.

But it is said that no report of the sale was ever confirmed by, or ever made to the court.

That a report of the sale was made 129 to the court, seems *to be very clear.

The bonds were certainly returned to the court, among whose scattered and confused records they were found after the war. It is not perceived how they could have been returned to the court but by the commissioner who took them, or that they would have been so returned without a report, showing for what they had been taken, or why they were returned. Many of the records of the court were destroyed, and what were not destroyed were deranged and scattered by the federal army in April, 1865. It is not strange, therefore, that the report cannot be found.

That such report was never expressly confirmed by an order of court made before the institution of this suit, may be a more doubtful question. That it never was, seems to be probable from the circumstances of the case. The chancery order-book of the court has been found, containing the orders entered from 1858 to 1863 inclusive, and no order has been found in that book, where it would probably have been, if anywhere, confirming the said sale. It may probably have been confirmed after 1863, and before the end of the war.

Certain it is, that the purchaser might have had the report of sale confirmed at any time before the institution of this suit. None of the other parties interested in the land or the purchase money would have opposed it. He probably did not move in the matter because he did not choose, or was not ready to pay the purchase money, which he might have been required to do had he made any motion in the matter. The other parties interested in the land, who were mostly infants, or feme coverts, probably considered it the business of the guardian or commissioners. The commissioners were probably either dead or non-residents, or else waited for the action of the parties concerned, who were all members of the same family. That

the purchaser considered himself bound 130 *by his purchase long after it was made, is shown by the fact that about the 1st of October, 1861, he tendered the amount of his first bond to J. E. Jones, the commissioner, who would not receive it; probably because it was Confederate money. And even after the war, and so late as the 12th of March, 1866, in a deed dated on that day from Street and wife to said Thomas W. Williams, conveying to the latter the former's interest in the estate of the said Eliza J. Williams, it is expressly stated that her land

and slaves had "been sold by a decree or decrees of the circuit court of the county of Nottoway, through its commissioner," and full power was given to any person authorized to convey title to the land known as Vermont, (no doubt the tract of 450 acres aforesaid), sold as aforesaid, and purchased by said Williams, so far as the interest of said Street and wife were concerned.

The appellant, Redd, who is the father-in-law of the said Thomas W. Williams, and one of his sureties and co-obligors in the bonds given for the deferred instalments of the purchase money of the said land, might, at any time, have had the question of his liability determined by the said court. If he had had any doubt on the subject he might, at any time, have called upon the court to confirm or set aside the said sale, but he did not choose to do so. He knew that his son-in-law was in the quiet and peaceable possession and enjoyment of the land, claiming it as purchaser as aforesaid. He has no more right now than has Thomas W. Williams to question the validity of the said sale.

The third error assigned in the decree appealed from is: "Because it pronounces a sale firm and stable between the parties, when by the decree of April term, 1861, pronounced in the original suit of Williams' guardian, &c., against Street and Wife, &c., the court had, in sum and substance, set aside said sale as null and void, and ordered a resale of said land."

131 *We do not think that the said decree of April term, of 1861, had any such effect, or was intended so to have. In saying that the sales decreed by the former decree (of March term, 1859), had not been concluded, it was not intended to say that the sale of the land had not been concluded, but that the sales of the slaves and other personal property which had been also decreed to be sold had not been concluded. The said decree of April term, 1861, was "by consent of parties by counsel," and the plaintiff, Thomas W. Williams, would hardly have consented to a decree in April, 1861, affirming that the sale of the land to him was not concluded, and in October thereafter tendered to the commissioner the amount of his first bond for the purchase money of the land.

In regard to the fifth assignment of error in the decree appealed from: "Because it gives to the plaintiffs E. P. Lyon and wife, one-ninth part of the alleged purchase price of said land, with interest from October 1st, 1859, when in fact, if entitled at all, they were only entitled to one-ninth of the principal thereof, with interest from the time at which William O. Williams would have arrived at the age of twenty-one years; and it does not appear when he would have so arrived, nor was this enquired into by the court."

We think there is no error in the decree in this respect. The parties, doubtless, intended that the deferred instalments of the purchase money of the land, with interest from the 1st day of October, 1859, should be distributed among the parties entitled to the land in proportion to their interest therein. At the time of the decree of March term, 1859,

Davis D. Williams was dead, having died in 1855 under age, unmarried and without issue; whereby his interest in the estate of his mother devolved equally on his brothers and sisters. After the rendition of that decree and the sale of the land made under it—to-wit, in 1863—William O. Williams was

132 killed at the battle *of Gettysburg, and was then also under age, unmarried and without issue; whereby his interest in the estate of his mother devolved equally on his brothers and sisters. In regard to the trust created by her will, in expressing a wish that the 450 acres of land aforesaid should be worked for the benefit of her three youngest children (two of whom were her said sons, David D. and William O., and the third was her daughter, Mary Augusta), and that it should be kept as a house and home for her single daughters until William O. Williams should be twenty-one years old, and then to be equally divided between said David D. and William O., it was no doubt understood and agreed that those charges upon the use of the land antecedent to the period prescribed by the will for its division as aforesaid, should be otherwise satisfied out of her estate. By a decree of the said court made on the 29th of March, 1858, among other accounts directed to be settled was an account of the administration of R. H. and T. W. Williams, as executors of said Eliza J. Williams; also an account of the administration of Joel B. Williams, as administrator de bonis non, with the will annexed, of said Eliza J. Williams; and also "an account of the receipts and disbursements of the said executors, and of the said administrator in the administration of the land and personal estate set apart by the said testatrix for the benefit of her single daughters and five youngest children, with a statement showing what would be a fair allowance to the three youngest children for the rent of said land." In the decree of March term, 1859, for the sale of the said land, there was a direction that a commissioner of the court should ascertain and report "what will be a fair compensation to Martha V. and Cornelia R. Williams for their right of residence in the mansion house in the bill mentioned." The said Cornelia

seems to be the same person with the **133** appellee, C. R. *Lyon, wife of E. P. Lyon, in whose favor the decree appealed from was rendered.

This case has been argued with great ability by the counsel on both sides, who cited many books and cases in support of their respective views. The following, among others, were referred to: 1 *Leading Cases in Equity*, with Notes of Hare and Wallace, Fox v. Mackreth, and Pitt v. Mackreth; Davone v. Fanning, 2 John. Ch. R. 252; 2 *Tucker's Commentaries*, 459; 12 Leigh 1, Moore v. Hilton; 13 Gratt. 195, Daniel, &c., v. Leitch; 20 Id. 1, Howerly v. Helms, &c.; 22 Id. 378, Cline's heirs v. Catron; Id. 573, Phelps v. Seely, &c.; 26 Id. 517, Zirkle v. McCue, &c.; 27 Id. 812, Brock v. Rice, &c.; 6 Id. 339, Talley, &c., v. Starke's adm'r. But, without noticing them any further, it is sufficient to say that we think they sustain, while there

is nothing in any of them in conflict with the foregoing opinion.

Upon the whole, we are of opinion that there is no error in the said decree, and that it ought to be affirmed.

Decree affirmed.

134 *Clarke v. Tyler, Sergeant.

March Term, 1878, Richmond.

Absent MONCURE, P.*

Fines—Payments in Over-Due Coupons.†—

Fines imposed for a violation of law are embraced in the act of 1871 known as the funding act, and a person upon whom such a fine is imposed, may discharge it by the over-due coupons taken from the bonds mentioned in said act.

This was an application to this court by James Clarke for a writ of habeas corpus. The case is stated by Judge Christian in his opinion.

Royall, for the petitioner.

The Attorney-General, for the sergeant.

CHRISTIAN, J. This case is before us, upon a petition filed by James Clarke, invoking the original jurisdiction of this court for a writ of habeas corpus. The petition and the record therewith filed show that the petitioner, Clarke, is confined in jail under an execution (*capias pro fine*) issued upon a judgment of the hustings court of the city of Richmond for the sum of thirty dollars, the fine assessed by said court, and twenty-two dollars and five cents, the costs of prosecution on behalf of the commonwealth.

It is further shown that the petitioner tendered to James M. Tyler, sergeant of the city of Richmond, "a coupon, which was due and past maturity, for thirty dollars, 135 *which said coupon was cut from a bond of the state of Virginia issued under the provisions of the act of assembly passed March 30, 1871, commonly known as the funding bill," and the sum of twenty-two dollars and five cents in money, that being the amount of costs.

The city sergeant refused to receive the coupon tendered in payment of the fine imposed by the court. And thereupon Clarke applied to this court for a writ of habeas corpus, and insists upon his right to pay the fine assessed against him by the hustings court in a coupon of a bond of the state, and that upon such payment, with the costs of prosecution, he is entitled to his discharge from further imprisonment.

This record, therefore, presents for our consideration the single question, Whether

*JUDGE MONCURE being interested in the question, did not sit in the case.

†**Validity of Payments in Over-Due Coupons.**—The principal case is cited and approved in *Williamson v. Massey*, 33 Gratt. 249; but in *Com. v. McCullough*, 90 Va. 597, cases in line with the leading case are criticised; and the acts of 1871 and 1879 are held unconstitutional, as to school funds.

a fine imposed for a violation of law can be discharged in coupons, or whether it can only be demanded and paid in money?

This is the same question which was elaborately argued at the January term of this court, in the case of *Tyler, sergeant, v. Taylor, auditor*. That case was argued upon a petition to this court for a writ of mandamus, to compel the auditor of public accounts to receive from the sergeant of the city of Richmond certain coupons which had been received by him in payment of a fine imposed on one Mayo for a criminal offence. In that case this court unanimously held that the writ of mandamus could not be issued against the auditor of public accounts because he was not the public officer whose duty it was under the law to receive fines collected by the city sergeant, and declaring that this court could only exercise its extraordinary jurisdiction by way of mandamus to compel a public officer to discharge a duty which the law imposed on him, and not on another; and inasmuch as the city treasurer, and not the auditor of public accounts, was the public officer whose duty it was to receive all fines collected by the city sergeant, the rule was

136 *discharged and the case dismissed without deciding the question on its merits. In that case it was said, and is here repeated: "This court is always ready and willing to decide, to the best of its ability, all questions however important or difficult, or however they may affect public or private interests, which are properly brought before it, no matter how great or far-reaching may be the responsibilities it must assume in such decision. But the court is not willing, nor is it any part of its judicial functions, to decide questions outside of the case before it, and thus constitute itself a moot court to determine abstract questions."

The question argued in the case of *Tyler, sergeant, v. Taylor, auditor*, did not arise upon the pleadings in the cause, and the court did not (for the reasons stated in its opinion) feel called upon to decide an abstract question. But the same question now does arise properly upon the record in this case, and the court is now prepared to meet the question and assume all the responsibilities which may attach to its decision, however it may affect individual or public rights, private or political questions.

But the question we have to determine (however it is sought to be connected with questions which are the subject, unhappily, of political agitation) is purely a legal question, to be determined upon well defined legal principles, and the rules of construction universally recognized as applicable to the statute law. It all depends upon the true construction to be given to the second section of the act approved March 30, 1871, entitled an act to provide for the funding and payment of the public debt. This section, after declaring that the owners of any of the bonds, stocks or interest certificates heretofore issued by this state * * * may fund two-thirds of the amount of the same * * * in six per centum coupon or registered bonds of the state, &c., &c., contains the following pro-

vision: "The bonds shall be made
 137 *payable to order or bearer, and the coupons to bearer, at the treasury of the state, and bonds payable to order may be exchanged for bonds payable to bearer, and registered bonds may be exchanged for coupon bonds, or vice versa, at the option of the holder. The coupons shall be payable semi-annually, and receivable at and after maturity for all taxes, debts, dues and demands due the state, which shall be so expressed on their face." The only question, then, we have to determine, is whether fines imposed for a violation of law, are included within the terms of the statute? I say this is the only question we have to determine, because the question of the constitutionality of the act above referred to, known as the funding act, has already been determined by this court. The case of *Antoni v. Wright*, sheriff, 22 Gratt. 833, settles this question. The same arguments against its constitutionality made in this case were urged in that. I refer to that case and adopt its principles and reasoning as a clear and conclusive exposition of the law, and am of opinion that this decision of the court declaring the constitutionality of the act of March 30, 1871, and declaring that any act of the legislature in conflict with the provisions of that act, so far as it may "forbid the collecting officers of the state to receive in payment of taxes and other demands of the state anything else than gold or silver coin, United States treasury notes, or notes of the national banks of the United States," must be held to be an act "impairing the obligation of a contract," and therefore unconstitutional and void. This decision of *Antoni v. Wright* was recognized and reaffirmed in *Wise Bros. v. Rogers*, second auditor, and *Maury & Co. v. Same*, 24 Gratt. 169, and must now be held to be the settled law of this state. It is not necessary, therefore, and indeed it would be a vain and useless task,

to attempt to go over again the reasons which *governed this court in coming to the conclusions then reached, and firmly adhered to ever since. I can only say for myself, that after a careful consideration of all the views which have been presented on this question, the opinion of Judge Bouldin, in *Antoni v. Wright*, is a lucid, able and conclusive exposition of the law, is one based upon judicial logic, and fortified by judicial authority, which makes it impregnable against every assault which may be made upon it.

Adopting, therefore, the principles and reasoning in the case of *Antoni v. Wright*, we are left in this case to a single and very narrow enquiry, and that is, are fines imposed for a violation of law, included in the purview of the statute?

One of the principal and universally adopted rules of construction of statutes, is, that in the enactment of statutes, the rule of interpretation is, in respect to the intention of the legislature, that where the language is explicit, the courts are bound to seek for the intention in the words of the act itself, and they are not at liberty to suppose or to hold that the legislature intended anything differ-

ent from what their language imports. Pot. Dwaris on Statutes, p. 146. Words in a statute are never to be considered as unmeaning and surplusage, if a construction can be legitimately found which will give force to, and preserve all the words in the act. The best rule by which to arrive at the meaning and intention of a law is, to abide by the words which the law-maker has used. Dwaris, p. 179, note. Especially is this the case where the words used have no double or doubtful meaning, but are plain and explicit in their signification; for it is a rule of universal application that effect must be given to the words used by the legislature where there is no uncertainty or ambiguity in their meaning.

Now, the words used in the act we
 139 are called upon to *construe, are as broad, explicit and comprehensive as any terms which could possibly be used. The act declares that coupons shall be receivable at and after maturity for all taxes, debts, dues and demands due the state. Is there any uncertainty or ambiguity in these terms? They all have a certain, definite, explicit and technical meaning. We cannot discard any one of them as unmeaning and surplusage, but must, according to the rules of construction which bind the courts, give effect to all. We must suppose the legislature knew the ordinary meaning and legal force of the words which they used. If the provision of the act had been that these coupons should be receivable "for all taxes and debts due the state," there might be some room for doubt whether fines were embraced; for although fines are recoverable by action of debt, and in a certain sense a fine is a debt due the state, yet it might be said with much force, if not conclusively, that the word debt refers to matters of contract, and that, therefore, a fine is not embraced in the meaning of the statute in the word debt. But the words dues and demands are added. Shall we give no effect to these words of explicit meaning? Can we take the liberty of striking these words out of the statute? If we can, then the courts may override the powers of the legislature, and construe away any act it may pass. These words dues and demands are not uncertain and ambiguous, but have a certain, definite and explicit meaning. The word "due" is defined by Webster to be "that which is owed," "that which custom, statute or law requires to be paid;" and by Worcester, "that which any one has a right to demand, claim or possess," "that which can justly be required." The word demand is a word of still larger significance, and more comprehensive meaning. Indeed, Lord Coke says, the word demand is the largest word in law, except claim. In 2 Coke upon Littleton, 291 b. he says "demandum is a word of art, and
 140 in the understanding *of the common law, is of so large an extent, as no other word in the law is, unless it be clamum, whereof Littleton maketh mention. § 445." Webster defines "demand," "the asking or seeking what is due or claimed to be due;" and Worcester, "a calling for a thing due or

claimed to be due." No words of more explicit or broader signification could have been used than these two words, "dues and demands." We cannot discard them, but must give them effect. Do they embrace fines? I am bound by every rule of construction to say they do. A fine is something "which the law requires to be paid;" and that is the meaning of the word "dues." A fine is a thing "due or claimed to be due" to the state, a liability which the state has a right to enforce and demand; and that is the meaning of the word "demand." I am, therefore, of opinion, that fines are clearly embraced within the meaning and the very words of the statute. The legislature has used words which by their explicit, comprehensive and unmistakable meaning embrace fines, as well as taxes and debts. If after using the words "dues and demands" they had intended to exclude fines, how easy it would have been to have added the words "except fines" after the words "dues and demands." But having used these broad and comprehensive terms, which by their common and explicit meaning embrace fines, and having used no words of exception, it follows upon every rule of construction that fines are embraced in the terms "dues and demands."

This construction, which would seem to be free from all doubt, if it rests upon the language of the act, is objected to upon two grounds—First. It is insisted that fines are imposed as one of the potent means of punishing offences against the law, and that the offender does not satisfy the judgment of the court if he pays an amount less than the fine assessed against him, which he does, if he may pay in coupons instead of money, 141 (the coupons *being at a discount).

In answer to this view, it is sufficient to remark that the state has a right to say, and has said, in the act of her legislature under consideration, how her "demands" against her citizens shall be satisfied; how the liabilities "due" to her shall be discharged. It might, with the same propriety and with equal force, be argued that debts and taxes due the commonwealth are not fully discharged by payment of coupons; and yet this is done every day under the statute law, sustained and enforced by the judgment of this court. But in point of fact, the judgment for the fine is discharged to its full extent, so far as the state is concerned, because the coupon represents the obligation of the state for the face value of the coupon offered in payment of the fine.

Second. It is objected that fines are dedicated by the constitution and by statute enacted in pursuance thereof, to the literary fund for school purposes, and if the act under consideration embraces fines, to that extent it is unconstitutional.

Now, it is to be observed that neither the constitution nor any act passed in pursuance thereof, requires the collectors of the public revenues, nor the auditor, to keep separate and distinct each particular fine assessed against offenders, and pay it over as collected to the literary fund; but the requirement is,

upon fair construction, to turn over to the literary fund whatever amount may come into the treasury from the source of fines, and dedicate that amount to the purpose indicated. This same argument was pressed most vigorously in the case of *Antoni v. Wright* (supra), and was answered, I think successfully and conclusively by the lamented Judge Bouldin, and I prefer to adopt his views, so clearly and ably put, rather than mar and weaken them by words or views of my own. He says: "But it is argued that the contract in this case is void because it is repugnant to

the 8th section, 8th article, and 3d section, 10th article, of the state *constitution, dedicating certain portions of the state revenue to the support of free schools. We think there is no such conflict in this case.

* * * It only requires that the obligations of succeeding legislatures shall be firmly met; that there should be what the creation of every new debt imperatively demands, to-wit: an increase of taxation if the existing rate be insufficient. The argument is based on the assumption that subsequent legislatures will fail in their duty, and pursue such a course as may result in mal-appropriation of the funds referred to; that they will decline to meet faithfully the high obligation resting on them, and then rely on the irregular consequences of their own default as an argument against the validity of the debt for which they will have failed to provide. The mal-appropriation which would follow would not be the legitimate result of the funding act, but in effect would be the act of the legislature failing to discharge its duty. The obligation to provide for the interest due by these coupons is as high as the duty of applying the capitation tax and other funds to the schools. Both duties are alike obligatory, and both may be discharged, as there is no conflict between them. It is only by a failure to discharge the one that the performance of the other can be put in jeopardy, and it rests with the legislature by faithfully and fearlessly meeting both obligations, to preserve the plighted faith of the state and protect her constitution from violation."

After this opinion of the court, delivered by Judge Bouldin was announced, there was a motion for a rehearing submitted by the attorney-general, and the court held the case under advisement for several weeks, anxious to correct its decision if it should appear in any respect to be erroneous, and to give to the case that calm and careful reconsideration which the gravity and importance of the questions involved required. After a candid and

anxious review of the case, the court 143 could *find no reason to change its opinion, but was confirmed in the justice and reasons of its conclusions. In delivering the judgment upon the motion for a rehearing, Judge Anderson, in an able and exhaustive opinion, discusses the whole question, reaffirming and enforcing the views of Judge Bouldin; and in these views the same judges concurred as in the original decision. I mention this to show with what deliberation and care the questions involved in the case of *Antoni v. Wright* were con-

sidered, and the futility of again considering those questions, except to reaffirm and adopt the principles of that case, so far as they apply to the case before us.

With respect to the argument made in that case, as it was pressed in this case, that fines and other revenues were dedicated to the school fund, and therefore cannot be paid in coupons, Judge Anderson, in his opinion (22 Gratt. p. 874), says: * * * "It is said that those provisions of the constitution which set apart certain funds and a certain proportion of the tax for the public schools would be defeated by this legislation. It would seem to be a sufficient reply to say, that if it were impracticable to raise a sufficient amount of revenue for both purposes, the latter did not impose an obligation on the legislature paramount to the obligation to provide for the payment of the interest on the public debt. That was an obligation antecedent and paramount to the constitution itself, and could not be repudiated by the constitution if it had so provided. But it is not repudiated nor ignored; but the obligation is clearly recognized by sections 7, 8, 19 and 20, of Article 10, at least to pay Virginia's proportion. And, furthermore, this being an obligation of debt, and not eleemosynary in its character, as are the other provisions referred to, and however desirable and important it may be that they should be carried out, I hesitate not to say

this is of higher obligation. But there
144 need be no clashing of duties here. *It is only required that the legislature should levy a tax sufficient for both objects; a duty imposed on it by the constitution. It has not been the practice to set apart in the public treasury the identical money received for the public schools, nor is it required by the constitution nor the acts of assembly. And the legislature has discharged its constitutional obligation when it has set apart the required amount for that purpose."

These views, expressed both upon the first hearing and the rehearing of the case of *Antoni v. Wright*, are applicable to the case before us, and must govern our decision in this case.

Much has been said in the case before us about the sacredness of the school fund, and the paramount obligation of the state to educate the people. This is a great and high obligation, and no doubt will be faithfully and firmly met by the legislation. But however great and high this obligation, it cannot and ought not to be met at the sacrifice of other obligations equally sacred, and other duties equally high and binding. A state, like an individual, must be just before it is generous. No honest man can or will abstract from his creditors what is justly due them, in order to give it to his children. No state, in order to educate its citizens, ought to withhold from its just creditors, that which has been pledged, by its honor and plighted faith, to the payment of its just debts. Both obligations must and will be met. The people must be educated, but they must not be educated at the price of repudiation and dishonor. Better would be igno-

rance than enlightenment purchased at such a price.

In conclusion, I will repeat here the utterance of the unanimous voice of this court in the *Homestead Cases*, 22 Gratt. 301, which declared that "no state and no people can have any real and enduring prosperity, except where public faith and private faith are guarded by laws wisely administered and faithfully executed. The in-
145 violability *of contracts, public and private, is the foundation of all social progress, and the corner stone of all the forms of civilized society, where an enlightened system of jurisprudence prevails. Under our system of government it has been wisely placed under the protection of the constitution of the United States, and there it rests secure against all invasion."

It only remains for me to say that the petitioner has the right, under the law, to discharge the fine imposed upon him by the hustings court, with a coupon of a bond of the state, which the state has agreed to receive in payment of "all taxes, debts, dues and demands due the state," and that he must be discharged from further custody.

STAPLES, J. The opinion just delivered by Judge Christian is an affirmance of the doctrines laid down in *Antoni v. Wright*. It was my misfortune to dissent, not only from the decision in that case, but the reasoning by which it was supported. Since that time the subject has received a full and exhaustive discussion in the public press, upon the hustings and in the legislature. That discussion and my own deliberate reflections have but confirmed my convictions of the soundness and justice of the views then entertained. I do not see, however, that any good can be effected by a further discussion of the question. Every one here present—every intelligent mind in the state—has, perhaps, reached some fixed conclusion upon the subject, and nothing that can now be said by myself or others will tend to change or modify that conclusion. I will not, therefore, now undertake to enter into any discussion of those points with respect to which it was my misfortune in the former case to differ with a majority of this court. This much may be said: If it is now to be considered as the settled rule of this court that every demand, debt, claim of the
146 commonwealth, *of whatever char-

acter or description, to the amount of one million and two hundred thousand dollars annually, may be paid in these coupons; if the legislature, under no circumstances, has for the next thirty years the power to diminish the rate of taxation, whatever may be the condition or necessities of the people; if, during that time, whatever may be the public exigencies, the revenues of the state are irrevocably dedicated to the creditor; if, to such an extent and for such a time the legislature has surrendered all control of the revenues and resources of the state beyond recall, then, indeed, has the government abdicated its functions, and the state is stripped of one of its most essential attributes of sover-

eignty. We can form some faint idea of the magnitude of the surrender and of the principle involved in it when we remember that under the funding bill the entire public debt might have been funded but for the subsequent legislation arresting its operation.

To all this but one answer has ever been given, and that is, it is the duty of the legislature to lay a sufficient tax each year to pay the creditor and carry on the government. To this it may also be answered, that no legislature has the power to impose on succeeding legislatures such a duty. However strong the obligation of the public debt may be, there are periods in the history of every state when no part of it can be paid; when the government creditor and individual creditor must consent to wait for a season; and of such periods as they arise the legislature, and not the courts, must be the judge. Instances of the kind are found in the late civil conflict between the north and the south, and in times of great financial distress and disaster, when the collection of debts is universally suspended; and others will hereafter, no doubt, occur when such a suspense is essential to the public safety. The amount of taxation the people can bear—the mode and manner of imposing it
147 —is a political question *to be determined by the representatives of the people, from time to time, as the public exigencies may require.

This is the essential principle of the governments under which we live—state and federal. It is the vital element of all representative governments. In the language of the supreme court of the United States a legislative body cannot part with its power by any proceeding so as not to be able to continue the exercise of them. It cannot abridge its own legislative power by making permanent and irreparable contracts in reference to matters of public interest. *East Hartford v. Hartford Bridge Co.*, 10 How. U. S. R. 511, 535; see also *State Bank of Ohio v. Knoop*, 10 How. U. S. R. 408; *Ohio Life Ins. and Trust Comp. v. Debolt*, 16 How. U. S. R. 416; *Burroughs v. Peyton*, 16 Gratt. 470.

With this brief discussion I am content to leave this branch of the subject, having already said, perhaps, more than was necessary. It may be proper further to say that the precise question now before us did not arise and was not decided in *Antoni v. Wright*. It is true it was discussed both by Judge Bouldin and Judge Anderson; and while it is perhaps covered by their reasoning, it was not necessarily decided. It is, therefore, an open question.

I agree that the funding act is broad enough to include fines imposed for the violation of the penal laws; and upon that ground I thought, and still think, it violates the seventh section of the eighth article of the constitution of Virginia. That section declares: "The general assembly shall set apart as a permanent and perpetual literary fund, the present literary funds of the state, the proceeds of all public lands donated by congress for public school purposes, of

all escheated property, of all waste and unappropriated lands, of all fines accruing to the state by forfeitures, of all fines collected for offences
148 *committed against the state, and such other sums as the general assembly may appropriate."

Will it be maintained that it is competent for the legislature, by any contract made since the adoption of the present constitution, to divert the funds mentioned in this section from the objects therein designated? Take, for example, the proceeds of the public lands dedicated by congress for school purposes. If these lands, when sold by the state, may be paid for in coupons, are the proceeds set apart for the specific purposes prescribed by the constitution? Are they not in fact indirectly appropriated to the payment of the public debt? The same is true with reference to fines. Instead of being "set apart as a permanent and perpetual literary fund," according to the requirement of the constitution, they will be applied to the interest on the public debt. There is no practical difference between a law which directly hands them over to the state creditors, and a law which allows them to be paid in coupons.

The answer to this again, is, that the legislature must increase the taxes, and supply the deficiency from other sources. But the question still arises, can one legislature divert a fund from the purposes of a trust under the constitution, and rely upon another legislature to raise another fund from some other source with which to execute the trust. Suppose the succeeding legislature fails in its duty, what becomes of the constitutional requirement? The main design of the provision already cited was the creation of a fund beyond the reach of the legislature, in nowise dependent upon popular caprice for its preservation and application.

It is very true that the fines have heretofore been paid into the treasury indiscriminately with other public dues, and so long as the whole was paid in money no injustice or inconvenience could arise. But now the question is presented in an entirely
149 different aspect. For if the *legislature shall pass a law, as it ought long ago to have done, carrying out this provision of the constitution and setting apart the fines for school purposes, under the present ruling of the court the act must be held unconstitutional, because the funding bill authorizes the payment of all state dues in coupons. And thus it is that an unconstitutional contract is made paramount to the constitution. One legislature, by an agreement with the public creditor, may appropriate to his claim a fund set apart by the constitution irrevocably for another purpose, and if succeeding legislatures fail to supply the deficiency from other sources, there is no remedy for the breach of trust and a palpable infraction of that instrument. I can never give my assent to these positions. It is the duty of the legislature, by taxation, to pay the indebtedness of the state. It cannot for that purpose appropriate other revenues which by the constitution are placed beyond

its control. Upon this point I think the argument of the attorney-general was unanswerable.

It is said, however, that the duty of the state to pay its debts is of paramount obligation to that of providing for the education of its people; and the conclusion sought to be deduced from this is, that the constitutional provision dedicating certain funds to the cause of education, leaving the public debt unpaid, is inoperative and void.

The moral obligation of a state to pay its debts is not denied; but it has never been seriously contended by any one familiar with the principles of our government, that this obligation can be enforced by law. If the people of the state do not voluntarily raise the means by taxation to pay the public creditor, there is no way of coercing them. If this be not so, the holders of the unfunded debt will be very glad to know it, as they have not received one dollar of interest, and there is but little probability of their doing so in the present condition

of affairs. At the time of the adoption 150 of the present constitution *the state was free to appropriate its revenues to any objects whatever. It will scarcely be contended there was anything to prohibit prevent the dedication of the funds named in the seventh section to the cause of education. That section, when adopted, became the supreme law of the land; and no legislature could by a contract with a creditor, or by any device or contrivance whatever, evade the force and effect of the provision. The contract, if it is to be so termed, was an usurpation, so far as it attempted to appropriate the school fund to the payment of the public debt. For these reasons I cannot concur in the opinion just delivered.

Let me say in conclusion, however, I concur now, as I did then, with what was said by Judge Christian in the Homestead cases; that is, "The inviolability of contracts, public and private, is the foundation of all social progress, and the corner stone of all forms of civilized society, wherever an enlightened jurisprudence prevails." Good faith is as essential in states as in men. Neither can be just or permanently prosperous without it. Upon that subject my own voice, feeble as it is, can never have any uncertain sound. When we speak of a contract, however, involving the public faith, such as the courts can enforce, we mean a contract sanctioned by the constitution and the principles of government under which we live. Believing that the funding bill is in violation of both, I am for refusing the mandamus in this case.

ANDERSON, J. I fully concur in the clear and able opinion of Judge Christian in this case, but deem it proper to present some additional views in support of his just conclusions and in vindication of my opinion in *Antoni v. Wright*, which was assailed in the argument of this case.

The court being unanimous in the opinion that fines are embraced in the terms of 151 the act of March 30, 1871, *which provides that coupons shall be receivable in payment of "all taxes, debts, dues and

demands" of the commonwealth, I will confine myself to the inquiry, is said act unconstitutional so far as it requires that coupons shall be receivable in payment of fines? It is unquestionably true, and requires no learned and elaborate citation of authorities to show it, that an act may be unconstitutional in one or more of its provisions, and constitutional in all other respects.

It is contended that the act in question is unconstitutional, so far as it authorizes the payment of fines with interest coupons, because it violates section seven of article eight of the state constitution. That section is in the following language: "The general assembly shall set apart as a permanent and perpetual literary fund the present literary funds of the state, the proceeds of all public lands donated by congress for public school purposes, of all escheated property, of all waste and unappropriated lands, of all property accruing to the state by forfeitures, and all fines collected for offences committed against the state, and such other sums as the general assembly may appropriate." The ground of the unconstitutionality of the act as to fines as alleged, is that it is incompatible with the foregoing constitutional requirement that they shall be set apart, with the other funds designated, as a permanent and perpetual literary fund, and is a diversion of them from the purposes of the trust created by the constitution, and an application of them to other purposes. Is this so?

The constitutional requirement is, that fines, among other things, shall be set apart by the general assembly as a permanent and perpetual literary fund. The act of assembly declares that coupons shall, after their maturity, be receivable in payment of all taxes, debts, dues and demands of the commonwealth (not excepting fines). Unless the duty imposed by the constitution and 152 that imposed *by the act of assembly are so incompatible and conflicting that both cannot be performed, the latter is not unconstitutional for the reason alleged. If both can stand together, both may be enforced, and the act cannot be said to be unconstitutional, because it is incompatible with the constitutional provision.

The only question then is, can the general assembly comply with this requirement of the constitution, to set apart fines as a permanent and perpetual literary fund, when it has contracted with creditors of the commonwealth to receive their coupons of interest in payment of fines?

How can they be set apart? The constitution does not appropriate the fines to the public schools. The requirement is that they, with other things, shall be set apart as a permanent and perpetual literary fund, and by section eight, that the general assembly shall apply the annual interest to the public schools. It is evident that they must be set apart in a way which will yield an annual interest, otherwise the requirement to apply the annual interest to the public schools could not be fulfilled. And if the fines, as they were collected, were applied to the

schools, they would be consumed in the use, and could not be set apart as a permanent and perpetual literary fund, from which an annual interest would arise to be applied to the schools.

For the same reason, to separate them from the other revenues by locking them up in strong boxes, whereby they could yield no interest, would not be in accordance with the design and spirit of the constitution. And moreover it would not be for the encouragement of education.

By the law, as it now stands, all moneys designed to be set apart for the "board of education," a name substituted for the "literary fund," are to be paid into the public treasury upon the warrant of the

153 second auditor. *And every warrant is required to express the head of general revenue or expenditure on account of which the money is received or paid; and distinct accounts are required to be kept in the second auditor's office of the receipts and expenditures of the board of education, the board of public works, and of each of the corporations composed of officers of the government, of the funds and property of which the state is sole owner.

And the treasurer is required to keep separate accounts of the money belonging to the literary fund, to the fund for internal improvement, to the sinking fund, &c., showing the receipts and disbursements on account of each. (See Code of 1873, chap. 43, sections 23, 25, 26, 27, 32 and 35.)

Such was the law at the time the present constitution was being framed, and when it was adopted; such it is now, and such it had been for many years prior to the making of the present constitution. Funds which were required to be set apart for the literary fund, and the other corporations which were composed of officers of government, of whose funds and property the state was sole owner, were not required to be kept separate from each other, or from the other revenues of the commonwealth, but were required to be paid into the public treasury, the money of each fund and of the general revenues being mingled together undistinguishably. Indeed, it could not be otherwise, because all the moneys to be paid into the treasury, whether upon the warrant of the first or second auditor, were required by law to be paid into one of the banks of the city of Richmond (Ibid. § 7), and the bank became debtor to the commonwealth for the amount deposited. And a person bound to pay money into the treasury could not make a valid payment in any other way (§ 8), and all moneys so paid stand on the books of

the bank to the credit of the treasurer 154 of the state, and *can only be drawn on his check, and not even upon his check unless it be drawn upon a warrant issued by one of the auditors (§ 9), which indicates whether it belongs to either of the funds aforesaid, and to which.

Upon the books of the bank the fines paid in stand to the credit of the treasurer, just as all other funds or revenues of the commonwealth do which are paid into bank, that is,

into the treasury. But upon the books of the second auditor and of the treasurer, fines and other things which are required to be set apart as a literary fund, are debited to the commonwealth to the credit of the literary fund—now the board of education. So that, whilst the bank is debtor to the commonwealth for the whole, the commonwealth is debtor for so much of it as belongs to the literary fund, to the board of education.

Under the law as it was when the constitution was framed, and for many years before, and as it now is, fines, when collected in money, would be paid into the public treasury, as other moneys, but would be debited to the commonwealth, to the credit of the literary fund; and thus were set apart as a literary fund. And so if they never reached the treasury, but were paid to the collecting officer in coupons, the commonwealth is debited with them to the credit of the board of education. And it is a matter which does not affect in the slightest manner the rights or interests of the board of education, whether the fines are paid to the commonwealth in money or in coupons, for in either case the board of education has no claim for the specific thing which the commonwealth received in satisfaction of the fines, but only to the amount for which the commonwealth chose to become debtor to the board.

The fines were due to the commonwealth. It is only those that are due to the commonwealth that are required to be set apart as a literary fund. And they are paid into the treasury, just as all other dues of the 155 commonwealth, *and are a part of her general revenues until they are set apart for a specific object.

To set apart is not the same as to invest. The general assembly is required to set apart. The board of education has no power to set apart any of the revenues of the commonwealth as a literary fund. No such power is given it by law. It is a power which the legislative department alone is invested with. And the constitution expressly requires the general assembly to set apart fines and certain other revenues of the commonwealth as a literary fund. This cannot, therefore, be done by the board of education. But after they are set apart by the general assembly for the specific object aforesaid, the board is authorized to invest them. By the Code of 1873, chapter 78, § 7, it is authorized and required to invest all the capital and unappropriated income of the literary fund (of course that which has been set apart for it by the general assembly) in certificates of debt of the United States, or certificates of debt of, or guaranteed by the state, or in railroad bonds of a certain description, and may call in any such investments, or any theretofore made, and reinvest them as aforesaid, whenever deemed proper for the preservation, security or improvement of the said fund.

The power, I have said, to set apart fines and other revenues as a permanent literary fund which the board of education is authorized to invest, is vested in the general assembly.

bly. The power to set apart carries with it the power to determine in what mode the thing shall be set apart where no particular mode is prescribed in the power. This power has been executed by the general assembly in the regulations which have been made by law for receiving, keeping and disbursing the public revenues, already described. They prescribe the mode by which all revenues of the commonwealth, including fines and the other revenues which
 156 the constitution requires *the general assembly to set apart as a permanent and perpetual literary fund, shall be paid into the treasury, and how they shall be disbursed. Those designated by the seventh section, when they are paid into the treasury, are required to be debited to the commonwealth to the credit of the literary fund in both the second auditor's and treasurer's offices. This is the mode prescribed by law, by which they are distinguished from the other revenues, and set apart as a literary fund, and the only mode that was ever observed in this state for setting apart a portion of the revenues of the commonwealth for a specific object. It is thus effectually set apart, for it can be disbursed only upon the second auditor's warrant, and only for the benefit of the literary fund.

These regulations were in force long before, and when the constitution was adopted, and the provisions contained therein requiring certain revenues to be set apart as a literary fund, must be taken as made with reference to the existing regulations on that subject, and that the terms "set apart" were used in the sense in which they had always been accepted in this state, and that the framers of the constitution, when they required the general assembly to set apart certain revenues as a permanent literary fund, contemplated that they would be set apart in the mode in which portions of the revenue, including fines, had always been set apart for specific objects, and that they did not thereby intend to overturn and render unconstitutional the whole system which had long been established by law for regulating the receiving, keeping and disbursing the public revenues. I hold that the constitution cannot fairly be so construed, and that the regulations which have been prescribed by law for paying fines and other revenues into the treasury, which were designed to be a permanent literary fund, and for distinguishing them from other revenues in the treasury, and setting them apart as a permanent literary
 157 fund, and *for disbursing them for the benefit of the literary fund, are valid and constitutional.

Let us now briefly notice its practical working. The state collects fines and other dues of the commonwealth, which the constitution requires the general assembly to set apart as a literary fund. They are paid into the treasury upon the warrant of the second auditor, and are debited to the commonwealth, to the credit of the literary fund, in the offices of both the second auditor and the treasurer. They are thus distinguished

and set apart from the other revenues as a literary fund, as we have seen, according to the requirements of the constitution. Afterwards the board of education, by authority of an act of assembly, determines to invest the amount, which is to the credit of the literary fund, in certificates of debt of the United States, or of this state, or in railroad bonds, and applies to the second auditor for a warrant on the treasury for the same. But there is no money in the treasury to pay it. Is it a matter of any consequence to the board much, or whether any of it was received how in money, or how much of it was received by the commonwealth in coupons, since the commonwealth is debited with the whole of it to the credit of the literary fund? And as there is no money in the treasury to pay it, it would have been no better if all of it had been paid into the treasury in money. So it is obvious that the inability of the treasurer to pay the money to the board is not caused by coupons being receivable in payment of taxes and other dues of the commonwealth. The result would have been the same if coupons had not been so receivable, and the whole had been paid into the treasury in money, but had been disbursed in the payment of interest or other demands on the treasury before the board applied for payment.

No matter, therefore, in what medium the state received payment of the fines.
 158 By requiring them to be *paid into the treasury, and debiting the commonwealth with the amount as received, to the credit of the literary fund, which we have seen is prohibited by no constitutional inhibition, and by providing for the payment of the annual interest thereon to the schools, she fulfils the requirement of the constitution. Her receiving payment of fines in coupons is consequently no diversion of a fund dedicated to the schools. If she received payment in money it would be all the same, so far as the literary fund or the schools are concerned; for in either case the state would debit herself with the amount, and the schools or the board of education would have to look to the state for payment, and not to any specific fund. Whether the money received for fines, in common with other revenues, was used in paying interest on the public debt, or in the payment of governmental expenses, it would not be diverting it from any purpose to which it was dedicated by the constitution, it having been set apart as a literary fund by the commonwealth, debiting herself with it to the credit of that fund. For if the fines were collected in money and applied to the payment of school quotas, it would be using them for a purpose to which they were not specifically dedicated by the constitution, for only the annual interest was dedicated to that purpose.

But it may be said that the board of education is authorized by law to receive the principal and to invest it; but the constitution does not invest the board with a right to the specific fine, so as to divest the commonwealth of the right to receive it. It is the property of the commonwealth who

alone has the right to collect and to give acquittances and discharges against it. It must be paid to the commonwealth. It must be paid into the public treasury. It must be set apart by an act of the general assembly as a literary fund, and then the law authorizes its investment by the board of education, *and after it is so set apart the commonwealth is still the sole owner of it, as she is of all the funds and property of the board of education, and the other corporations which are composed of officers of the government, the funds and property of which are the sole property of the commonwealth. For these reasons the commonwealth's receiving payment of fines in coupons, and debiting herself with them to the credit of the literary fund, is not a diversion of funds dedicated by the constitution to the literary fund, or to the public schools, and is no violation of the seventh or eighth sections of article ten of the constitution.

But if the foregoing view is erroneous and untenable, and said seventh and eighth sections must be construed so as to inhibit the general assembly from appropriating so much of the revenues of the state as are practicable to be raised to the payment of the interest of the public debt, as shall be necessary for that purpose, by dedicating them to the support of a public school system, which is introduced by said constitution, then the grave question arises, are they not, to that extent, in conflict with the constitution of the United States? The act making interest coupons receivable in payment of all taxes and other dues of the commonwealth (not excepting fines) is only an appropriation in advance of so much of the revenues of the state to the payment of the interest, after it is due, as will be necessary for that purpose, in fulfilment of a high constitutional obligation, and if the provisions of the constitution in question are repugnant to that act because it necessarily absorbs in the payment of interest the funds of the commonwealth which are dedicated by said provisions of the constitution, as contended, to the schools, but which are indispensably necessary for the payment of interest, do not those sections of the constitution, as thus construed, obstruct the fulfilment by the *state of its solemn obligation to pay the interest it owes its creditors and impair the obligation of her contract?

No one has ever doubted that the state constitution, so far as it does not conflict with the constitution of the United States, is the supreme law to the courts of that state as well as to every other department of the government of that state. But I will not stop to argue so plain a proposition, though it seemed to be contraverted in the argument of learned counsel that if any of its provisions are in conflict with the constitution of the United States, the courts are bound to disregard the former, and to give effect to the latter. Article VI, section 2, of the latter declares that "this constitution and the laws of the United States, which shall be

made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." And if this constitution has inhibited what a state has ordained by her constitution, or enacted in the course of ordinary legislation, how can a judge, who has sworn to support the constitution of the United States with the foregoing clause as part of it, disregard the inhibition and enforce the state law which is inhibited?

By Article I, section 10, no state "shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts." And it is well established doctrine that the inhibition extends to the organic law as well as to ordinary legislation of the state. It was so held by this court, unanimously, in the Homestead cases, and the constitution itself, in the latter part of the clause cited, *supra*, expressly so provides.

In the face of this inhibition in the constitution of the United States, which Virginia has adopted as her supreme law, was it competent for the framers of her present *constitution to assemble in convention, with a just debt resting upon the state, which they acknowledge, and devise and institute a splendid and costly scheme of charity, for the education of all the children in the state between the ages of five and twenty-one years, white and colored, and to pledge the resources of the state to its execution in advance, so as to divest the state of the means and the ability, as is claimed it does, of paying the interest she owes her creditors and fulfilling her obligations of pre-existing debt? Can there be a question in the judgment of a fair minded man, that those provisions of the constitution, as thus construed, would and do impair the obligation of the state's pre-existing contracts? That the obligation of the debt was pre-existing appears from the fact that the whole debt embraced in the act of 30th March, 1871, and recognized by that act existed prior to April, 1861, the beginning of the war, and the constitution was framed and submitted to the vote of the people in 1869. And the fact that Virginia, in that settlement, assumed only two-thirds of the debt, with the consent of the creditor, could hardly be relied on to show that for the part of it which she recognized and assumed there was not an existing liability prior to the formation of the present constitution. The fact is, there was a pre-existing and acknowledged liability on her for the whole debt at the date of the constitution, and it was a legal liability (see *Higginbotham v. The Commonwealth*, 25 Gratt. 627), from one-third of which she is, in effect, relieved by the settlement in question. But she gave additional security for so much of the original debt as she assumed in the settlement, in the shape of coupons, for the interest receivable in payment of taxes and other dues of the commonwealth. Does that show that there was not a pre-existing ob-

ligation on the state, at the date of the
 162 constitution, for at *least two-thirds of
 the debt, which is now claimed by the
 creditors? As well might it be said that,
 because a debtor gave a mortgage to secure
 an old debt, he was under no prior obliga-
 tion to pay it. But, in fact, at the date of
 this constitution, there had been no settle-
 ment, and the state was legally bound for
 the whole debt, and had previously acknowl-
 edged her obligation by the act of her
 legislature; and that obligation arose under
 contracts which antedated the war. If,
 therefore, the said seventh and eighth sec-
 tions of the constitution are in effect such
 as they are claimed to be; if they have
 pledged the resources of the state, as claim-
 ed, which were necessary to fulfil its pre-ex-
 isting obligations to its creditors, for the
 gratuitous education of the children in the
 state, however desirable it is that they
 should be educated, those sections, so far as
 that is their effect, fall within the inhibition
 of the 10th section of Article I of the con-
 stitution of the United States, before recited,
 because they impair the obligation of those
 contracts. And hence, in my opinion in *An-
 toni v. Wright*, concurred in by the court
 with only one dissenting voice (22 Gratt.
 833), in reference to the objection that those
 provisions of the constitution which set
 apart certain funds and a certain part of the
 property tax for the public schools, would
 be defeated by the act in question, I re-
 marked: "It would seem to be a sufficient
 reply to say that if it were impracticable to
 raise a sufficient amount of revenue for both
 purposes, the latter did not impose an obli-
 gation on the legislature paramount to the
 obligation to provide for the payment of
 the interest on the public debt. That was
 an obligation antecedent to and paramount
 to the constitution itself, and could not be
 repudiated by the constitution if it had so
 provided."

But if the said constitutional provisions
 for the institution and support of the public
 schools have been rightly construed in this
 opinion, and can be carried out in sub-
 163 ordination *to the higher obligation
 of providing for the payment of the
 principal and interest of the public debt,
 those provisions, so understood, could not
 impair the obligation of contract, and
 consequently are not in this aspect of the
 case in conflict with the federal constitution.
 It is only when they are held to impose ob-
 ligations on the legislature, or to invest it
 with the right and authority to divert the
 resources of the state from the payment of
 the public debt, by devoting them in advance
 to the public schools, and thus to impair the
 obligation of the state's contracts, that they
 can be held to be violative of the constitution
 of the United States, and void.

There is undoubtedly an obligation impos-
 ed on the general assembly, by sections 7 and
 8 of article 10 of the state constitution, to con-
 stitute a permanent and perpetual literary
 fund, and to apply, as may be implied (it
 is not expressed), the annual interest thereon
 to the public schools. And the state may

prefer to hold the fund herself, and pay the
 annual interest on it to the schools, to hav-
 ing it invested in other securities, which
 would be no infraction of any provision of
 the constitution. And if there is anything in
 the provisions of the act of March 30th, 1871,
 which conflicts with section 7 of chapter 78
 of Code of 1873 (*supra*), which requires the
 capital and unappropriated income of the
 literary fund to be invested in a particular
 way by the board of education, the former
 being the more recent act of the assembly,
 must supersede the latter where there is any
 such conflict. This is a well established prin-
 ciple. There is also an obligation on the
 general assembly to provide for the pay-
 ment of the interest on the public debt.
 Which is entitled to the precedence? Which
 is the higher obligation?

In the opinion already cited, I said: "This
 being an obligation of debt, and not
 164 eleemosynary in its character, as *are
 the other provisions referred to, and
 however desirable and important it may be
 that they should be carried out, I hesitate
 not to say that it is of higher obligation."
 But whilst the distinction is recognized, and
 the higher obligation is conceded, we are
 told that it is a distinction which it is be-
 yond the province of the court to consider;
 that the difference is only in morals, and is
 not recognized by our state constitution,
 beyond which we cannot look.

In our complex form of government, as we
 have seen, the courts are bound to have
 respect to, and take cognizance of, the fed-
 eral as well as the state constitution. In
 fact, to regard the former as the supreme
 law, which invalidates—renders null and
 void—any law of the state which impairs
 the obligation of contract. Now, it was
 claimed in argument; that the state constitu-
 tion imposes an equal if not higher obliga-
 tion on the state to carry out the provisions
 for the schools. In my opinion it cannot be
 so regarded, neither in morals nor in law, in
 view of the relations of the state to the con-
 stitution of the United States, which dis-
 tinguishes between the obligations we are
 now considering. Whilst it inhibits a state
 from passing a law which impairs the obli-
 gation of contract, a law in conflict with
 the provisions made by the state constitution
 for the public schools would not fall within
 the inhibition. The state might, in conven-
 tion, or in any other mode provided for
 changing the constitution, abrogate and an-
 nul the provisions it contains for the public
 schools without inhibition from the federal
 constitution, but it could make no provision
 for impairing the obligation to pay its debts.
 And the reason is because the obligation in
 the former case is not a contract within the
 meaning of the 10th section of article 1 of
 the federal constitution. Consequently, if the
 revenues which have been set apart for the
 schools are necessary, in fulfilment of
 the contracts of the commonwealth,
 165 *to be applied to the payment of the
 interest on the public debt, so to apply
 them is not prohibited by the constitu-
 tion of the United States; whilst to set

apart by the state constitution, or by an act of the legislature, a portion of the revenues of the state for the schools, or as a literary fund, which are necessary to enable the commonwealth to fulfil her obligations of contract, and without which it would be impracticable for her to fulfil them, would be a plain violation of the federal constitution, because it would be a law of the state which impairs the obligation of contract. Hence the distinction is not only moral but legal, and the consideration of it in this case is clearly within the legitimate province of the court, and a part of its duty.

For the foregoing reasons, and those stated by Judge Christian, I fully concur in his opinion and in the judgment of the court.

BURKS, J., concurred in the opinion of CHRISTIAN, J.

The writ awarded.

166 *Gayle v. Wilson, Trustee, & als.

March Term, 1878, Richmond.

Covenants—Application of Funds to Certain Debts.—In 1851, N. E. conveyed to his brother, J. E., a tract of land on which there were four deeds of trust to secure debts, which were recognized in the conveyance from N. E. to J. E.; and J. E. covenanted to pay off the debts of N. E., for which J. E. and two others were bound as his sureties, amounting to some \$4,000. J. E. paid part of the first, second and third mortgage debts, and took no assignment from the creditors. When the conveyance was made in 1851, the property was worth more than the amount of the mortgage debts and the debts for which J. E. was bound as surety of N. E.; but during the war it was very much injured by the enemy, who destroyed the buildings and cut off the timber. In 1871, the trustee in the first two deeds sold the land to satisfy the balance due under these deeds, and there was a balance left—**Held:** That under the circumstances J. E. is not entitled to have this balance applied to repay him what he had paid upon the debts secured by the first three deeds; for he was in fact paying his own debt; but it is to be applied to pay, first the balance due under the third deed, and then the debt secured by the fourth deed.

This was a bill of interpleader in the circuit court of Norfolk county, brought in 1873 by Mary Ann L. Sharp, executrix of William W. Sharp, deceased, against Holt Wilson, trustee, the Portsmouth Orphan Asylum, Elizabeth S. Beaton, administratrix of David E. Beaton, deceased, John H. Gayle and others, to settle the rights of said Orphan Asylum, Beaton's administratrix and Gayle, in a fund in her hands as administratrix of her husband, which was the balance of the purchase money of land which he had sold as the trustee in two deeds executed by N. H. Edwards to secure debts due to James Cornick. The case is as follows:

167 *Nathaniel H. Edwards, who departed this life some time in the year 1864, in his lifetime, to-wit: On the 10th of January, 1851, conveyed a certain tract of land, owned in fee by him, and situate in

Norfolk county, to William W. Sharp, in trust, to secure to Dr. James Cornick the payment of a bond of \$2,000, executed by said Edwards, and the interest accruing thereon. And on the 22d of January, 1856, he executed another deed to the said William W. Sharp, conveying the same tract of land, in trust, to secure the payment of another bond of \$2,000, executed by him, said N. H. Edwards, to said Cornick, and the interest accruing thereon.

On the 9th of May, 1857, the said N. H. Edwards executed another deed of trust, whereby he conveyed the said tract of land, subject to said Cornick's aforesaid liens thereon, to Holt Wilson, in trust, to secure his bond of \$3,000, executed to the Portsmouth Orphan Asylum, and accruing interest thereon.

On the 1st day of June, 1859, the said Edwards conveyed the said tract of land (subject to the deeds aforesaid to Sharp, and also subject to the deed to Wilson) to V. O. Cassell, in trust, to secure a bond of his of \$800, executed to Elizabeth A. Beaton, administratrix of David E. Beaton, deceased.

Afterwards, to-wit: On the 18th day of August, 1860, the said Nathaniel H. Edwards executed his deed, whereby, in consideration of his brother, J. C. P. Edwards, assuming to pay the amount of all notes and bonds executed by him, the said N. H. Edwards, and for which the said J. C. P. Edwards and George W. Grice and Arthur Emmerson were bound as securities or endorsers, and of the further consideration of one dollar, conveyed, in fee with general warranty, to the said J. C. P. Edwards the aforementioned tract of land, and also all his chattel estate, consisting of negro boy Tobe, his horses, carts, farming utensils, household and kitchen furniture, stock of cattle, 168 *sheep, hogs, and the present and growing crops on the land. And in said deed it was stated "the real estate (conveyed) is subject to several deeds of trust, executed by me (N. H. Edwards), and duly recorded;" and the said J. C. P. Edwards covenanted in said deed that, "in consideration of the above sale and conveyance," he would well and truly pay off and discharge the aforesaid notes and bonds executed by the said Nathaniel H. Edwards, and for which he, the said J. C. P. Edwards, George W. Grice and Arthur Emmerson, were bound as securities or endorsers.

The said J. C. P. Edwards, in compliance with his covenant, paid off the notes and bonds of said Nathaniel H. Edwards, required to be paid by said deed, over four thousand dollars, leaving still one to be paid, amounting to about twelve hundred dollars. In the fall of 1860 he sold the personal estate conveyed in the deed, and did not realize more than \$500, and at the same time offered the farm for sale, but as only a little over \$8,000 was offered no sale was made. The federal army officials took possession of the farm about May 15th, 1862, and retained possession until October 31, 1865, and in the meantime destroyed all out-buildings, and

cut off all the timber, estimated at 1,000 cords of wood.

The said J. C. P. Edwards, after the execution of said deed, paid at various times to the aforementioned James Cornick sums of money upon his debts, secured by the deeds aforesaid, amounting in all to the sum of \$3,878.73; and to the Portsmouth Orphan Asylum, upon their debt aforesaid, various amounts, in all amounting to the sum of \$1,327.60—these payments extending down to July, 1870.

The said William W. Sharp, trustee in the aforementioned first two deeds, on the 25th of April, 1871, sold the said tract of land at public auction for the sum of \$7,550, and, after paying the expenses of closing

169 his *trust and the balance due to said

James Cornick upon his two bonds aforesaid executed by N. H. Edwards, there remained in his hands, as trustee, the sum of \$4,086.24, until the time of his death, which occurred on June 9th, 1871. Mary A. L. Sharp qualified as his personal representative.

The said Mary A. L. Sharp, personal representative of said William W. Sharp, trustee, being unadvised as to whom she should pay the said amount, instituted suit in the circuit court of Norfolk county, paid said amount in court, and asked the court to require the various parties claiming said amount to interplead, that the court might determine and direct who are entitled to the same.

J. C. P. Edwards, in his answer, cited the aforesaid deed from N. H. Edwards to him, and charged that he had fully performed the covenant on his part to be kept, except the payment of one note, upon which judgment had been obtained against him; that he had at various times paid to the said James Cornick the amounts stated above; that these payments were never intended as voluntary payments, but that he had always claimed the right to be substituted to all the rights of said Cornick, as against the said tract of land, to the extent of said payments; and that on the 25th of April, 1871, he had, for value received, conveyed and assigned to John H. Gayle all his right, title and interest, to take, have and receive, out of the proceeds of the sale of said land, all such sums as he would be entitled to receive therefrom, by reason of said payments by him upon the debt of said Cornick, secured on said land.

The said John H. Gayle, in his answer, averred the assignment to him, by said Edwards, of all his interest in the money in the hands of said trustee, to which the said Edwards might be entitled by reason of his payments aforesaid upon the debts

170 due to said Cornick, *secured upon said land. That under the deed aforesaid, from Nathaniel H. Edwards to J. C. P. Edwards, the debts of Cornick, the Portsmouth Orphan Asylum, and Beaton, were no part of the consideration for the purchase of said land; that the said J. C. P. Edwards purchased nothing therein but the equity of redemption in said land, remaining in Nathaniel H. Edwards, after the execution of

the deeds aforesaid for the benefit of Cornick, said Asylum, and Beaton; that the said J. C. P. Edwards, by virtue of his payments to Cornick, became, to the extent of these payments, a purchaser from said Cornick, and entitled to be considered in equity his assignee to that extent, to be paid from the amount of purchase money realized at the sale made by the trustee of said Cornick.

The defendant, Holt Wilson, trustee for the Portsmouth Orphan Asylum, in his answer, averred that the said J. C. P. Edwards purchased the said tract of land, subject to the aforesaid debts due by said N. H. Edwards to Cornick, the said asylum, and Beaton, secured on said land; that he, the said J. C. P. Edwards, took the said land cum onere; that the acceptance by him of said burden was a part of the consideration of the purchase of said land; and that when he made the payments aforesaid to Cornick it was not a purchase pro tanto of the debt of said Cornick; that it was not made to discharge the debt of another, "but to pay off a debt due by himself."

The defendant, Beaton, in his answer, reiterated the allegations of the answer of the said Wilson.

The deposition of John C. Edwards was filed in the cause, and is sufficiently referred to by Judge Staples in his opinion.

The case was referred to a commissioner, who reported the foregoing facts, and also that there was due to the Portsmouth Orphan Asylum of principal \$3,000, and 171 of *interest to the 26th of July \$759.17, and there was due Beaton's administratrix of principal \$800, with interest from the 1st of January, 1870. The fund in court was stated to be \$4,572.26, with interest from the 21st of May, 1873.

The cause came on to be heard on the 2d of April, 1874, when the court held that the Portsmouth Orphan Asylum was to be first paid out of the fund in court, and that Beaton's administratrix was entitled to be next paid; and they were each authorized to check upon the fund for the amount respectively due to them. And thereupon Gayle applied to a judge of this court for an appeal; which was allowed.

Gayle and J. Alfred Jones, for the appellants.

W. W. Crump, for the appellees.

STAPLES, J., delivered the opinion of the court.

The appellant claims under John C. Edwards, who purchased from his brother, Nathaniel Edwards, in the year 1860. At the time of this purchase the land was subject to four deeds of trust: the first and second of which were for the benefit of Dr. James Cornick, the third for the benefit of the Portsmouth Orphan Asylum, and the fourth for the benefit of Beaton's estate. John C. Edwards, after his purchase, paid a part of the debts secured by the Cornick deeds, and the appellant, as his assignee, now claims to be substituted to the lien of those deeds, and thus to obtain priority over the debt due the

Orphan Asylum. The fund being insufficient to pay all the liens, it becomes important to determine its proper application.

The evidence shows that John C. Edwards, when he made the purchase, was fully apprized of the existence of these deeds of trust. Indeed, the conveyance from Nathaniel Edwards to him declares that it is made subject to them. Although John C. Edwards does not expressly undertake to pay them, there is no doubt that such was the understanding of the parties. His deposition was taken by consent, and in it he gives a history of the transaction. He states that both as endorser and surety he was responsible for his brother to a considerable amount, along with A. Emmerson and George W. Grice; that before his brother's death the latter, without consultation with the witness and without his knowledge, had the deed prepared; that witness was sent for to go to Emmerson's office, and he (Emmerson) explained that if the witness paid all the debts mentioned, and the mortgages, then the land would belong to witness. The latter said the land was not worth it. He, however, signed the deed, agreeing to pay all the debts of Nathaniel Edwards, for which Emmerson, Grice and himself were bound. From this it is apparent that while John C. Edwards expressed the opinion that the value of the land was not equal to the debts, he nevertheless consented to the arrangement, and agreed to take the land upon the terms suggested. If he was not willing to accede to these terms, he ought to have said so and refused to sign the deed. Further on in his deposition he admits, on cross-examination, the only benefit he expected at the time to derive from the purchase was whatever might remain from the sale of the land "after the payment of the deeds of trust." I do not think Nathaniel Edwards would have sold the land, except with the understanding that, as between him and the purchaser, the land was to remain the primary fund for the payment of the incumbrances. It is very certain that John C. Edwards would never have paid his brother the full value of the land, with the incumbrances upon it, and trusted solely to the covenants in the deed for his

173 indemnity. Whilst, therefore, John

C. Edwards did not make himself personally liable for the trust debts, it is very certain, I think, they were considered a part of the purchase money, and that he agreed to take the land, and, as he himself states, rely for his indemnity upon any surplus remaining after satisfying the incumbrances. As a general rule, a conveyance of property subject to a mortgage imposes no personal liability on the grantee. It, however, raises a presumption that the purchaser buys the property to the extent stated, and that he takes his chances of realizing out of the property enough, over and above the mortgage, to indemnify him for his advance of purchase money. The fair inference is, that the purchaser does not pay the vendor the full value of the property, but that the amount of the mortgage debt is reserved in his hands as so much purchase money for the

purpose of discharging the lien. In such case, the land conveyed is as effectually charged with the amount of the mortgage as if the purchaser had expressly assumed its payment. As between the vendor and the purchaser of the equity of redemption, the land is the primary fund for the liquidation of the incumbrance. See *Daniel v. Leitch*, 13 Gratt. 195, 206; *Jumel v. Jumel*, 7 Paige R. 591, 11 Paige 28; *Stebbins v. Hall*, 29 Barb. R. 524; *Jones on Mortgages*, §§ 736, 740-8-9, 756.

In *Wedge v. Moore*, 6 Cush. R. 8-10, Chief Justice Shaw, in discussing the rights of the purchaser who had discharged the mortgage and claimed the benefit of it, said: "Such a payment made no difference. He (the purchaser) took his conveyance subject to that incumbrance, and it may be presumed that the consideration paid was less by the amount of that incumbrance than he otherwise would have paid. He paid off the incumbrance to clear his own estate and took a discharge. The tenant (that is the purchaser) must have agreed to pay off and discharge this mortgage as part of the purchase, 174 *for otherwise he would, if evicted, have had a remedy under his general or special warranty against the grantor. The fact that the tenant obtained a discharge of the mortgage and did not take an assignment, leads to the conclusion that he was to pay the mortgage himself as in effect part of the purchase money." These observations are as directly applicable to the present case as to the one in which they were made. They relieve me of the necessity of any further discussion of this branch of the case. See also *Eaton v. Simonds*, 14 Pick. R. 98; *Thompson v. Chandler*, 7 Greenl. R. 377. In *Spengler v. Snapp*, 5 Leigh 678, Judge Carr said Joseph Stover bought the land under his deed of trust with proclamation that it was sold subject to Christian's mortgages. These mortgages then became a part of the purchase money which Joseph Stover gave for the land.

We have still further proof that John C. Edwards was to pay off and discharge the deeds of trust as part of the purchase money for the land. It appears that for ten successive years, commencing in 1860 and ending in 1870, he made payments to the Orphan Asylum upon the debt due that institution, amounting in the aggregate, principal and interest, to nearly two thousand dollars. According to the present pretension, he was under no obligation to make these payments. Why, then, did he make them? How can they be accounted for, except upon the supposition that the trust debts constituted a part of the purchase money, and as such he had agreed to pay them, and he well understood it was only by paying them (prior and subsequent) he could obtain a valid title to the land? His conduct in other respects sustains this view. For from 1860 down to 1871 he never, at any time during all that period, claimed that he could hold the Cornick deeds of trust for his own benefit, so far as he had paid them, to the entire exclusion of the Orphan Asylum. Not until the spring

175 of 1871, after the *land was sold and the proceeds in the hands of the trustee for distribution, was this claim asserted. It is clearly an after-thought growing out of the decline in the value of the land, and the failure of the security. In opposition to this view it is said that the value of the land would not have justified John C. Edwards in paying the incumbrances. Let us see how this is. The trust debts in round numbers amounted to about nine thousand dollars. The debts for which he was bound as security amounted to about four thousand dollars—in all, thirteen thousand dollars, and certainly a very liberal estimate. The only evidence we have of the value of the lands is that of John C. Edwards, who proves that his brother received an offer for it of twenty-two thousand dollars two years before the war, and refused it. This statement is not contradicted or impugned in any respect. There is no countervailing testimony, and it must be taken as proof of the value.

It is very true that John C. Edwards, in 1860, offered the land for sale and received a bid of only eight thousand and five hundred dollars. But he of course intended to sell, as he had bought, subject to the incumbrances, and the purchaser, in making his bid, would necessarily make allowance for them. The bid was therefore practically an offer of \$21,500.

It is also true that at the sale made in 1871, under the first incumbrances, the property sold for seven thousand and five hundred dollars. This, however, is obviously no fair test of the value in 1860. It is in proof that the federal forces were in possession of the land from May, 1862, to October, 1865. They destroyed all the out-buildings of the value of three or four thousand dollars. They cut down or destroyed all the timber of the value of four or five thousand dollars. The amount of damage otherwise necessarily inflicted by such people in four years is simply incalculable, besides the decline in real estate

176 *in every part of the country resulting from the war. And yet, notwithstanding all this, the property at a cash sale in 1871 brought seven thousand and five hundred dollars. • These facts conclusively show that at the time of the purchase by John C. Edwards, in 1860, he could, upon any reasonable calculation, take the land, pay the trust debts and the debts for which he was bound as security, and still have in his hands a sufficient surplus to compensate him for the trouble and risk he incurred. He had also further indemnity in a deed of trust executed by Nathaniel Edwards upon a negro man, the stock of horses, and the chattels upon the land which, if sold before the war, would have realized a considerable amount. It is safe to say, that if the war had not occurred we should never have heard of this controversy, as we should never have heard of a multitude of others originating in unfortunate land speculations. If the times had proved propitious, the transaction would have been an advantageous one to John C. Edwards. But the great disaster befell the country, and his investment proved an unfor-

fortunate one. Much has been said of the injustice done in permitting the Orphan Asylum to reap the benefit of the payments made upon the first deeds of trust. It is a sufficient answer that John C. Edwards stood in the shoes of his vendor, and in making the payments he was simply paying a part of the purchase money for the land. It is precisely the same thing as if he had paid the money to Nathaniel Edwards, and the latter had paid it upon the trust debts. Such payments necessarily operate as a satisfaction of the debt and an extinguishment of the incumbrance pro tanto, which can never be revived, merely because there is a change of circumstances. If John C. Edwards desired or intended to keep alive the incumbrances for his own benefit, he ought to have taken an assignment or transfer of the deeds of trust. Instead of that, he pays them

177 *off in part, and in so doing his sole purpose was to extinguish the lien to that extent. How can this court now, after this lapse of time, revive it in favor of his assignee?

It may be conceded there are cases in which the purchaser of an equity of redemption, upon paying off an incumbrance, will be subrogated to the rights of the creditor, and a court of equity will keep alive the lien for his benefit, although it may have been discharged by payment. But these cases depend upon peculiar circumstances, which need not now be considered. And even when the purchaser takes an assignment, this does not necessarily entitle him to the protection of the mortgage. If it is his duty by the terms of the contract to pay and cancel the mortgage, it will be held to be a release and not an assignment. And when there is no such duty devolving upon him, the assignment will be held to operate as an extinguishment or not, according to the intention and situation of the parties. *Gibson v. Crehore*, 3 Pick. R. 475; *Brown v. Lapham*, 3 Cush. R. 551. But when the purchaser takes no assignment, and his payments are made for the purpose of discharging the debt, and with no intention of keeping alive the mortgages, he cannot afterwards, upon a change of his intentions, or upon a change in the surrounding circumstances, insist upon the mortgage as a subsisting security to the injury of third persons. *Jones on Mortgages*, § 855, and cases there cited. And see *Hatch v. Kimball*, 16 Maine R. 146. These principles would seem to be decisive of the case.

But this is not all. The conduct of J. C. Edwards, throughout, was well calculated to lull the Orphan Asylum into a false security. If it had looked at the deed to him from Nathaniel Edwards, it would have seen that he purchased the property subject to all the deeds of *trust. If it had enquired of the parties, it would have been told that the arrangement was to pay all the debts. For ten years John C. Edwards made his payments to that institution precisely as if he regarded the debt as his own, and the deed of trust an incumbrance which he was required to satisfy. But for this conduct the

Orphan Asylum, might have redeemed the Cornick deeds of trust, for nothing is better settled than that upon paying the prior mortgage, the junior succeeds by right of subrogation to the lien of the former as a security for the sum paid without even an assignment. The Asylum might have bid for the property at the sale made in 1871, and thus have secured a part of its debt. But it was not until more than twelve years after the original transaction—not until the last sale was made in 1871, and the proceeds in the hands of trustee—that this claim was ever asserted. To what extent the Orphan Asylum may have been injured by this delay—what other measures it might have adopted for its protection, had it been apprized of this claim—it is impossible for us to say. It may be safely assumed that its conduct would have been very different from what it has been with reference to its debt. Under such circumstances, now to set up the Cornick deeds in favor of John C. Edwards or his assignee, would be to violate every rule of equity. The courts will not enforce the doctrine of subrogation where it will work injustice. 2 Washb. on Real Property, 198-20. As was said by Chancellor Kent in *Star v. Ellis*, 6 John. Ch. R. 393: "A court of equity will keep an incumbrance alive or consider it extinguished as will best serve the purposes of justice and the actual and just intention of the party. It must, at all events, be an innocent purpose, and injurious to no one." Jones on Mortgages, 959, 963. And this is the language of all the authorities. Without multiplying 170 citations upon *this point, or protracting discussion, I think the decree should be affirmed.

ANDERSON, J., dissented.

Decree affirmed.

180 *Compton v. Major & al.

March Term, 1878, Richmond.

Absent, MONCURE, P.

On a contract for the sale of land by M to C, a bond dated July 2, 1863, is given for \$3,000, payable on demand, for a balance of the purchase money, and a deed of trust to secure it. In December, 1867, C estimates the value of the \$3,000, as of Confederate money, at the date of the bond, in United States currency, adds the interest on this sum to date of tender, then adds the premium on gold, and tenders the amount to M in discharge of his bond. M, claiming that the bond was to be paid in good money, refuses to receive it. C then gives him notice, under section 5 of the adjustment act of 1866, to proceed to institute proceedings for the recovery of his debt; but M does not institute any proceeding to enforce his debt until October, 1872, when the trustee advertises the land for sale, and C enjoins it—Held:

1. Payment of Debt—Confederate Money.

—Under the evidence the debt was to be paid in Confederate money, and the amount tendered was the proper amount.

2. Statute—Interest.—The case is to be governed by the act of 1866, and not by the amended act of 1867, and M is only entitled to the amount tendered without interest.

3. Same—Construction.—The statute providing that the creditor in such case shall be barred from all legal remedy whatever, founded upon such debt or contract, to recover more than the sum tendered without interest, this statute includes the remedy by sale under the deed of trust.

This was a bill filed in the circuit court of Culpeper county in November, 1872, by Elias Compton, to enjoin the sale of a tract of land by John C. Major, trustee in 181 *a deed of trust, executed by Compton and wife, to secure a debt due to Langdon C. Major, the balance of purchase money on land sold by Langdon C. Major to Compton. It appears that previous to the 10th of April, 1863, the parties entered into a written agreement under seal by which Major sold to Compton a tract of land containing five hundred and eighty-three acres, minus two lots he had previously sold, at \$17.15½ per acre. This land Major had received in right of his wife, upon the division of the estate of her father, George Ficklin, deceased. By deed dated the 10th of April, 1863, Major and wife conveyed the land to Compton. Compton paid all the purchase money but \$3,785.06, for which he gave his bond payable on demand, with interest payable annually, and conveyed the land to John C. Major, in trust, to secure it. On this bond he paid, about the same time, \$785.06, so as to leave due \$3,000. The cash payment and also this sum was paid in Confederate currency.

In December, 1867, Compton having made a statement ascertaining the value in United States currency of \$3,000 Confederate currency at the time of the contract, with interest up to the 15th of December, 1867, made a tender of the amount, viz: \$949.66, to Langdon C. Major; which Major refused to receive, on the ground that the \$3,000 was to be paid in good money. And then Compton gave him notice under section five of the adjustment act of 1866, to proceed to institute legal proceedings for the recovery of his debt. Major, however, did not institute any action or other proceedings for the recovery of his debt until October, 1872, when the trustee advertised the sale of the land under Compton's deed of trust.

The only disputed facts in the case were whether the bond was to be paid in Confederate currency or good money. On that question the court below and this 182 court *held it was payable in Confederate currency. The other fact was whether the land was liable to contribute to the annuity allowed to the widow of George Ficklin, in lieu of dower.

The cause came on to be heard on the 10th of February, 1874, when the court held the contract was solvable in Confederate treasury notes; but that under all the circumstances the fair value of the property would be the most just measure of recovery; and prescribing the rule on which the balance due was to be ascertained, referred the case to a

commissioner to take an account—1st. Of the balance due by the plaintiff on said trust deed, upon the rule fixed by the court; and 2d. An account of all liens on said land existing at the time of the conveyance thereof by Major to Compton.

After this decree was made Compton presented his petition, asking that on account of the conduct of Major in failing to prosecute his claim for such a length of time, and the depreciation of land in the meantime, the value at the time of the sale might not be taken as the measure of recovery. But the court refused to allow him to file it. He thereupon applied to a judge of this court for an appeal; which was allowed.

James G. Field and Gray, for the appellant.

James W. Green and Williams, for the appellees.

BURKS, J., delivered the opinion of the court.

The controversy in this case grows out of a contract for the sale of a tract of land entered into on the 10th day of April, 1863. A large portion of the purchase money was paid at or near the time the contract was made, and a bond was given for the residue, secured by a deed of trust on the 183 land. The nominal amount (balance) *of the bond is \$3,000, carrying interest from the 2d of July, 1863.

The appellee, Langdon C. Major (the vendor), claims that the full amount of this bond, with the interest upon it, is due and owing to him in lawful money, and that he has the right to enforce collection by sale under the deed of trust; while the appellant (the vendee) contends that the contract for the sale was by agreement to be wholly fulfilled and performed in Confederate States treasury notes, or was entered into with reference to such notes as a standard of value; that, under the adjustment acts, he had the right to discharge the bond by paying the gold value of the nominal amount thereof, and having made the tender authorized by section 9 of chapter 138, Code of 1873, and in all respects complied with the provisions of that section, the appellee is not entitled to demand and have more than the sum tendered, without interest.

Of the numerous cases, involving dealings and transactions in or with reference to Confederate currency, which have come before this court for decision, this, I believe, is the first presenting a question under the section just cited. That section, the 5th of chapter 71 of the act passed March 3, 1866 (Acts of 1865-66, p. 184,) is in these words:

"It shall be lawful for any person bound for any debt or the performance of any contract, which has to be discharged or performed by the payment of Confederate States treasury notes, or for the performance of any contract made with reference to such notes as a standard of value, to tender to the party entitled to demand payment or performance, or damages for non-performance, the amount demandable according to the provisions of this

act; and if such party shall refuse to accept the amount so tendered, it shall be lawful for the party bound, by notice in writing duly served, to require him to institute proper legal proceedings for the recovery of such debt *or the enforcement of such contract, or for the recovery of damages for its non-performance; and if such party shall fail to institute such proceedings within three months from and after the service of such notice, he shall be forever barred and precluded from all legal remedy whatever, founded upon such debt or contract, to recover more than the sum tendered, without interest."

Under this section: 1. The tender allowed applies to debts or contracts which were to be discharged or performed by the payment of Confederate States treasury notes, and to contracts made with reference to such notes as a standard of value. 2. The tender, made by the party bound to the party entitled, must be of the amount demandable under the provisions of the act. 3. On refusal of the party to accept the amount tendered, he must be duly served with notice in writing, requiring him to institute proper legal proceedings for the recovery of the debt, &c. 4. On failure to institute such proceedings within three months from and after the service of the notice, he is forever barred and precluded from all legal remedy whatever, founded on such debt or contract, to recover more than the sum tendered, without interest.

The appellee, Langdon C. Major, in his answer to the bill and in his deposition, states that the contract for the sale of land to the appellant was not to be performed in Confederate currency, nor made with reference to such currency as a standard of value. No other witness testifies in his behalf. Several circumstances are relied on in support of his statement, such as the fact that the bond for the unpaid balance of purchase money stipulates on its face for the payment of interest "annually," and the further fact that the nominal amount agreed to be paid for the land, did not much, if any, exceed its real value before the war. But this proof, I think, is more than counterbalanced by the proof on the other side. The appellant 185 and his son both testify *positively, that the sale was for Confederate currency, and there are many circumstances to sustain them.

The contract was made on the 10th day of April, 1863, when the only currency in circulation among our people was the treasury notes of the Confederate States, and the cases were rare and exceptional in which contracts were made with reference to any other kind of currency. A large portion of the purchase money, more than one-half, was paid in that currency at and soon after the sale, and when the bond was given for the residue on the 2d day of July, 1863, eight hundred dollars and more were paid in the like currency, for which a credit was endorsed reducing the amount of the bond to precisely \$3,000, principal money. The bond was payable "on demand," and a sale under

the deed of trust could have been required any day after its execution on due notice, and although the nominal amount agreed to be paid for the land may not have been much in excess of its actual value before the war, yet it is distinctly proved that Major, in the January before he made the sale to Compton (the appellant) at \$17.15½ per acre, offered to sell the land to another person at \$15 per acre, payable in Confederate money; that the appellant made a tender to Major in December, 1867; that the latter refused to accept the amount tendered; that a notice in writing was at once duly served upon him, requiring him to institute proper legal proceedings for the recovery of the debt evidence by the bond; that he did not institute such proceedings within three months from and after the service of the notice, and has never, in fact, at any time, instituted any suit, either at law or in equity, for such recovery, and never took any steps to enforce a sale under the deed of trust until October, 1872,

when the sale, then for the first time
186 advertised by the trustee, *was stayed by an injunction awarded on the bill of the appellant filed in this case, are all facts not disputed.

Only two questions, therefore, remain to be considered. The first is, Was the amount tendered "the amount demandable according to the provisions of the act?"

The amount tendered was \$949.66, United States currency. This sum is composed of the gold value of the \$3,000 of Confederate currency, ascertained by applying the scale of depreciation as of the date of the contract, interest computed to date of tender, and premium on the gold as of the same date. If the "amount demandable" was the value of the Confederate currency according to the gold standard, the mode adopted to determine that amount was the correct one (*Fultz v. Davis*, 25 Gratt. 903), and the tender was sufficient.

Under our adjustment acts, there are two standards or measures of recovery on Confederate contracts. The one already mentioned is the gold standard by which the nominal amount of the Confederate currency is reduced, according to the scale of depreciation, to its value in gold coin, to which, interest computed till date of recovery and the premium on the coin in United States currency as of the same date, are added. This is universally the measure of recovery in cases of loans of Confederate money, and has been sometimes applied in other cases where the debtor has not been in default. *Myers v. Whitfield*, 22 Gratt. 780; *Stearns v. Mason*, 24 Gratt. 484; *Merewether v. Dowdy*, 25 Gratt. 232.

The other mode of adjustment is to allow in cases of sale, renting or hiring of property, the fair value of the property sold, or the fair rent or hire of it, if the court or jury, as the case may be, think that under all the circumstances, the fair value of the property sold, or the fair rent or hire of it, would be the most just measure of recovery. Ch. 138, § 1, Code of 1873.

187 *While this mode of adjustment in cases of sale, or renting or hiring, is the one generally to be pursued, as declared in *Pharis v. Dice*, 21 Gratt. 303, and numerous cases since decided by this court, yet, as said by Judge Christian in *Merewether v. Dowdy*, supra, "there is no fixed rule on this subject, nor can one be laid down by which every case is to be measured. Each case must rest on its own peculiar facts." * * * "It may be observed," said he, "that in all cases in which the 'property standard,' instead of the gold value, has been adopted, the debtor has either proved to be in default in not tending the Confederate currency on the day when, by the terms of the contract, his debt was payable, or there were other circumstances which would make it inequitable to compel the creditor to receive the scaled value according to the gold standard of the Confederate currency, with reference to which the contract was made and entered into."

Is the sum allowed to be tendered under the section before cited (§ 9, ch. 138, Code of 1873), the "amount demandable" according to the gold standard, or is it the "amount demandable" according to the "property standard," as it has been called? I think it is the former. By the original act, of which this section in its present form was a part, passed March 3, 1866, the only measure of recovery was the gold value of the Confederate currency. The tender must of necessity have been according to that standard.

The subsequent amendment, by the act passed February 28, 1867, of the second section of the act, by a proviso improperly attached to the first (see *Pharis v. Dice*, supra), was never intended, I think, and should not be construed to change the meaning and effect of the fifth section. It furnished an additional standard, it is true, by which to measure the recovery in a particular class of cases, to be applied, in the

188 discretion of the court *or jury, according to the circumstances; but it left it to the debtor, by tender under the rule already established, to require the creditor to institute proper legal proceedings to test his right, if he claimed it, to a larger amount than the sum tendered. The prime object of the section was to enable the debtor to compel a fair and speedy adjustment of his Confederate liabilities, and as these liabilities are more readily and conveniently measured by the gold standard than any other, that standard was adopted as the better, if not the only practical one, for the purposes of tender.

The appellant having complied on his part with all the requirements of the section, Major, failing to institute the proper legal proceedings within the time prescribed, is, by the terms of the statute, forever barred and precluded from all legal remedy whatever, founded on the bond for \$3,000, to recover more than the sum tendered to him, without interest.

The bar provided is of "all legal remedy whatever." To construe these terms as descriptive of an action at law merely, would be to "stick in the bark." Nor do I think

they should be limited by construction to suits, whether at law or in equity, but extended to all means sanctioned by law to coerce payment. Suits and actions are certainly within the terms, and other coercive measures allowed by law, are within the spirit if not within the letter of the section. It is a settled rule of construction that cases out of the letter, yet within the same mischief or cause of the making thereof, shall be within the remedy thereby provided. Broom's Leg. Max. 83.

The power of a trustee under a deed of trust to make sale, although founded on the agreement of parties to be executed in pais, derives its efficacy from the sanction of the law, and in that sense may be said to be a "legal remedy" within the meaning of the statute. To bar a suit at law or in equity 189 for the recovery of a larger sum *than the amount tendered, and yet allow a trustee by sale to coerce payment of such sum, would defeat the intent of the statute.

This construction does not bring the statute within the category of "a law impairing the obligation of contracts." The main design of the adjustment acts is two-fold: first, to ascertain the contract according to the true understanding and agreement of the parties; second, to give effect to that contract as thus understood.

Now, the obligation of the bond in this case does not extend beyond the value of the Confederate currency promised, nor is the deed of trust a security for any greater amount: and if the true amount, according to a just legal standard, be ascertained and tendered, it is no violation or impairment of the contract under the deed of trust to require that it shall stand as a security only for the amount so tendered.

The rule that "he who asks equity must do equity" does not impose upon the appellant the duty, under the circumstances of this case, of paying any greater amount than the sum tendered. If the appellee, Major, claimed to be entitled to a larger sum, he should have instituted his suit to test his right within the time prescribed by the statute. Having failed to do this and delayed the assertion of his claim for more than five years, and until after the land sought to be subjected has greatly depreciated, he has no equity now to demand that his recovery shall be measured by the value of the land at time of sale, or by any other standard than the one under which the tender was made. He is entitled to the amount tendered, to-wit: \$949.66, in lawful currency of the United States, without interest, subject to abatement for the amount of any valid liens and incumbrances, if any there be, on said land existing at the time of the conveyance thereof by the said Major and wife to the appellant. He is entitled to no greater sum. I am for reversing the decree 190 *of the circuit court so far as it is in conflict with this opinion, for affirming it in other respects, and remanding the cause for further proceedings.

The decree was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the contract entered into between the appellant and the appellee, Langdon C. Major, for the sale of the tract of land in the bill and proceedings mentioned, was, according to the true understanding and agreement of the parties, to be fulfilled or performed in Confederate States treasury notes, or was entered into with reference to such notes as a standard of value; and the appellant, in pursuance of the 9th section of chapter 138 of the Code of Virginia of 1873, having made a tender to the said appellee of the sum of \$949.66 in United States currency, which was the amount demandable according to the provisions of the act of which said section is a part, for the nominal amount (3,000) of the balance of purchase money owing by the appellant to said appellee on the contract aforesaid for the sale of the tract of land aforesaid and the interest on said balance of purchase money till the date of said tender; and the said appellee having refused to accept the amount so tendered, and after being duly served with such notice in writing as said section provides having failed to institute the legal proceedings therein required within the time therein prescribed, the court is of opinion that the said appellee is barred of all legal remedy whatever to recover of the appellant more than the sum tendered as aforesaid, without interest, and that the power to enforce 191 a sale of said land under the *deed of trust given by the appellant to secure the payment of said balance of purchase money is a "legal remedy" within the spirit and meaning of said section of the act aforesaid; and that the said deed of trust is a security only to the extent of the sum tendered as aforesaid, without interest, and can be enforced for the payment of that sum only.

The court is further of opinion, that so much of the decree aforesaid as declares that the fair value of the property sold would be the most just measure of recovery in this case, and orders and decrees that the balance of purchase money owing by the appellant to the said appellee secured by the deed of trust aforesaid be fixed as in said decree stated, and that an account be taken of said balance of purchase money, to be ascertained in accordance with the rule fixed by said decree, and declares that the said appellee is not barred or precluded in this case by the 9th section of the 138th chapter of the Code of Virginia of 1873 from relying on the lien of said deed of trust to enforce the payment of what is equitably due him according to the principles of said decree, is erroneous.

It is therefore decreed and ordered, that so much of the said decree as is hereinbefore declared to be erroneous be reversed

and annulled, and the residue thereof affirmed; and that the appellee, Langdon C. Major, pay to the appellant his costs by him expended in the prosecution of the appeal aforesaid here. And this cause is remanded to the said circuit court of Culpeper county for further proceedings, to be had therein in conformity to the opinion and principles herein expressed and declared; which is ordered to be certified to the said circuit court.

Decree reversed.

192 *Carter v. Dulaney & als.

March Term, 1878, Richmond.

D died in 1856, and by his will directed that any fund of his estate remaining after payment of his debts and funeral expenses, should be invested by his executor, and the interest applied to pay an annuity left to his wife. In January, 1860, the executor has in his hands \$4,991.84. In 1862, he invests in his own name \$5,900 in Confederate eight *per cent.* bonds. In December, 1864, he applies to and obtains from the judge of the circuit court of Richmond an order authorizing him to invest \$5,900 which he held in his hands as executor in Confederate bonds; and he invests the amount in February, 1865—Held:

1. **Executors—Investments in Confederate Securities—Statute.**—The statute did not authorize the investment of the fund in his hands, which was, in fact, good money, in Confederate bonds in 1865.
2. **Same—Same.**—The bonds invested in 1862 were invested in his own name, and were his bonds, though he may have intended to hold them for the estate.
3. **Same—Same.**—The executor is not to be credited for the amount of the investment, but is liable for the amount in his hands in January, 1860.

This was a suit in equity in the circuit court of Fauquier county, brought in February, 1869, by Caroline R. Dulaney, the widow, and two of the children of Bladen Dulaney, against Richard H. Carter, the executor, asking for an account of Carter's administration, and that they might have liberty to surcharge his accounts, &c. The only question in this court was as to the right of Carter to a credit for \$5,900, which he had invested in Confederate bonds. The

case is stated by Judge Christian in 193 his *opinion. The court below disallowed the credit, and he obtained an appeal to this court.

Brooke & Scott, for the appellant.

William Payne, for the appellee.

***Executors—Investments in Confederate Securities.**—See also *Crawford v. Shover et al.*, 29 Gratt. 69 *et seq.*; *Jennings v. Jennings*, 22 Gratt. 313; *Campbell's ex'ors v. Campbell's ex'or*, 22 Gratt. 649; *Bennett v. Claiborne et al.*, 23 Gratt. 366; *Moss et ux. et al. v. Moorman's adm'r et al.*, 24 Gratt. 97; *Crickard's ex'or v. Crickard's legatees*, 25 Gratt. 410; *Kirby v. Goodykoontz et al.*, 26 Gratt. 298; *Ammon's adm'r v. Wolfe et al.*, 26 Gratt. 621; *Tosh et al. v. Robertson et al.*, 27 Gratt. 270.

CHRISTIAN, J., delivered the opinion of the court.

The only question brought up by appeal in this case, is whether the appellant, Richard H. Carter, is entitled to a credit upon the settlement of his executorial account to the amount of \$5,878.20, alleged to have been invested by him for the estate he represented in bonds of the Confederate States. The following facts are disclosed by the record: Bladen Dulaney, of the county of Fauquier, departed this life in the latter part of the year 1856, seized and possessed of a large real and personal estate, having first duly made and published his last will and testament, which was admitted to probate in the county court of Fauquier on the 27th day of January, 1857. The will was written by the appellant, Richard H. Carter, and he was appointed sole executor under the will, with the express desire and request on the part of the testator that he should not be required to give security for the performance of his duties as such executor. He accordingly qualified as executor, without security, before the county court of Fauquier, on the 27th January, 1857.

The will of the testator contains the following directions to his executor (after providing for an annuity of \$600 to his wife), viz: "But, if after the payment of my debts and funeral expenses, there shall be money unexpended, whether the same be arrears of pay or derived from the sale of my crops, cattle, farm stocks or farming utensils, then it is to be invested at the discretion of 194 my *executor, and the interest accruing thereon applied to the payment of said annuity." &c.

It appears by the accounts settled by the executor, that on the 25th January, 1859, there was in his hands due the estate the sum of \$5,688.48, and on the 25th January, 1860, the sum of \$4,991.84. For this last amount he was a debtor to the estate on the 25th January 1860. It was plainly the duty of the executor to have invested that amount in a safe interest-bearing security to meet the annuity provided by the will. There was the highest obligation on him to do this. He was the confidential friend of the testator. He was selected and sent for to write his will. He was appointed the executor, with the "request and earnest desire" that no security should be required by the court of probate. Such confidence ought to have been scrupulously respected, and the wishes of the testator faithfully and diligently executed.

The object of the investment was to aid in providing an annuity for the widow of the testator. It is true that the investment was to be made "at the discretion of the executor," but the investment was to be made of moneys in his hands after the payment of debts and funeral expenses. On the 25th of January, 1860, certainly, if not before, every debt due from the estate had been fully paid, and there was in the hands of the executor on that day, subject to be invested under the directions of the will, the sum of \$4,991.84. This large amount was then in

his hands, and ought then to have been invested under the directions of the will of the testator. From that day he became a debtor to the estate, and must be regarded as a borrower of the fund. The excuse which the executor now attempts to make for not then making an investment is, that a suit was pending against him brought by the widow, and he was awaiting the termination of that suit in order that he might ascertain the exact amount which he could invest for the purposes of the annuity provided

195 *by the will for the widow. The record

in that case is not printed in the record of *Carter v. Dulaney*, now before us, but by consent of counsel at the bar it was agreed that the court should inspect the manuscript record of the case of "*Caroline Dulaney v. Carter, ex'or*," as if it was made a part of the record in the case before is. An inspection of the record in that case shows that the bill was filed by Mrs. Caroline Dulaney in order to get a construction of her husband's will in regard to certain furniture bequeathed under the will to her—whether she was entitled only to the furniture in the house which the testator occupied at the time of his death, or to all the furniture belonging to him, some of which was then in other houses which he owned. This was the principal matter of controversy in that suit. There was one other matter of minor importance upon which the court was asked to pass. It was this: The testator had directed in his will that the sum of \$1,500 should be applied to repairs on one house at Mount Alburn, one of the farms of the testator; the repairs made, according to the estimate of the architect employed, was more than \$1,500; and the question was, whether this additional amount was to be paid out of the estate or by Mrs. Dulaney. This amount, which was only \$133.87 (interest added), was paid by the executor on 27th March, 1858, as per receipt filed by him in said manuscript record. This suit terminated in September, 1861, by the dismissal of the plaintiff's bill. The real controversy in the case was (outside of the small amount of \$133.87, which the executor paid, and for which he received credit), whether the widow of the testator was entitled to all the furniture left by the testator, or only to that which was in the house in Washington, in which the testator lived at the time of his death. The decision of this question, nor of that of the repairs to the "Mount Alburn" property, amounting to only \$133.87, could not in any manner affect the

obligation of the executor to invest

196 *the sum of \$5,000 in round numbers,

which he admits was in his hands on the 25th January, 1860. Nor does the pendency of such a suit, for such a purpose, not at all affecting the fund in his hands, furnish him any valid excuse for retaining the funds belonging to the estate, without investing them according to the provisions of the will. For this amount, then, he stands as debtor to the estate and borrower of the fund. After the close of the war he seeks to discharge this indebtedness, on settlement of his executorial account before a commis-

sioner, by producing certain Confederate bonds. And the order of Judge Meredith of the circuit court of the city of Richmond, date December 6th, 1864, which recites that "on the petition of Richard H. Carter, executor of Bladen Dulaney, deceased, this day filed by his attorney, the court doth order that the said Richard H. Carter, executor as aforesaid, have leave to invest \$5,900 (the amount stated by him in his petition to be in his hands in his fiduciary character aforesaid), in interest-bearing bonds or certificates of the Confederate States," &c., &c. Under this order the investment was not made until the 11th February, 1865, when Confederate money as compared with gold was as 1 to 55; so that the sum of \$5,900 was worth only the sum of \$92.54. It therefore appears that the executor in this case having in his hands in January, 1860, nearly \$5,000 in gold, or its equivalent, which he was directed by the will of his testator to invest so as to produce an annuity for the widow (which it was his duty then to invest), offers before a commissioner, as a satisfaction of this gold debt, Confederate bonds purchased in February, 1865, representing \$5,900, but worth only \$92.54. The right to make such payment is urged upon the ground that the investment was made by a court of competent jurisdiction.

It is sufficient to say that this investment was made under an ex parte order 197 upon a petition which is not *before us. But it is impossible to conceive that the learned and able judge then presiding in the circuit court of the city of Richmond, would have made the order which he did if he had known that the fund which this executor desired to invest in Confederate bonds was received by him in January, 1860, and that he was thereby discharging a debt which he himself owed to a widow and orphans of \$5,000 and upwards, by turning over to them a Confederate bond worth only the insignificant sum of \$92.54.

The order of the circuit court was obtained on an ex parte petition by the executor under the act of March 5th, 1865. That act has been more than once construed by this court. See *Campbell's ex'ors v. Campbell's ex'or*, 22 Gratt. 649; *Grickard's ex'or v. Crickard's legatees*, 25 Gratt. 410. In these cases it was held that the act expressly provided that whenever a fiduciary had in his hands moneys received in the due execution of his trust, which, from the nature of his trust, or from any other cause whatever, he was unable to pay over to the parties entitled thereto, or to dispose of the funds in accordance with the directions of the instrument creating the trust, it should be lawful for him to apply by motion or petition to any judge of a circuit court for instructions to invest the fund thus remaining in his hands; and it was further held that before a party can avail himself of the provisions of this act three things must concur: 1st. He must have in hand the same money, or its equivalent in value, which he received in his fiduciary character. 2nd. He must have received the currency which he proposes to

invest in the due exercise of his trust; and 3d. He, for some cause, must be unable to pay it over to the parties entitled, or invest it in accordance with the directions of the instrument creating the trust. In the case before us no one of these three things existed. The

money which he had in hand in December, 1865, was Confederate *money, almost worthless, and not that which he acknowledged was in his hands in January, 1860, which was gold or its equivalent. The currency which he proposed to invest was not received in the due execution of his trust, for he admits he did not receive one dollar belonging to the estate after January, 1860, a period of more than a year before the establishment of the Southern Confederacy, and nearly two years before Confederate currency was in circulation. The fund in his hands, so far from being in a condition that it could not be invested under the will creating the trust, might have been and ought to have been invested any time after January, 1860.

The court is therefore of opinion that upon the principles declared in *Campbell's ex'ors v. Campbell's ex'or*, and *Crickard's ex'or v. Crickard's legatees* (supra), and numerous other cases since decided by this court, down to the case of *Patterson v. Bondurant's ex'or*, decided very recently, and in which case the many cases on this subject are collected and referred to in the opinion of Judge Anderson, that the executor cannot discharge himself from a gold debt contracted in January, 1860, by a Confederate bond, purchased by him with Confederate money in February, 1865, and depreciated at the rate of fifty-five dollars to one. (See also the opinion of Judge Burks, in *Cole's committee v. Cole's adm'r*, 28 Gratt. 365.)

But it is claimed in this case by the executor that while he made no investment, in the name of the estate he represented, of the funds in his hands, until February, 1865, yet, in April, 1862, he did invest the sum of \$5,900 in eight per cent. coupon bonds, and that he intended and regarded this investment as made for the estate. Now, if in point of fact the executor (though he was in default for more than two years in making the investment required by the will), in the

exercise of the discretion reposed in him by the will, had, as early as *April, 1862, invested the money in his hands belonging to the estate in Confederate bonds, and marked and designated these bonds as the property of the estate, he would certainly have had a much stronger case and have stood upon much higher ground in a court of equity. But it is not pretended that the money which he invested in April, 1862, was the money of the estate, or that the bonds taken were in any way marked or designated as bonds due the estate. They were his own bonds, bought with his own money. If he had died these bonds would have been the property of his estate and not that of Bladen Dulaney. It matters not that he intended they should stand as an investment for Dulaney's estate; the bonds themselves should have been so set apart and designated. They were not so set apart. The whole

defense of the executor in this case stands alone upon his own deposition; and upon his own evidence it is shown that the investment in April, 1862, was not made in the name of or for the benefit of the estate, as appears from the following extract taken from his deposition:

"Fourth question by same. You have stated that you received no money of the estate after the 25th of January, 1860; please state whether the amount in your hands on that day remained in your hands in kind until the investment you refer to, in April, 1862; if not, what became of it?"

"Answer. I did not keep it separate from my other means. I did not keep a separate account of a deposit in bank of that specific amount, but had an amount, or nearly so, at all times on hand sufficient to settle the balance due. I had either an equivalent amount on hand or at my call during the whole time.

"Fifth question by same. With what sort of funds did you buy the Confederate eight per cent. coupon bonds?"

200 *"Answer. My impression is that it was almost exclusively Virginia bank notes, and a check on the Exchange Bank of Virginia.

"Sixth question by same. In what funds were checks on the bank paid in April, 1862?"

"Answer. I do not recollect; I did not draw the money myself upon the check.

"Seventh question by same. Was there anything about the coupon bonds purchased in April, 1862, to indicate that they belonged to the estate of Bladen Dulaney?"

"Answer. There was no such mark or endorsement on the bonds.

"Eighth question by same. Where were the coupon bonds which you say you purchased for yourself about the same time; if you have them please file them with your deposition?"

"Answer. I have a portion of them which I will file; a portion I left with a friend in Orange county during the war, and since the war I have never called for them (about \$2,000). I had about the same amount burned up in my trunk with the wagon train at Amelia C. H., in April, 1865.

"Ninth question by same. Was there anything on the face of these last-mentioned bonds, or endorsed on their back, to distinguish them from the bonds for \$5,900?"

"Answer. I do not recollect that there was."

It is a significant fact, showing that the executor himself did not regard the investment made by him in April, 1862, as made for the estate, that he invested the same amount in February, 1865, under the order of the circuit court of Richmond, in his name as executor of Bladen Dulaney, and that when called upon to settle his executorial account before a commissioner, he produced the bonds purchased in February, 1865, and claimed that *these bonds were in full discharge of his indebtedness to the estate of his testator.

Upon the whole case we are of opinion

that there is no error in the decree of the circuit court of Fauquier, and that the same be affirmed.

Decree affirmed.

202 *Bank of Greensboro' v. Chambers & als.

[32 Am. Rep. 661.]

March Term, 1878, Richmond.

1. Wife's Separate Estate—Powers of Married Woman.—For the general powers of a married woman over her separate estate, see the opinion of Buks, J.

2. Same—Same.—In contemplation of a marriage between C and M, a deed of marriage settlement is executed by which C conveys to a trustee his dwelling-house and lot in Danville, other real estate, all his personal property, including his tobacco fixtures, in trust for the separate use of the intended wife for life, remainder to their children. The purpose of the settlement, as expressed in the deed, is to provide a home for the wife and children, and the only power of alienation expressed in the deed is, that the trustee may, on the written request of the wife, sell and reinvest on the same trusts. C, who before the marriage was a manufacturer of tobacco, after the marriage carried on the business in the name of his wife, and to obtain advances of money to carry on the business, C and his wife and the trustee conveyed the house and lot to a trustee to secure such advances—**Held:** Looking to the purpose and the whole provisions of the deed of marriage settlement, the wife had no power to convey her interest in the property for the purpose of securing said advances.

This was a suit in equity in the circuit court of the town of Danville, by the Bank of Greensboro' against A. B. Chambers, and Fannie E. Chambers, his wife, and Thomas J. Patrick, to subject a house and lot in Danville to satisfy a debt of said Fannie E. Chambers. Before the marriage of A. B. Chambers and his said wife, he and Patrick had been engaged in the manufacture of tobacco in the town of Danville. Before the marriage, Chambers and his intended wife entered into a marriage agreement, which was duly recorded, and is as follows:

203 *This indenture, made and entered into this 12th day of December, 1868 between A. B. Chambers, of the first part, Fannie E. Major, of the second part, and Thomas J. Patrick, trustee, as hereinafter named, of the third part:

Whereas a marriage is agreed upon and intended to be shortly had and solemnized by and between the said A. B. Chambers and the said Fannie Major; and whereas it is agreed and understood by and between the said Chambers and the said Fannie E. Major, that the property and effects of the said Fannie Major will come into the possession of and be subject to the control of and disposal of the said A. B. Chambers; and whereas the said A. B. Chambers is desirous of securing

and providing a comfortable home, and proper maintenance and support for his said intended wife, and any child or children there may be of the marriage between them: Now, this indenture witnesseth, that for and in consideration of the said intended marriage, and in pursuance and perfecting of the said hereinafter mentioned agreements, and also for the further consideration of five dollars to the said A. B. Chambers in hand paid by the said Thomas J. Patrick, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, he, the said A. B. Chambers, has this day bargained, sold, assigned, transferred, conveyed and set over, and by these presents doth hereby bargain, sell, assign, transfer, convey and set over, unto the said Thomas J. Patrick, his executors, administrators and assigns, the following real and personal property, to wit: A certain lot or parcel of ground, together with all the improvements thereon and appurtenances thereto, lying and situated on the north side of Main street, in the town of Danville, Va., beginning at the former northwest corner of Main street and Wilson Ferry road; thence with the line of said Ferry road, N. 21° 30' W. 283 feet to elbow; thence **204** N. 9°, W. *191 feet, to corner in road; thence S. 81°, W. 198 feet, to corner of road and Thomas B. Doe's line; thence S. with said Doe's line 20° 30' E. 202 feet to elbow; thence S. 25° 15' E. 361 feet to corner on said Main street; thence N. 57° 15' E. 200 feet front on said Main street to the beginning, it being the same lot or parcel of ground conveyed by Thomas J. Patrick and wife, by deed bearing date on the 15th day of April, 1866, and now of record in the clerk's office of the court of hustings for the town of Danville, and the same upon which the said Chambers now resides. Also a small tract or parcel of land, about three miles north of Danville, in the county of Pittsylvania, containing thirty-five acres, be the same more or less, adjoins the lands of Thomas C. Williams & Co., and others, and was purchased by said Chambers of a certain William A. Lash, by deed now of record in the clerk's office of the county court of Pittsylvania, to which reference is here made. Also, a wooden factory-house, on the west side of Lynn street, in the town of Danville, Va., together with the unexpired lease of said Chambers upon the ground upon which said factory stands, said lease extending to the 1st day of January, 1271. Also, in said factory-house, one hydraulic tobacco press, five retainers, ten box screws, bands and shrouds for the same, and one hundred dryers. Also, a chamber set of rosewood furniture, consisting mainly of bedstead, with hair, cotton and schuck mattresses, a bureau, wardrobe and washstand. Also, three chamber sets of walnut furniture, consisting of three bedsteads, with hair, cotton and schuck mattresses, two bureaus, two washstands. Also, two other walnut bedsteads, with necessary beds, &c., of cotton and schuck mattresses. Also, twenty-four chairs of different kinds, used in the chambers and dining-room at said Chambers' house. Also, the parlor furniture, consisting

***Wife's Separate Estate—Powers of Married Woman.**—See also Ropp v. Minor *et al.*, 33 Gratt. 97, and note.

mainly of two sofas or settees, two easy-chairs, and six fine chairs. Also, two
 205 *bay horses, one fine carriage and harness, one two-horse buggy and harness, one two-horse wagon with the usual gearing, to have and to hold the said property, both real and personal, hereby conveyed, transferred and assigned unto the said Thomas J. Patrick, his executors, administrators, &c., successors in office.

But nevertheless upon trust, and for the intents and purposes hereinafter expressed and declared of and concerning the same: that he, the said Thomas J. Patrick, his executors, administrators or successors in office, shall hold, use and manage the said real and personal property, and all and every part and parcel thereof, to and for the sole and separate use, benefit and disposal of the said Fannie E. Major, her said marriage notwithstanding, and that the same shall in no wise be subject to the disposition, control, debts, contracts or liabilities of the said A. B. Chambers, her said intended husband, and that he, the said trustee, will suffer and permit the said Fannie E. Major, after her marriage aforesaid shall have been consummated, to have, occupy, use and enjoy in quiet and peaceable possession during the term of her natural life, all the property, both real and personal, herein conveyed, assigned and transferred, without interference on the part of any one, and of him, the said trustee, save and except as to such acts and things as he may be required either in law or equity to do and perform by virtue of his office of trustee as aforesaid—the understanding and agreement between the parties hereto being, in consideration of the premises and of the marriage aforesaid, to settle said property to the sole and separate use and benefit of the said Fannie E. Major, and after her, to any child or children which there may be of the marriage between herself and the said A. B. Chambers, and in such manner as shall be hereinafter named. And it is moreover directly understood and agreed between the parties

hereto, that if at any time after the
 206 consummation *of the marriage aforesaid, the said Fannie E. Major should deem it for the best interest of herself and family that the said real and personal property herein conveyed should be sold and the proceeds of such sale invested in other real property, or in property more convenient and suitable for the purposes desired, then the said trustee, upon the request in writing of the said Fannie E. Major, shall make such sale and investments as shall be deemed desirable, necessary and proper in the premises, and hold the property so purchased upon the same terms and subject to the same trusts as that hereinbefore conveyed. But it is also agreed and understood between all the parties hereto, that the said A. B. Chambers shall be allowed to live in and upon said property, and the same shall be his home during the term of his natural life, though not subject to his control or management, nor liable for his contracts; and in case said property is sold and the proceeds invested in other real property, then he shall

be entitled to a home upon the same as upon that herein conveyed; and it is further covenanted and agreed between all the parties hereto, that the said Fannie E. Major, after her contemplated marriage aforesaid, and during her life, shall have a right to dispose of by deed or will, duly authenticated according to law, all or any part of the property hereinbefore conveyed, to a child or children of the marriage between herself and the said A. B. Chambers, or to a child or children of the said Chambers by a former marriage, having reference to an equality of division should there be more than one child; and finally, it is agreed and understood between all the parties hereto, that if the said Fannie E. Major, after her intended marriage as aforesaid, shall depart this life, leaving no child or children, nor the descendants of any by her intended husband, A. B. Chambers, and having made no testamentary disposition of said property to a child or children of the said A. B. Chambers by

207 his *former marriage, he, the said Chambers being survived by his said wife, then, and in that event, the property hereby conveyed, or what remains of the same, shall revert to and be divided amongst and between those to whom by the laws of the state of Virginia it would go, by virtue of their relationship to the said A. B. Chambers; and the said A. B. Chambers doth for himself, his heirs, personal representatives, &c., covenant and agree to and with the other parties named in this indenture, to warrant to them a good and lawful title generally to all the property hereby conveyed.

Witness the following signatures and seals:

A. B. CHAMBERS, [Seal.]
 F. E. MAJOR, [Seal.]
 THOS. J. PATRICK, [Seal.]

Teste—D. Blount,
 Jas. A. Glenn.

After the marriage the business was conducted in the name of Mrs. F. E. Chambers, and in February, 1870, A. B. Chambers, F. E. Chambers and Thomas J. Patrick executed a deed, which, after reciting that Fannie E. Chambers is engaged in the manufacture of tobacco in the town of Danville, and deems it necessary to make with some party an arrangement for an advance of money and the discount of such notes and drafts as she may draw, and that the Bank of Greensboro' had agreed to advance to and discount the notes and drafts of said Fannie E. Chambers to an amount not exceeding \$25,000 at one time, to secure the said Bank of Greensboro', conveyed to R. W. Peatross the house and lot in the town of Danville, which was embraced in the said marriage settlement, in trust, to secure said bank from any loss or damage from advancements to or drafts drawn, &c., during the succeeding eighteen months for the benefit and accommodation of said
 208 Fannie E. Chambers, with *power of sale after the eighteen months. The acknowledgment of Mrs. Chambers was taken by Peatross, the trustee, as notary; and the deed was admitted to record.

The Bank of Greensboro' seems to have

been the firm name of three persons doing business in Greensboro', in North Carolina, and they afterwards were incorporated by that name. In pursuance of the arrangement they seem to have advanced money to F. E. Chambers, and when this suit was brought they held her five notes, together amounting to \$13,000, which they had discounted at eighteen per cent.

A number of questions were made in the case, but the only one considered in this court was the power of Mrs. Chambers under the marriage settlement to make the deed of trust. The court below dismissed the bill; and the plaintiffs obtained an appeal to this court.

E. E. Bouldin and Marshall & Johns, for the appellants.

Jones & Bouldin and Robinson, for the appellees.

BURKS, J., delivered the opinion of the court.

It is conceded by the counsel on both sides that the estate of the appellee, Mrs. Chambers, in the property embraced in the antenuptial contract and deed of settlement of the 12th day of December, 1868, is a separate estate, and it was further very properly conceded in argument by one of the counsel for the appellants, that this estate of Mrs. Chambers is limited to the term of her natural life. What are her powers over it, is the question presenting most difficulty. Has she the power to dispose of it, or to encumber and charge it with the payment of her debts in such manner and to such extent as would lead to an alienation of it?

209 *It is the settled law of this state that a married woman is regarded in equity as the owner of her separate estate, and as a general rule, the *jus disponendi* (qualified as to the mode of disposal of the corpus of real estate), incident to such estate, unless and except so far as it is denied or restrained by the instrument creating it; but it is subject to such limitations and restrictions as are contained in the instrument, which may give it *sub modo* only, or withhold it altogether. *McChesney & als. v. Brown's heirs*, 25 Gratt. 393; *Nixon v. Rose*, 12 Gratt. 425; *Penn & others v. Whitehead & others*, 17 Gratt. 503.

As incident to this *jus disponendi*, she may charge such estate with the payment of her debts. She may charge it as principal or surety for her own benefit, or that of another. She may appropriate it to the payment of her husband's debts. She may even give it to him if she pleases, no improper influence being exerted over her. She may extend the charge to the whole, or confine it to a part of the estate. If no specific part is appointed for the payment of the debt, the fair implication is, that the whole was intended to be made liable. If, on the other hand, only a part of the estate, expressly or by fair inference, is designed to be charged, no liability whatever can attach to the residue. The liability of the estate can arise only out of the supposed intention of the

wife to charge it, and no pecuniary engagement can be a charge upon the estate, which is not connected by agreement, express or implied, with such estate. *Burnett & wife v. Hawpe's ex'or*, 25 Gratt. 481; *Darnall & wife v. Smith's adm'r & als.*, 26 Gratt. 878.

We do not find in the deed of settlement in this case any express interdiction or limitation of the *jus disponendi*, and of the incidental power to encumber and charge the separate estate to an extent involving alienation, but,

210 if by a fair construction of the instrument, the exercise *of these powers would be inconsistent with the plan and scheme of the settlement, and would defeat the plain intent pervading the deed, they must be considered as much forbidden as if expressly denied. The exclusion of the power of alienation, as said by Judge Moncure in *Nixon v. Rose*, trustee, *supra*, "is often, if not generally, necessary to effectuate the objects of the settlement, and to protect the wife as well from her own weakness, as from the power and influence of her husband. The law, therefore, favors the intention to exclude it, and will give effect to such intention whenever it can be ascertained, by a fair construction of the instrument."

In the construction of every instrument, the paramount rule is so to construe it, as, if possible, to give effect to every part of it, and in order to discover the intention of the parties, we look not only to the terms of the instrument, but to the subject matter and the surrounding circumstances.

The settlement in this case appears to have been wholly of the property of the husband, and it would seem it was all he had. To what extent, if at all, he was indebted, is not disclosed. The property consisted in part of a lot with improvements, on which he resided, in the town of Danville. Its value does not appear, except that on the pledge of it as security, the appellants agreed to advance from time to time a sum of money not exceeding at any one time \$25,000. It must, therefore, have been regarded as valuable. The other property conveyed consisted of a small tract of land (thirty-five acres), a wooden factory-house with an unexpired lease of the ground on which it stands, divers fixtures for the manufacture of tobacco, household furniture, several horses and other articles of personal property. From the enumeration and description of the property, it is evident that

211 the property of principal value in the settlement *was in the house and lot in Danville, the home and residence of the grantor.

Looking to the deed, we cannot fail to discover that the leading intent was not only to provide, but to secure a home, maintenance and support, not for the wife only, but also for the children of the marriage. This is quite apparent from the preliminary recitals in the deed: "Whereas the said A. B. Chambers is desirous of securing and providing a comfortable home and proper maintenance and support for his intended wife, and any child or children there may be of the mar-

riage between them: Now, this indenture witnesseth," &c.

This declared purpose to provide and secure a "home" for the wife and children is, by a subsequent provision of the deed, extended to the husband; for, after conferring upon the wife the power to have the property sold by the trustee and the proceeds invested in other property subject to the trusts impressed on the property conveyed, it is expressly stipulated as follows: "But it is also agreed and understood between all the parties hereto, that the said A. B. Chambers shall be allowed to live in and upon said property, and the same shall be his home during the term of his natural life, though not subject to his control or management, nor liable for his contracts; and in case said property is sold, and the proceeds invested in other real property, then he shall be entitled to a home upon the same, as upon that herein conveyed." Again, the only sale of the property expressly authorized by the deed is to be made by the trustee "upon the written request" of the wife, if at any time after the consummation of the marriage "she should deem it for the best interest of herself and family that the said real and personal estate herein conveyed should be sold, and the proceeds of such sale invested," &c.

Thus it would seem, that the leading intent of the settlement was to provide
212 for the "family"—to secure a *home for all, and the common support and maintenance of the wife and children. Accordingly, in harmony with this intent, the general features of the scheme were to settle the whole property to the separate use of the wife during her life, and to limit the equitable fee to the children of the marriage, with power in the wife to make appointment amongst them, observing the principle of equality, or on failure of issue of the marriage, as it would appear, to appoint the children of the husband by a former marriage to take, observing the same principle of equality in the appointment; and on failure of issue of the marriage and default of appointment to the children of the husband by the former marriage, at the death of the wife, she having survived the husband, to limit the fee to "those to whom by the laws of the state of Virginia it would go by virtue of their relationship to the said A. B. Chambers (the husband)." The only contingency in which no limitation is provided, is the death of the wife in the lifetime of the husband without issue of the marriage and without appointment by the wife among the children of the husband by the former marriage. Upon the happening of that contingency, the fee, by operation of law, would result to the husband, the grantor, in the settlement.

Now, this whole scheme would seem to be designed to preserve the property, settle and secure its use and enjoyment to the family—to provide and secure a home for them and support and maintenance for the wife and children. The only change in the property which is expressly authorized, is a sale, on the written request of the wife, and reinvest-

ment of the proceeds in other property, subject to the same trusts which are impressed on the property conveyed, if the wife should deem such sale and investment to be "for the best interest of herself and family."

It is true, the trustee is directed to
213 "hold, use and *manage" the property * * * "for the sole and separate use, benefit and disposal of the wife," but the word "disposal" may appropriately be referred to the sale for reinvestment which has been mentioned, and the language descriptive of the control of the estate by the wife, while per se and disconnected from the other parts of the instrument it might not import with certainty any restraint against alienation, should, in its relation to other provisions, have a restricted meaning given to it. The language is, that "the said trustee will suffer and permit the said Fannie E. Major (the intended wife), after her marriage aforesaid shall have been consummated, to have, occupy, use and enjoy, in quiet and peaceable possession during the term of her natural life, all the property, both real and personal, herein conveyed, assigned and transferred, without interference on the part of any one, and of him, the said trustee, save and except as to such acts and things as he may be required either in law or equity to do and perform by virtue of his office of trustee aforesaid."

Bearing in mind the leading intent of the settlement, to-wit: to provide and secure a home and support and maintenance for the family, the construction of the language just cited should be such as, if possible, to give effect to that intent, not to defeat it. The words "have, occupy, use and enjoy" may, and we think should be construed, as used with particular reference to the words which follow, relating to the possession of the property, the intent being that she should have "quiet and peaceable possession * * * without interference on the part of any one and of him, the said trustee * * * ." These words too were the more proper as serving to qualify those preceding, by which it was declared that the trustee should "hold, use and manage" the property.

The language which immediately follows, to-wit: "the understanding and agree-
214 ment between the parties hereto *being, in consideration of the premises and of the marriage aforesaid, to settle said property to the sole and separate use and benefit of the said Fannie E. Major (the intended wife), and after her, to any child or children which there may be of the marriage between herself and the said A. B. Chambers, and in such manner as shall be hereinafter named," was more particularly intended to declare what had not been done before, the disposition of the estate after the death of the wife. It had already been declared that her interest should be for her life, that the martial rights of her husband should be excluded, and it only remained to limit the estate after her death. Some of the property embraced in the deed of settlement was personal property, which might perish from use or from natural causes. In

the contingent limitation of the property to the heirs or next of kin of the husband after the death of the wife, the words "what remains of the same" are used, we think, in reference to the possible diminution of the estate from the causes before mentioned.

We think, taking the whole deed together, the fair construction is, that it was intended that the property should be kept together during the life of the wife, so as to furnish a home for the family and for the common support and maintenance of the wife and children, and that it was never intended that the wife should have the power (except for the purpose of reinvestment, as specially provided), to alien the property, or to encumber or charge it in such manner and to such extent as to lead to alienation. The exercise of such power would be inconsistent with the scheme of the settlement, and effectually defeat the leading and prevailing intent indicated by the deed.

It follows that, in our judgment, the claim of the appellants, whether under the deed of trust relied on, or under the alleged
215 agreement of Mrs. Chambers to *charge the estate with the payment of the money advanced, cannot be sustained. She had no right to charge her own separate estate, in the manner claimed, with the payment of the money advanced, nor can the arrangement made be sanctioned as a legitimate exercise of the power given by the deed of settlement to make sale of the property and invest the proceeds.

The money advanced on the credit of the trust property was to be used in a hazardous business, and the purposes to which it was to be implied could, in no just sense, be called an investment under the terms of the deed of settlement. The appellants, when they advanced the money, knew how it was to be employed. The deed of trust under which they claim shows on its face that they had this knowledge. With this knowledge, and a full knowledge of the deed of settlement and all its provisions, they advanced the money at a ruinous rate of interest (eighteen per centum per annum), and took a deed on the trust property to secure its payment. The deed is not a valid security, nor are the notes which were given for the loan, nor any other engagement or undertaking of Mrs. Chambers, a valid charge upon the trust property or upon any estate or interest which she has in it.

Judicial decisions, based mainly on construction, can seldom be relied on as precedents for construction in other cases, for the obvious reason, that the instruments construed differ, more or less, in their terms, subject-matter and attending circumstances. They are sometimes alike, but nullum simile est idem. The case of *Penn & others v. Whitehead & others*, 17 Gratt. 503, in some of its features, resembles the case in judgment, but is very unlike it in other essential particulars. In that case, the settlement was post-nuptial, and the consideration flowed wholly from the wife. The property

settled consisted of some slaves and
216 other personal estate, of the *value, all together, of little more than one thousand dollars. The husband was insolvent, and there was a numerous family of children. The estate was limited to the separate use of the wife for her life, to remain in her possession for the support and maintenance of herself, her issue and family, and for no other purpose, and after her death, to her children. The profits of the estate were wholly inadequate to the support of the family, and it was held that the wife was not restrained by the settlement from engaging in a small mercantile business, to be conducted by her husband and his sons, on the credit of the separate estate. In the case before us, the consideration flowed from the husband. The settlement was before and in contemplation of marriage. The property of chief value was a house and lot, the residence and home of the husband. The primary object of the settlement was to provide and secure this home to the wife and any children there might be of the marriage. While, under the circumstances, it may reasonably have been supposed to have been in contemplation of the parties in making the settlement in the first case, that a small mercantile business might be undertaken on the credit of the estate, it would seem wholly inconsistent with the intent and objects of the settlement in the present case to permit the wife to engage in the hazardous business of buying, selling and manufacturing tobacco on the credit of the property dedicated and set apart to her as a home for herself and her family; and, if the adventure should prove disastrous, as in this case, she would be deprived of the very home intended to be secured to her and her family.

In the petition, briefs and oral arguments of counsel, several interesting questions have been presented for our consideration, such as whether the bill should not have been in the corporate name of the "Bank of Greensboro'," and whether the bill, in its
217 present form, may be treated *as such a bill; whether the trustee in the deed of trust to the appellants was competent, as notary public, to take and certify the acknowledgment and privy examination of Mrs. Chambers as a party to said deed; whether the contract for the loan made and security taken by the appellants was a Virginia contract or a North Carolina contract; and if the latter, whether the contract and security (being for a higher rate of interest than is allowed by the laws of North Carolina), can be enforced on a bill by the appellants in a court of equity in Virginia.

The view we have taken of this case makes it unnecessary to decide these and other incidental questions raised.

We are all of opinion, for the reasons stated, that there is no error in the decree of the circuit court dismissing the bill of the appellants, and that said decree should therefore be affirmed.

Decree Affirmed.

**218 *Richmond & Petersburg R. R. Co.
v. Kasey & als.**

March Term, 1878, Richmond.

Absent BURKS, J.

I. K, as general freight and ticket agent of the R. & P. R. R. Co., gave a bond with sureties. The rule of the company was that he should settle monthly; and though there was no rule on the subject, it was expected that freight and tickets should be paid for in cash. K seems to have given credit at his own risk to such persons as he chose, for the freight, and this was known by the president, who remonstrated with him for doing it. He did not settle his accounts promptly, and the deficit grew for eighteen months, when he was dismissed. There was no fraudulent concealment of these facts by the officers of the company, though the sureties of K were not informed of them—HELD:

1. Railroads—Freight Agents—Liability of Sureties.—The sureties are not released from their liability for the default of K, by the knowledge of the officers of the company that he gave credit for the freight delivered. And if there had been a rule that freight should be paid for in cash, and that rule had been changed after the execution of the bond, that would not have released the sureties.

2. Same—Same—Same.—There having been no fraudulent concealment of the fact that K did not settle promptly, the failure to inform his sureties of the fact, did not relieve them from their liability for the default of K.

3. Same—Officers—Employment Bonds—Conditions—Rules.—The rules and regulations of a corporation made for the government of the conduct of its officers, do not become terms and conditions of the bond of its officers unless such an intention is expressed on the face of the bond.

This was an action of covenant in the circuit court of the city of Richmond, brought in April, 1873, by the

219 *Richmond and Petersburg Railroad Company, against Robert B. Kasey and five others, to recover from the defendants an amount of money which the plaintiffs alleged Kasey, as their ticket and freight agent, had received and had not accounted for. The action was founded on the bond of Kasey, as such agent, the other defendants being his sureties in the bond. There was a judgment against Kasey for \$2,319.55, with interest from April 1, 1873, and a judgment in favor of the other defendants, and thereupon the plaintiffs applied to a judge of this court for a writ of error; which was

'Negligence of Officers—Discharge of Sureties.—In regard to duty of officers to report promptly to sureties any default of agent and what negligence on their part will discharge sureties, see 19 Am. & Eng. Enc. Law 77.

Railroad Agents' Accounts—Equity Jurisdiction and Relief.—In *Vilwig v. B. & O. R. Co.*, 79 Va. 449, the principal case is cited by the court as sustaining the doctrine that courts of equity have jurisdiction in matters of account involving the dealing of an agent, where he occupies a position of trust, has the duty of keeping and rendering accounts, and has custody of the vouchers of his receipts and disbursements, as the remedy at law is not so free from difficulty.

awarded. The case is stated by Judge Moncure in his opinion.

W. W. Gordon and B. H. Nash, for the appellant.

John A. Meredith and J. G. Blackwell, for the appellees.

MONCURE, P., delivered the opinion of the court.

This is a writ of error to a judgment of the circuit court of the city of Richmond, rendered on the 30th day of July, 1874, in an action of covenant brought in said court by the Richmond and Petersburg Railroad Company, plaintiff, against R. B. Kasey, M. M. Kasey, R. H. Whitlock, Peter J. Crew, Silas L. Johnson and C. B. Lipscomb, defendants. The bond bears date on the — day of November, 1870, is in the penalty of \$3,500, and has a condition thereto annexed, reciting that the said R. B. Kasey had been appointed by the president and directors of the Richmond and Petersburg Railroad Company general ticket and freight agent of said company, and stipulating as follows, to-wit: "Now, if the said R. B. Kasey shall faithfully perform all the duties of the said office, and shall well, truly and faithfully account for all moneys or other valuable effects belonging to said company, or of which the said
220 company may become the *carriers or warehousemen, that may in any manner be entrusted to him, the said R. B. Kasey, during his continuance in said office of general ticket and freight agent; any such money or other effects which may be injured, lost or destroyed while in the custody or under the charge of the said R. B. Kasey as aforesaid, to be regarded and held as so injured, lost or destroyed by his negligence and fault, unless shown by him to have been injured, lost or destroyed otherwise than by such negligence or fault, then this obligation to be void, else to remain in full force and virtue." A breach of the said condition was charged in the declaration.

On the 7th of November, 1873, "came the parties, by their attorneys, and mutually agreed that it be referred to Lawson Nunnally, as a commissioner, to ascertain and report at as early a day as practicable, what amount, if any, is due from the defendants to the plaintiff in this cause, with liberty to either party to except to said report, and to show cause against the same, which said exceptions are to be heard and determined by the judge of this court upon such evidence as may be reported by the commissioner, and may be offered by either party," &c., "and any exceptions to the report of said commissioner shall be filed five days before trial."

The said commissioner returned a report to the said court, showing that in pursuance of the said order of reference, "after spending much time in examining the books of the said railroad company, investigating the accounts between the parties, taking the depositions of sundry witnesses and fully hearing the statements of the parties and their counsel," he had come to a conclusion thereon, and was of opinion that "the ac-

count between the parties should stand thus." Then follows the said account, showing to be due thereon to the said company the sum of two thousand three hundred and nineteen *dollars and fifty-five cents, which should bear interest from the 1st day of April, 1873, till paid.

The depositions taken by the commissioner were returned with his report.

Four exceptions were taken by the defendants to the report of Commissioner Nunnally, and will be hereinafter set out and commented on.

On the 30th day of July, 1874, came again the parties, by their attorneys, and the defendants pleaded "covenants performed," and "covenants not broken"; to which the plaintiff replied generally, and put itself upon the country, and the said defendants likewise; and neither party demanding a jury, but agreeing that the whole matter of law and fact may be heard, and judgment given by the court; and the court, upon consideration of the evidence adduced in this cause, and the report of Commissioner Nunnally, filed herein on the 27th of June, 1874, and the testimony returned therewith, with the exceptions to said report, adjudged that the plaintiff recover against the defendant, Robert B. Kasey (the principal in the said bond), twenty-three hundred and nineteen dollars and fifty-five cents, with interest thereon from April 1st, 1873, until paid, and the costs; and that the defendants, M. Kasey, R. H. Whitlock, Peter J. Crew, Silas L. Johnson and C. B. Lipscomb (the sureties in the said bond), go thereof without day and recover against the plaintiff their costs by them about their defence therein expended.

To which said judgment in favor of the said five last named defendants (the sureties, in said bond), the plaintiff excepted, and tendered his bill of exceptions, which was made a part of the record, and in which was certified all the evidence adduced on the trial of the cause.

The plaintiff applied to a judge of this court for a writ of error to said judgment, which was accordingly awarded, and that is the case we now have to decide.

222 *The questions arising in this case are presented by the four exceptions taken by the defendants to Commissioner Nunnally's report, and were argued in the same order by counsel in their argument of the cause in this court. We will pursue the same order in considering and deciding the said questions, and in doing so will state, substantially, so much of the evidence in the cause, and such authorities and cases as seem to be material to be stated.

The first exception is as follows:

"1. The item charged to him (R. B. Kasey) for tickets and freight after his discharge. These items are charged between the 3d and 10th of March. He was discharged on the 3d of that month. It is clear that the charge is illegal. The plaintiff endeavors to get over the difficulty by trying to prove that corresponding credits are given; but the witness fails to point out the credits. He merely

says credits were given, but cannot designate the credits; they were embraced in the general credits. This confuses the accounts, so that its accuracy cannot be tested. The sureties should therefore be discharged.

We think the items of charge above referred to are good charges, as well against the sureties as the principal, and are warranted by the report of Commissioner Nunnally and by the evidence of M. S. Yarrington, the treasurer of the company. In the said report, after charging the defendants with \$1,263.45 for freights collected between the 3d and 10th of March, 1873 (the said R. B. Kasey having ceased to be the agent of the company on the 3d of March, 1873), the commissioner thus proceeds: "This commissioner has given much thought to these charges; but when he considered that more than \$2,400 has been collected by the company and credited Kasey after he left the employment of said company, and the testimony of M. S. Yarrington, the treasurer, he saw no objection to such charges being made, **223** more particularly *when corresponding credits were given therefor, and he has therefore allowed them."

And in the deposition of said Yarrington, taken by the commissioner on the 20th of June, 1874, in answer to the second question by commissioner, the witness says: "After Kasey left the employment of the company, we determined to fix some period of time to which to charge him, and fixed the 10th of March, 1873, and the bills uncollected by him and left in his office were collected by his clerks and other employees of the company, and as they made such collections and handed over the money, Kasey was credited with the same, as may be seen by the account, such credits amounting to more than \$2,400, and the charges to only \$1,263.45."

It thus appears, not only that these are proper charges against the principal and sureties, but that no loss, in any event, could have been sustained by either of them from making them.

The second exception is as follows:

"2. The uncollected bills should be credited to Kasey. The company knew that he was giving credits for freights, and thus sanctioned and approved it, and therefore should bear the loss; it should not fall on his innocent securities. When they signed his bond the rule of the company was that no credit for freight should be given. This formed a part of their contract with the company. It was practically incorporated into the bond, and they were protected from this risk; the company changed the rule by allowing credits for freights to be given, and thus increased the risk, and should bear the loss. The securities were not informed of this change, and hence had no means of protecting themselves, and upon every principle of law and equity are discharged from the loss that was caused by this change in the rule of the company."

The company did not sanction or **224** approve Kasey's *giving credit for freights, nor did the president or

treasurer of the company. The president of the company, T. H. Wynne, in answer to the third question propounded to him on his cross-examination, viz: "Did you know Kasey was in the habit of delivering articles without the payment of freights?" says: "Yes, sir, and I knew he did it at his own risk and hazard as regards the freights." And in answer to the fourth question, "Did you interfere to prevent it?" he says: "I frequently remonstrated with him in regard to the risk which he was assuming, when I thought it was a very doubtful matter in regard to his collecting the freight, and he replied that he could trust the parties, and was willing to risk it." And in answer to, the fifth question, "Did you speak to him in regard to particular persons, or as to the particular practice?" he says: "I spoke to him as to both, but more particularly in regard to parties I would not have trusted."

It does not appear that when the sureties signed the bond it was the rule of the company that no credit for freights should be given, nor that there was any change of the rule of the company on this subject after they signed the bond and while their principal was agent of the company. In answer to a question propounded to the witness, Yarrington, on his cross-examination, he says: "The rule of the company requires that he (the ticket and freight agent) should settle his account for the preceding month by the 5th of each month; Kasey never complied with this rule, and was in arrear on each successive month; on the 23d of December, 1872, he made a payment which closed the account for the month of November, and on the 1st of January, 1873, he was in arrears, as shown in Account A." And in answer to other questions propounded to the same witness on his cross-examination, he further says as follows:

225 *"Thirty-seventh question. When did you first become aware that Kasey was in default to the company?"

"Answer. I think it was about twelve or eighteen months before he left; I knew that in the first month he did not settle until four days after the time allowed by the rules, and he continued so for each successive month until he left; his indebtedness increased nearly every month.

"Thirty-eighth question. Did you inform the president or directors of this fact?"

"Answer. Yes, sir; I did.

"Thirty-ninth question. Were the securities of Kasey informed of it?"

"Answer. Yes, sir; I cannot say when.

"Fortieth question. You have spoken of accounts rendered to you by Kasey; did you find those accounts generally correct?"

"Answer. No, sir; and sometimes I found errors which I corrected; it was frequently the case—almost every month."

It does not appear that the company ever changed its rules in regard to the time for paying for tickets and freight. On the contrary, it appears that no such change was made while Kasey was agent for the company. But it would have been competent for the company to have made such change

without impairing the liability of any of the obligors to the bond, principal or sureties. It is well settled, as we will presently see, that the rules and regulations existing at the time of the execution of such a bond do not become terms and conditions thereof, unless such an intention be expressed on the face of the bond.

We are therefore of opinion that the second exception is unsustainable.

226 *The third exception is as follows:

"3. The default occurred in the first month, and was continued, with the knowledge of the company, each month until it reached the amount of the penalty of the bond. No information of this default was given to the sureties, and they had no opportunity of protecting themselves. It was the duty of the company to have discharged him at the end of the first month. Every subsequent defalcation was with the knowledge and concurrence of the company, and they should bear the loss. It was their duty to the securities to discharge him, and was a part of the contract itself. To allow the defalcation to increase monthly until it reached the penalty of the bond, was not only a breach of the contract, which required that he should be discharged when the first default was known, but it was a fraud on the securities, and vitiates the whole claim."

The default did not reach the amount of the penalty of the bond, as stated in the third exception. Information of the default was given to the sureties by Yarrington, though he could not say when; and Wynne says that he did not inform the sureties of Kasey of the condition of his accounts until he admitted that he was behindhand; which seems to imply that he did then so inform them. On being asked, "When did you first become aware that Kasey was in arrears?" Wynne answered, "About a year before he left, I was informed by Mr. Yarrington that he was in arrear; but he said he could settle at any time, and would take the receipts of the succeeding month to settle for the preceding one, and would so settle." If any defalcation of Kasey was with the knowledge of the company, certainly there was none with its concurrence, or that of its president, treasurer or auditor.

Certainly there was no fraud nor connivance on the part of the company, or

227 of its president, treasurer or *auditor in any transaction with Kasey in regard to his agency aforesaid for the company.

The said president and treasurer seem to have acted in that regard with an eye solely to the interest of the company, which was at the same time the interest of the sureties. If they refrain for any time from removing him from office, or otherwise proceeding against him, it was only with the hope of enabling and inducing him to pay what he owed in exoneration of his sureties. It does not appear and is not pretended that the company entered into any contract or had any understanding with Kasey which had the effect of tying its hands for a moment and preventing it from enforcing the obligation of himself and his sureties,

or removing him from office whenever it might be its pleasure to do so; nor that the company ever released any lien which it may have had (but in fact it had none) for the security of said bond or the indemnity of the said sureties. It does not appear that the said president or treasurer had any acquaintance, certainly the company itself could have had none, with the said Kasey at the time he was received in its employment. The sureties, on the other hand, no doubt knew him well and were his friends. They had confidence in him, and were willing to join him in the bond; and by offering to do so, and actually doing so, they enabled him to obtain the agency aforesaid. They ought to have looked to their interest and made enquiries and taken care of themselves in the matter, instead of waiting for two or three years, until their principal was turned out of office and a demand was asserted against him for his default therein, and then setting up as a defence for themselves the ground that their principal had not been compelled by the company to settle his accounts with it more promptly.

We are of opinion that the third exception is unsustainable, and that it will so fully
228 appear from the authorities *to which we will refer, after noticing the next and last exception, which is as follows:

"4. The dealings with Garber, charging Kasey with the money received from Garber. This was no part of his contract. He was general ticket and freight agent to sell tickets and receive money and to collect freights. He had nothing to do with Garber. He did not place the tickets in his hands, nor did he receive the money from him. That he is charged with all the tickets sold by Garber, is admitted and proved. And the only proof that he has been credited is a sweeping and general assertion to that effect; no item of credit can be pointed out. But it is said that these credits are embraced in and formed a part of other credits, which items, and what proportions of each item, the witness is unable to state. This commingling of debts and credits, which properly form no part of the accounts, is sufficient to vitiate the claim. But there is a more fatal objection. It increases the risk of the principal contractor without the consent of the sureties, and that discharges them; for it is a well-settled principle that any act of the party with whom the contract is made, which increases the risk of the promiser without the consent of his sureties, vacates the promise as to them. The period of the tenure of his office was indefinite, with power in the company to dismiss; and this they were bound to exercise with due regard to the interest of the securities."

The matter of this exception is fully explained in the deposition of Yarrington, taken June 20th, 1874, in the following question and answer:

"Third question by commissioner. Many enquiries have been made of you in regard to tickets delivered to Mr. Garber for sale and charged against Kasey; please explain more fully how this was?

"Answer. Mr. Garber was engaged in the business of transporting passengers
229 and their baggage from one *depot to another, and those leaving the city from their residences to said depots, and an arrangement was made with him for the sale of tickets by the president of the company for the purpose of facilitating passengers, and only the tickets actually sold by said Garber were charged to Kasey, and I am fully satisfied that every ticket sold by Garber has been accounted for by him and Kasey credited for the same; and upon reflection, since my deposition was given a few weeks ago, I am satisfied Kasey knew of the arrangement, for he was in the habit of receiving Garber's checks for the money and depositing them in bank to the credit of the company."

We think that the sureties sustained no injury from the transactions referred to in the fourth exception, and that the said exception is therefore unsustainable.

Kasey's office was that of general ticket and freight agent. That Garber was employed by the company to help him to sell tickets certainly did not injure him or his sureties if they sustained no loss, as they certainly did not, on his account. The whole account of such agency, including that of Garber, was kept in Kasey's name, because the company wished to have but one such agent. But this was done with the consent of Kasey, and his sureties can make no valid objection on that account. Kasey no doubt, from necessity, had several assistants in the execution of his agency. That Kasey might possibly have sustained loss from the default of Garber, which he did not in fact sustain, can be no good ground for releasing the sureties.

Having expressed our views on all the questions arising in the case, we will now notice the authorities which have been referred to, or many of them, some of which we think fully sustain those views, while none seem to be in conflict therewith.

They are: *United States v. Kirkpatrick*, 9 Wheat. R. 720; *Same v. Vanzant*, 11 Id. 184; *Same v. Nicholl*, 12 Id. 505;
230 **Dox, &c., v. Postmaster-General*, 1 Pet. 318; *Jones v. United States*, 18 Wall. U. S. R. 662; *The People v. Jansen, &c.*, 7 John. R. 331; *The People v. Russell*, 4 Wend. R. 570; *Albany Dutch Church v. Vedder, &c.*, 14 Wend. R. 165; *Board of Supervisors v. Otis, &c.*, 62 New York R. 88; *Atlantic & Pacific Tel. Co. v. Barnes & al.*, 64 Id. 385; *The Commonwealth v. Brice*, 22 Penn. St. R. 211; *Pittsburg, &c., Railway Co. v. Shæffer*, 59 Id. 350; 2 J. J. Mar. 564; *Taylor v. Bank of Ky.*; *The Trent Navigation Co. v. Harley*, 10 East R. 34; *Burgess v. Eve*, 13 Law Rep., equity cases, 450; *Phillips v. Foxall*, 7 Law Rep. Court of Q. B. 666; *Sanderson v. Aston*, 8 Id. Court of Exchequer, 73; *Holmes v. Commonwealth*, 25 Gratt. 771.

In *The People v. Jansen, &c.*, supra. decided in 1811, in an action brought against a surety on a bond given for the faithful discharge of the duty of a loan officer under the act therein mentioned, it was held that

the surety might set up in his defence the laches of the supervisors in not discharging and prosecuting the loan officer for his first default, but suffering him to continue after repeated defaults for upwards of ten years, when the loan officer became insolvent, and without prosecuting the officer as required by the act, and where no notice was taken of the defaults of the principal until after the death of the surety, this laches of the supervisors was held to be a good defence, especially in a suit against the heirs of the surety. The facts of that case were decidedly more favorable to the surety than those of this, yet that case has since been disapproved and overruled. See 9 Wheat. R. 720; 4 Wend. R. 570; 14 Wend. R. 166, 170, 171; 62 N. Y. R. 95, *supra*.

In *Albany Dutch Church v. Vedder, &c.*, *supra*, decided in 1835, in which the unanimous opinion of the court was delivered by Savage, C. J., it was held that "the sureties

231 had no reason to place any reliance upon the *by-law requiring the treasurer to account every six months; that was a mere private regulation which did not form any part of the contract with the sureties."

In *Board of Supervisors v. Otis, &c.*, *supra*, decided in 1875, it was unanimously held by the court of appeals of New York (Church, C. J., not sitting), that "the sureties upon the official bond of the county treasurer are not discharged from their obligation by any neglect, omission of duty, unfaithfulness, or malfeasance on the part of the board of supervisors in their dealings with the principal in the bond. The board of supervisors and the county treasurer are alike agents of the county, and the acts or neglects of one agent cannot affect the liability of another, or of his sureties to the common principal."

In *The Pittsburg, &c., Railway Co. v. Shoeffler & als.*, *supra*, decided in 1869, the rules of a railway company required from the cashier monthly reports and payments; the bond of the cashier and his sureties was conditioned that he should faithfully discharge his duties as required by the rules, a copy of which he acknowledged to have received; the cashier neglected to account and pay over for six months, when he was dismissed, and the sureties were not notified of his default for three months afterwards. It was held that they were not discharged. The unanimous opinion of the court in the case was delivered by Sharswood, J., who, after making a quotation from the opinion of Story, J., in the case cited, *supra*, from 9 Wheat. 720, proceeded thus: "The reasons so clearly stated by Story, J., in regard to officers of government, apply with equal force to officers of corporations. Corporations can act only by officers and agents. They do not guarantee to sureties of one officer the fidelity of the others. The rules and regulations which they may establish in regard to periodical returns and payments are for their own security, and not for the benefit of the sureties. The sureties by executing

232 the bond became responsible *for the fidelity of their principal. It is no col-

lateral engagement into which they enter dependent on some contingency or condition different from the engagement of their principal. They become joint obligors with him in the same bond, and with the same condition underwritten. The fact that there were other unfaithful officers and agents of the corporation who knew and connived at his infidelity, ought not, in reason, and does not in law or equity, relieve them from their responsibility for him. They undertake that he shall be honest though all around him are rogues. Were the rule different, by a conspiracy between the officers of a bank or other moneyed institution, all their sureties might be discharged. It is impossible that a doctrine leading to such consequences can be sound. In a suit by a bank against a surety on the cashier's bond, a plea that the cashier's defalcation was known to and connived at by the officers of the bank, was held to be no defence. *Taylor v. Bank of Kentucky*, 2 J. J. Marsh. 564."

What was said by Judge Robertson, who delivered the opinion of the court in the case last referred to, is very appropriate to this case, but need not be here repeated.

In *Phillips v. Foxall*, *supra*, decided in 1872, a case very much relied on by the counsel for the defendants in error in their argument of this case, it was held that on a continuing guarantee for the honesty of a servant, if the master discovers that the servant has been guilty of dishonesty in the course of the service, and instead of dismissing the servant, he chooses to continue him in his employ without the knowledge and consent of the surety, express or implied, he cannot afterwards have recourse to the surety to make good any loss which may arise from the dishonesty of the servant during the subsequent service. The ground for the relief of the sureties in that case was, that the servant, in the course of his service, was

233 guilty of a fraud, which came to the *knowledge of the master, and for which he might, and in justice to the surety, ought to have dismissed the servant; but instead of doing so, he concealed the fraud from the surety, and continued to employ the servant thereafter. Under these circumstances it was held that the surety was not liable for any default of the servant committed thereafter in the course of his employment. That such was the ground of that decision is further shown by the dictum of Sir R. Malins, V. C., in *Burgess v. Eve*, 13 Law Rep. Equity Cases, 450, decided about the same time, which dictum was quoted and relied on by the judges of the court of queen's bench in *Phillips v. Foxall*, *supra*; and is further shown by the case of *Atlantic & Pacific Tel. Co. v. Barnes, &c.*, *supra*, decided by the court of appeals of New York in 1876. It is true that in the case of *Sanderson v. Astor*, *supra*, decided by the court of exchequer in 1873, one of the barons, Kelly, C. B., in his opinion, does say that "the case of *Phillips v. Foxall* clearly shows that if any defaults or breaches of duty, whether by dishonesty or not, have been committed by the employed against

the employer, under such circumstances that the employer might have dismissed the employed, the surety is entitled to call on the employer to dismiss him. But none of the other judges in that case use any such expression, and the meaning of the judges in the former case seems to be plain enough, and to be correctly expounded by the court of appeals of New York as aforesaid.

But in the case under consideration there was certainly no fraud nor misconduct on the part of the president or treasurer, or any other officers of the Richmond and Petersburg Railroad Company, much less on the part of the company itself, in the dealings aforesaid with R. B. Kasey, and there is no
 234 ground on which his sureties *are entitled to be discharged according to any of the cases referred to.

We are therefore of opinion that the judgment of the circuit court in favor of the said sureties is erroneous and ought to be reversed and annulled, and in lieu thereof a judgment rendered, as well against the said sureties as the principal debtor, for the sum of \$2,319.55, with interest thereon from April 1st, 1873; and costs.

The judgment was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the said circuit court erred in rendering judgment in favor of the sureties of Robert B. Kasey, against the plaintiff, and in not rendering judgment as well against the said sureties as the said principal for the sum of money and interest ascertained to be due by him to the plaintiff by the report of Commissioner Nunnally, and the costs of the plaintiff in the action. Therefore it is considered that so much of the said judgment as is above declared to be erroneous, be reversed and annulled, and that the defendants in error, the said sureties, M. M. Kasey, R. H. Whitlock, Peter J. Crew, Silas L. Johnson and C. B. Lipscomb, pay to the plaintiff in error, the Richmond and Petersburg Railroad Company, its costs by it expended in the prosecution of its writ of error aforesaid here. And this court, proceeding to render such judgment as the said circuit court ought to have rendered, in lieu of so much of the said judgment of the said circuit court as is above declared to be erroneous and reversed and annulled, it is further considered by the court that the plaintiff recover against all the defendants, principal and sureties, to-wit: the said Robert B. Kasey, M. M. Kasey, R. H. Whitlock, Peter J. Crew, Silas L. Johnson, and C. B. Lipscomb, twenty-three hundred and
 235 nineteen dollars and *fifty-five cents, with interest thereon from April 1st, 1873, until paid, and the costs by the said plaintiff expended in the prosecution of this action in the said circuit court.

Which is ordered to be certified to the said circuit court of the city of Richmond.

Judgment reversed.

236 *Burging v. McDowell & als.

March Term, 1878, Richmond.

Marriage Settlement Deed—Bill for Reformation—Power of Married Woman to Alienate—Construction of Decree.—A bill filed for the reformation of a deed of marriage settlement prayed that the deed might be so corrected as to secure the property to the married woman, free from the marital rights of her husband, "as if she were a *feme sole*, and with power to dispose of the same by a writing in the nature of a deed or will;" and all parties interested, by their answers, concurred in the prayer of the bill; and the decree directed that the property should be, and was, secured to the said married woman, "as fully and completely as if she were a *feme sole*, free from the debts of her husband, and in no manner liable for his debts or contracts"—HELD: That the court might look to the bill and answers for the purpose of ascertaining the proper construction of the decree; and that the decree when so construed operated to confer upon the married woman power to dispose by her sole act of the real estate settled upon her.

The case is stated in the opinion of Judge Christian.

E. Y. Cannon, for the appellant.

There was no counsel for the appellees.

CHRISTIAN, J. This is an appeal from a decree of the chancery court of the city of Richmond. The facts shown by the record, material to be noticed, are as follows: Margaret Sternan intermarried with Christian J. Stockmar in the year 1857. She was then the owner in fee simple of certain real estate, derived under her former husband's will, she being the widow of Charles Sternan at the time of her intermarriage
 237 with Stockmar. *There was a marriage contract between the parties, executed before the marriage, and bearing date February 24th, 1857.

On the 1st day of August, 1859, a bill was filed in the county court of Henrico by the husband, Christian J. Stockmar, asking for a construction of the deed of marriage settlement. That bill contains the following allegation, after referring to said deed of marriage settlement:

"At the time said deed was prepared it was the intention of your orator and of his wife, said Anna Margaret, that the land and other property of said Anna should be secured to her, and the land and other property of your orator should be secured to him, but by mistake of the draftsman the deed was drawn as appears by the copy above."

***Wife's Separate Estate—Alienation.**—The principal case is approved in *Christian & Gunn v. Keen*, 80 Va. 372, citing *Penn v. Whitehead*, 17 Gratt. 503; *Muller v. Bayly*, 21 *Id.* 521; *McChesney v. Brown's heirs*, 25 *Id.* 393; *Burnett & Wife v. Hawpe's ex'or*, *Id.* 481; *Darnall & Wife v. Smith's adm'r*, 26 *Id.* 878; *Burging v. McDowell*, 30 *Id.* 236; *Justis v. English*, *Id.* 565; *Garland v. Pamplin*, 32 *Id.* 305; *Frank & Adler v. Lilienfeld*, 33 *Id.* 377; *Bain & Bro. v. Buff's adm'r*, 76 Va. 371; *Finch v. Marks*, *Id.* 207.

The bill further declares as follows:

"Your orator and his said wife, and said Henry Stockmar, and William Hebel and Emilie his wife, each desire that all of the property which said Anna Margaret held at the time of her marriage, as well as any she may hereafter acquire, shall be settled upon the said Anna Margaret as her absolute property, free from any claim on the part of her husband, and with power to said Anna Margaret to dispose of the same as she may desire, either by a writing executed as a deed or will; and that all of the property belonging to your orator at the date of his marriage, and any acquired since, or which may be hereafter acquired, shall be secured to your orator, free from all claim on the part of his said wife and of any other party to this bill; it being the intention of the parties to said marriage contract, at the time it was executed, that each of the parties thereto should have no interest in the property of the other, whether then owned or thereafter acquired."

And then the prayer of the bill is **238** that the court shall *enter a decree correcting the mistake in said deed, and securing the property belonging to said Anna Margaret at the date of said deed, or since acquired, or which may be hereafter acquired, to said Anna Margaret, as if she were a feme sole, and with power to dispose of the same by writing in the nature of a deed or will, and in like manner to secure to your orator all property to him at the date of said deed, or which has been or may be since acquired, as completely and fully as if he had never been married, and to grant him such other and further relief as may be consistent with equity and the nature of the case may require.

To this bill all the defendants, the parties interested, to-wit: the wife of the plaintiff, Anna Margaret Stockmar, Henry Stockmar, son of plaintiff, and Eliza his wife, Henry Hebel, son of Mrs. Stockmar, and Emilie his wife, answered the bill by joint and separate answer, in which they say that the statements contained in said bill are true; that they desire the property of the plaintiff and of Anna Margaret Stockmar settled on them respectively, and asked that the prayer thereof be granted.

Appended to this answer was the following certificate of a notary public:

"City of Richmond, to-wit:

"I, Henry G. Cannon, a notary public in and for the city aforesaid, in the state of Virginia, do certify that Anna Margaret Stockmar, the wife of Christian Jacob Stockmar, and Emilie Hebel, the wife of Wilhelm Hebel, and Eliza Stockmar, the wife of Henry Stockmar, each personally appeared before me, in my said city, and made oath that the statements contained in the answer hereto annexed are true to the best of their knowledge and belief, and the said Anna Margaret, Emilie and Eliza being examined by me privily and apart from their said husbands, and having said an-

239 swers fully explained *to them, acknowledged that they had willingly signed and executed the same, and did not wish to retract it, and desired that the prayer of the bill referred to herein should be granted.

"Given under my hand this 27th day of July, 1859.

"Henry G. Cannon,
"Notary Public."

On the same day on which this bill and answer was filed, to-wit: on the 1st day of August, 1859, the court entered the following decree:

"This cause came on to be heard, by consent, on the bill and exhibits and answers of A. M. Stockmar, Wilhelm A. Hebel, Emilie Hebel, Henry Stockmar and Eliza Stockmar, filed by like consent, with general replication to said answers, and was argued by counsel. On consideration whereof, the court (being of opinion that there is a mistake in the deed of marriage settlement between the plaintiff, Christian Jacob Stockmar, and the defendant, Anna Margaret Stockmar, and that the intent and design of said deed was to secure to each of the parties thereto whatever estate either held at the date thereof, and all estate which either might thereafter acquire), doth adjudge, order and decree that all of the property, real, personal and mixed, belonging to said Anna Margaret Stockmar at the date of said deed of marriage settlement, and all she has since acquired, or may hereafter acquire or become entitled to, shall be and is hereby secured to her as fully and completely as if she were a feme sole, free from the debts of her said husband, and in no manner liable for his debts or contracts; and all of the property, real, personal and mixed, belonging to said Christian Jacob Stockmar at the date of said deed of marriage settlement, and all he has since acquired, or may hereafter acquire, shall

240 be the property of said *Christian Jacob Stockmar as fully and completely as if he had never intermarried with said Anna Margaret, and said Anna Margaret shall be forever barred from all right of dower or other claim upon the estate of said Christian Jacob Stockmar by reason of the said marriage."

The record further shows that on the 28th February, 1863, Mrs. Margaret Stockmar (who had separated from her husband, Christian Stockmar, and assumed the name of Sternan, which was her name before she intermarried with Stockmar), conveyed by deed to Burging a piece or parcel of land lying in the county of Henrico, for the sum of \$4,995. This property was afterwards sold by Burging to McDowell, for which, under their agreement, he paid one-third of purchase money in cash, and for the remaining two-thirds executed his two negotiable notes, payable at six and twelve months after date respectively. And thereupon Burging and wife executed and delivered to McDowell a deed with general warranty. Shortly after this transaction, McDowell, alleging that he had discovered a defect in the title to said

property, filed his bill in equity, in the chancery court of the city of Richmond, praying for an injunction restraining Burging from using or negotiating said notes, and asking for a rescission of the sale and the repayment of the purchase money to him which he had paid in cash.

An injunction was awarded, and upon the hearing, a decree was entered by the said chancery court to the effect that unless the defendant, Burging, should obtain, within four months, a deed from Wilhelm Hebel and Emilie, his wife, conveying their interest in said property to McDowell, that said injunction should be perpetuated, and the notes for the purchase money be surrendered, and so much of the purchase money as had been paid should be refunded.

241 *From this decree an appeal was allowed by one of the judges of this court.

The only question we have to determine is, whether Margaret Sternan had the right to make the conveyance in question to Burging, as a feme sole.

It is manifest, by an inspection of the ante-nuptial marriage settlement, that it was the intention of the parties that the property held by each should be held free from the marital rights of the other. At the date of the marriage settlement Mrs. Sternan was the owner in fee of the real estate (now the subject of controversy), which she derived as a devisee under her former husband's will. It is plain that this real estate was intended to be settled on her, to be held as her separate estate, freed from the fetters and disability of coverture. But the instrument intended to secure this right to her was so inartificially drawn, that doubts might arise as to the true character of the estate with which she was vested. And in order to remove all doubts, a bill was filed by her husband, as heretofore set out, asking for a construction of the marriage settlement, in accordance with the real intention and purposes of the parties. In this bill it was alleged, as seen from the extract above referred to, that Christian Stockmar "and Margaret, his wife, and Henry Stockmar and Wilhelm Hebel and Emilie, his wife, each desire that all of the property which said Anna Margaret Sternan held at the time of her marriage, as well as any she may hereafter acquire, shall be settled upon the said Anna Margaret as her absolute property, free from any claim on the part of her husband, and with power to said Anna Margaret to dispose of the same as she may desire, either by writing executed as a deed or will." To this bill, as has been seen, the parties, who alone were interested in the matter, and who were all of full age, were made parties.

242 They *answered the bill, and admitted that "the statements contained in the bill are true, and that they desire the property of the plaintiff and Anna Margaret Stockmar settled on them respectively, and ask that the prayer of this bill be granted." The defendants, who were married women, were examined privily and apart from their husbands, and having the bill and answer fully

explained to them, "acknowledged that they had willingly signed the answer, and desired that the prayer of the bill should be granted." Upon this bill and answer, and upon an inspection of the instrument containing the marriage settlement filed with the bill, the court decreed "that all the property, real, personal and mixed, belonging to Anna Margaret Stockmar at the date of said deed of marriage settlement, and all she has since acquired, or may hereafter acquire or become entitled to, shall be, and is hereby secured to her as fully and completely as if she were a feme sole."

I am of opinion, that under this decree, founded upon the bill and answer in this case, that Mrs. Stockmar was invested with a separate estate of which she had the power of disposal, as clearly and absolutely as she had on the day before her marriage. It is true the decree does not in terms confer upon her the *jus disponendi*. But that is its legal effect. The bill, answer and decree all bear date the same day. We must read the decree as if the bill and answer were embodied in it. If there be any doubt as to the scope and effect of the decree, we may interpret its meaning by reference to the bill and answer. See Walker's *ex'or v. Page*, 21 Gratt. 636.

The prayer of the bill is (and the answer admitting its allegations to be true asks that the prayer of the bill be granted), that all the property, real and personal, held by Mrs. Stockmar at the time of her marriage, or which she may afterwards acquire, may be settled upon her as her absolute property, free from any claim on the part of *her husband, "with power to dispose of the same as she may desire, either by a writing, executed by deed or will." Now, when in reference to such a bill and answer, the court decrees that her property to which she, at the time of her marriage, was entitled in fee, "shall be, and is hereby secured to her as fully and completely as if she were a feme sole," I think it clear that this decree not only confers upon her a separate estate, but also the power of alienation; and that a deed conveying her separate real estate, executed by her (her husband not uniting in it), conferred upon the grantee a perfect title. As confirmatory of this construction of the decree, may be mentioned the fact that Stockmar had separated from his wife and gone to a foreign country, making it impossible for Mrs. Stockmar to dispose of her separate estate, if it can only be done by Stockmar uniting in a deed with her.

It seems to be well established by the modern authorities, and especially by the English Chancery, as a general proposition, that a married woman having real property settled to her separate use, in fee, and not restrained from alienation, has, as incident to her separate estate, and without any express power, a complete right of alienation by instrument *inter vivos*, or by will. And this doctrine of the English Chancery is founded on this principle: When the court of equity established the doctrine of the separate use of a married woman, and applied it to both real and personal estates, it

became necessary to give the married woman, with respect to such separate property, an independent personal status, and to make her in equity a feme sole. It is of the essence of the separate use that the married women shall be independent of and free from the control and interference of her husband. With respect to separate property, the feme covert is released and freed from the fetters

and disabilities of coverture and invested with the rights and powers of *a person who is sui juris, and to every estate and interest held by a person who is sui juris the common law attaches a right of alienation. See Leading Cases in Equity, vol. 1, pt. 2d, p. 686-7, and cases there cited.

This court has never gone to the extent of the doctrine above declared by the English cases, and the decisions of many of the American courts. But, on the contrary, the power of alienation with respect to separate real estate is limited to the mode prescribed by the instrument creating the estate; and if none be prescribed in the instrument, then in the mode prescribed by law for the alienation of real estate by married women.

In the last case on this subject decided by this court (*McChesney & al. v. Brown's heirs*, 25 Gratt. 393), Judge Moncure, delivering the opinion of the court, said: "The following may be laid down as sound and well-settled principles of law: 1st. A married woman is regarded by a court of equity as the owner of her separate estate, and as a general rule the *jus disponendi* is an incident to such estate—that is, it is an incident thereto, unless and except so far as it is denied or restrained by the instrument creating the estate. 2d. But it is subject to such limitations and restrictions as may be contained in such instrument, which many give it *sub modo* only, or withhold it altogether. 3d. In regard to separate personal estate and the rents and profits of separate real estate, this power of disposition, if it be unrestrained, may be exercised in the same way by deed, will or otherwise, as if the owner were a feme sole; but in regard to the corpus of separate real estate, it can be disposed of only in such mode, if any, as may be prescribed by the instrument creating the estate, or unless prohibited by such instrument in the mode prescribed by law for the alienation of real estate of married women." See also *Lee et al. v. Bank U. S.*, 9 Leigh 200.

These principles, so clearly declared in the case of **McChesney v. Brown*, must govern the case before us. I am of opinion that the decree of the county court of Henrico (interpreted, as before shown, by reference to the bill and answer, which may be read as if embodied in that decree), invests, if not expressly, by the clearest and most necessary implication, Mrs. Stockmar with an absolute and separate estate in the real estate in controversy and with the full power of alienation, as if she were a feme sole; and that the deed which she executed and delivered to Burging conveyed to him a perfect title. Especially is the title perfect in Burging, as

Stockmar, who was the only person in the world who had any interest in the question whether the property in controversy was the separate estate of his wife, not only filed the bill praying that the property might be settled on his wife, with full power of disposal in her, but also executed and delivered his deed releasing all interest which he might have in said property.

Upon the whole case, I am of opinion that the decree of the chancery court is erroneous, and that instead of perpetuating the injunction on the conditions prescribed in said decree, the said court ought to have dismissed the plaintiff's bill.

I am therefore, for the reasons stated, of opinion that the decree of the chancery court be reversed.

The other judges concurred in the opinion of CHRISTIAN, J.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the said decree of the said chancery court is erroneous. It is therefore decreed and ordered, that the same be reversed and annulled, and that the appellee pay to the appellant his costs by him *expended in the said chancery court, and also his costs expended in the prosecution of his appeal and writ of supersedeas here. And this court now proceeding to render such decree as the court below ought to have rendered, it is further decreed and ordered, that the injunction awarded by the judge of the said chancery court be dissolved and the appellee's bill be dismissed.

Decree reversed.

247 *Prunty v. Mitchell & Cobbs.

March Term, 1878, Richmond.

Absent, BURKS, J.

P brings *assumpsit* against M, who pleads *non-assumpsit*, on which issue is made up, and on the trial there is a verdict for P. M then asks for a new trial, and the court grants it on the condition that M shall pay the costs of the first trial, and agree that upon any future trial of the cause it shall be tried solely upon the issue already made up, without any additional plea; and to this M assents. The case is then sent to another court, and on the motion of M he is permitted to file another plea; to which P excepts. There is a judgment for M, and a writ of error by P—Held:

1. **New Trial upon Condition—Province of Court.**—It was competent for the court to

***Conditions—New Trial Confined to Certain Issues.**—An order granting a new trial will be presumed to award a new trial on all the issues and to reopen the whole case unless there are specific directions to the contrary. Where all the issues are essential and each involves the merits of the controversy the whole case must be opened. The courts have power to impose such reasonable terms and con-

grant the new trial upon the condition stated. If M objected to the condition, he should have excepted and spread the facts upon the record. Having accepted the condition, he is bound by his acceptance.

2. Same—Same.—If the same court who heard the evidence on the first trial and granted the new trial on condition might, at a subsequent term, have dispensed with it and have admitted another plea, certainly no other court could do so.

3. Same—Appeal—Review.—In reversing the judgment, the cause will be sent back to be tried upon the issue on the plea of *non-assumpsit*, or any matter which has occurred since the new trial was granted, and which is proper and sufficient to be pleaded *puis darrein continuance*.

In April, 1868, Jesse Prunty brought an action of assumpsit in the circuit court of Pittsylvania against Mitchell & Cobbs, partners. At the June term of the court they appeared by their attorneys and **248** filed the plea *of non-assumpsit, on which issue was made up. At a special term held in July, 1870, the case was tried, and there was a verdict and judgment in favor of the plaintiff for \$1,092.94, with interest from the 13th of June, 1867. At the same term of the court the defendants moved the court for a new trial, on the ground of surprise. Cobbs filed his affidavit, saying he was absent at the trial, and thought the case had been continued until the next regular term of the court; and he gave the names of witnesses who would prove facts material to the defence, stating what facts they would prove. And Mitchell filed his affidavit, stating that both Cobbs and himself were bankrupts, and he supposed that the suit would be revived in the name of the assignee, and he would attend to it; and he concurred in the facts stated by Cobbs.

The court granted the new trial upon condition that the defendants should pay the costs of the trial which had been had, and agree that upon any future trial of the cause it should be tried solely upon the issue already made up, without any additional plea; and the defendants agreed to the said condition.

The court then sent the case to the county court of Pittsylvania. And at the June term, 1871, of that court the defendants tendered their pleas of discharge in bankruptcy; which were objected to by the plaintiff. But the court admitted the pleas, and the plaintiff excepted.

The plaintiff then moved the court to enter up a judgment on the verdict of the jury, but the court overruled the motion; and the plaintiff excepted. He then took issue upon the pleas in bankruptcy, and by consent a jury was waived, and the court rendered a judgment for the defendants. The plaintiff then took an appeal to the circuit court of Pittsylvania, and the judge of that court

conditions as will promote justice and prevent useless litigation such as the condition that the new trial shall be confined to certain issues. 14 Enc. Pl. & Pr. 938. See also 4 Min. Inst. (2nd Ed.) 840 and 848, where the principal case is cited and approved.

deeming it was improper for him to sit in the case, it was removed to the circuit **249** court of the city of Richmond; *and at the February term, 1873, of that court the judgment of the county court of Pittsylvania was affirmed. And thereupon Prunty applied to this court for a writ of error; which was allowed.

W. W. Henry, for the appellant.

William M. Tredway, Jr., for the appellee.

ANDERSON, J., delivered the opinion of the court.

This cause is brought here by the plaintiff in error, who was also plaintiff below, by writ of error to the judgment of the circuit court of Richmond affirming the judgment of the county court of Pittsylvania. The cause was first tried in the circuit court of Pittsylvania upon an issue of non-assumpsit, which was the only issue. The jury rendered a verdict for \$1,092.94, with interest, for which there was judgment. Upon motion of the defendants, "the court ordered that the said verdict and judgment should be set aside and a new trial granted the defendants, upon condition that they would pay costs of this trial, and agree that upon any future trial of this cause, it should be tried solely upon the issue already made up, without any additional plea; and thereupon the defendants agreed to said conditions, and the said verdict and judgment were accordingly set aside and a new trial granted." At a subsequent day the cause was removed to the county court of Pittsylvania county.

The court is of opinion that the judge of the circuit court had the power, in the exercise of a sound discretion, to restrict the new trial to a particular issue, and consequently to the issue which had been made in the first trial, and to grant the new trial upon the conditions recited. Other terms than the **250** payment of costs may be *imposed on the party applying for a new trial. The new trial may be limited to a single point. Hilliard on New Trials, 2d edition, p. 68, citing *Lainey v. Bradford*, 4 Rich. R. 1. The practice of granting a new trial after judgment as to part, and letting the judgment stand for the residue of the demand sued for, although sometimes questioned, is held to have been too long sanctioned now to be disturbed. *Ibid.*, citing *Edwards v. Lewis*, 18 Alab. R. 494. A new trial may be ordered upon a particular question without reopening the whole case. *Ibid.*, p. 69, citing *Thwaites v. Sainsbury*, 7 Bing. R. 437, where the new trial was ordered, but upon conditions of payment of costs, bringing into court the sum claimed, and restricting the second trial to a single point.

In *Graham & Waterman on New Trials*, Vol. I, p. 604, the author says: "The terms imposed on setting aside verdicts, in addition to costs, may be divided into ordinary and extraordinary." "The extraordinary terms arise out of the merits of the case, the relative situation of the parties, the probable consequences of delay, the advantage or disadvantage which may result to either party

from the state of the pleadings, the prejudice which may result to the prevailing party from opening the whole case;" these, and other considerations which he mentions, he says, "all press upon the mind of the court, and call for salutary conditions to accompany the relief granted." And he adds: "To accomplish at the same time the claims of justice by sending the case to another jury, and protect the rights of the party in possession of the verdict, the courts will direct the requisite stipulations to be inserted in the rule." After citing many cases in which conditions had been imposed, he says: "It may be safely asserted, that no case can occur presenting circumstances timely addressed to the discretion of the court, in which the rights of the parties may not be fully protected by the imposition of conditions meeting the exigency."

251 *In *Thwaites v. Sainsbury*, 20 Eng. Com. L. R. p. 193, 7 Bingham, supra, the court observing that in causes where the defence was set out in pleading, the parties would on a second trial be necessarily confined to the issues which were on the record at the first trial, and that it was expedient the same course should be pursued where a particular line of defence had been relied on under the general issue, imposed the following conditions on the defendant: payment of costs, bringing into court the money sought to be recovered, and limiting the enquiry on the new trial to a single point. If the court could limit the enquiry to a single point, which was within the line of defence at the former trial, it could surely confine the party to the issue which was made up at the first trial. It is not necessary for the court to go to the extent of the cases cited to reach the conclusion to which we have been brought in this case. And there is nothing in our statute law which takes away from the courts or impairs their inherent and essential power to impose other precedent conditions than the payment of costs upon the party applying for a new trial.

But it was contended by the learned counsel for defendants that the circuit court of Pittsylvania did not properly exercise a sound discretion in thus restricting the defendants to the issue made at the first trial. How can it be so held by the appellate tribunal? The facts which show the grounds upon which the circuit court imposed that condition, are not set out, and do not appear in the record. It was competent for the defendants to have objected to it and refused to accept the new trial upon that condition, and to have taken exceptions to the ruling of the court requiring it, and had the facts certified, which would have enabled the appellate court to review the grounds upon which the court of trial, in the exercise of its discretion, deemed it proper to

252 grant the new trial only with such restriction. But the defendants *did not deem it judicious for them to pursue that course, but, on the contrary, they agreed to accept the condition, which agreement was entered of record. They are afterwards estopped to object to it; and if they

were not, the facts upon which the rulings of the court was founded are not set out in the record, so as to enable this court to determine that the ruling of the circuit court was erroneous. And upon the principle that what has been done by a court of competent jurisdiction, must be presumed to have been rightly done until the contrary appears we cannot say that there was error in the ruling of the circuit court now objected to.

The court is also of opinion that it was not competent for the county court, to which the cause was removed, to revise and set aside the order of the circuit court restricting the new trial as aforesaid, or to change the terms upon which the new trial was granted to the defendants by the circuit court. The circuit court only, before whom the first trial was had, was competent to determine whether a new trial should be granted, and to decide upon what terms it should be granted; subject, of course, to review by the appellate court, upon an exception to its decision, with the facts spread upon the record. If the same court before whom the trial was had and the evidence was given, could, at a subsequent term, revise its order and remove the restriction, it could not be done by another court, even of equal jurisdiction, who had not heard the evidence at the first trial and was not cognizant of the facts and considerations upon which the court before whom the first trial was had deemed it proper to impose the condition upon which a new trial would be granted. The court is of opinion, therefore, that the county court erred in not restricting the new trial to the issue which had been made up at the first trials and in admitting the pleas of the defendants, which put new matters in issue; and that the

253 circuit *court of Richmond, to which the cause was removed, erred in affirming the judgment of the county court by which the errors aforesaid were committed.

The court is further of opinion that the defendants are entitled to a new trial upon the issue which was of record at the first trial, by the order of the circuit court of Pittsylvania, and which, it seems, was the only issue upon which they sought a new trial, notwithstanding the error of the county court in allowing the new trial to be had on other issues; and that therefore it would not be proper now to enter up a judgment upon the verdict of the jury on the first trial.

Upon the whole the court is of opinion to reverse the judgment of the circuit court of Richmond, and to remand the cause, with instructions to reverse the judgment of the county court of Pittsylvania county, set aside the verdict of the jury upon the trial in that court, and the issues upon the new pleas of the defendants, and to award a venire facias de novo, to try the cause again; and if in the further progress of the cause, the new pleas filed by the defendants at the second trial and upon which the plaintiff was required to take issue, or any other new plea should be tendered, the same shall be rejected, and the trial be confined and restricted to the issue which was made at the first trial, unless the new matter of defence

pleaded arose subsequent to the order granting a new trial.

The judgment was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the county court of Pittsylvania should have confined the parties in the new trial to the issue that was made up at the previous trial in the circuit court of said county in conformity with the order of said court, and

254 *in admitting the defendants to plead new matter which was not in issue in the former trial, the same not having arisen subsequent thereto; and, therefore, that the circuit court of Richmond erred in affirming said judgment of the county court of Pittsylvania. It is therefore considered by the court that the judgment of the circuit court of Richmond be reversed and annulled, and that the defendants in error do pay to the plaintiff in error his costs expended in the prosecution of his writ of error here. And the cause is remanded to the circuit court of the city of Richmond, with instructions to reverse the judgment of the county court of Pittsylvania, with costs, to set aside the issues made upon the pleas of discharge in bankruptcy filed by the defendants severally, and award a venire facias de novo to try the cause again, either at its own bar or in such court as it may be deemed proper to remove the cause; and upon such trial the parties shall be confined to the issue which was made upon the record, and tried at the first trial before the circuit court of Pittsylvania county; and if the defendants shall again offer their pleas of discharge in bankruptcy, or any pleas of new matter of defence, the same shall be rejected, unless the new matter of defence pleaded shall have arisen subsequent to the order of the circuit court of Pittsylvania county granting a new trial; which new matter, if any, they may be allowed to plead, if in form and substance it be matter proper and sufficient to be pleaded post darrein continuance, in bar of the plaintiff's action; and further to proceed with the cause in conformity with this order and the opinion filed with the record.

Judgment reversed.

255 *Burkholder & als. v. Ludlam & als.

[32 Am. Rep. 668.]

March Term, 1878, Richmond.

Absent, MONCURE, P.

I. Appeal—Right to Question Decree.*—

Upon a bill by judgment creditors of C to subject two pieces of real estate held by different parties to the satisfaction of their judgments, there is a decree dismissing the bill as to one of these parties, from which there is no appeal; and there is a subsequent

*Appeal—Right to Question Decree.—The principal case is cited, and the ruling set out in its first headnote is sustained in *Blackwell's adm'r v. Bragg et al.*, 78 Va. 541. See also 4 Min. Inst. (2nd Ed.) 970. See also *Alexander v. Alexander*, 85 Va. 353 distinguishing the principal case.

decree subjecting the other parcel of land; and the holder of this land obtains an appeal from this last decree. This appeal does not bring up the first decree, and the appellees cannot set up any objections to that decree upon this appeal.

II. Same—Objection Not Taken in Lower Court.—Where a deposition is taken and read without objection in the court below, it is too late to object to it for the first time in the appellate court.

III. Witnesses—Death of Other Party.*—Where a party to a suit is examined as a witness and testifies about transactions to which the other party is dead, if he does not testify "in his own favor, or in favor of any other party having an interest adverse" to the party who is dead, or those claiming under him, but against his own interest and against the interest of those having an interest adverse to the dead party, he is not incompetent.

IV. B, who married the daughter of C, bought a lot when he was poor, and C in good circumstances. B being unable to pay for the lot, turned it over to C, who paid for it, took the title in his own name, and commenced to build a house on it for his daughter, the wife of B. Before the house was finished B removed with his family to another town and engaged in business, which was succeeding well, when C offered that upon condition that he would return, he would turn over the lot and unfinished building to the wife of B as her own property. B acceded to this, and with his family re-

256 turned, and he paid the expenses of doing so, and then with his own earnings and that of his wife finished the building, took possession, and had remained therein for about twelve years; but no deed was made by C to the property until the insolvency of C and after judgments were obtained against him and duly docketed. The house and lot was then conveyed to a trustee for the wife of B in consideration of five dollars and "love and affection." In a suit by the judgment creditors to annul the deed and enforce their liens—HELD:

1. Parol Gift of Land—Insolvency of Donor—Validity of Conveyance—Creditors.—That the title to the house and lot was in the trustee for the use of the wife and children of B, and that the liens of the judgments against C did not attach to the property.

2. Same—Specific Performance.†—A court of equity will compel the conveyance of the legal

*Witnesses—Death of Other Party.—The principal case is cited, and the doctrine stated in its third headnote is supported in 4 Min. Inst. (2nd Ed.) 767. See also *Hall v. Rixey*, 84 Va. 791; *Parent v. Spitler*, 30 Gratt. 819; *Morris v. Grubb*, 30 Gratt. 286 and note.

†Parol Gift of Land—Specific Performance.—The principal case, in regard to its holding that a parol gift of land will be enforced specifically in equity, where the donee has been induced thereby to alter his condition and make expenditures of money in valuable improvements, is expressly affirmed in *Stokes et al. v. Oliver et al.*, 76 Va. 72; *Halsey v. Peters' ex'or et al.*, 79 Va. 60; see also *Fishburne v. Ferguson*, 85 Va. 330, where the principal case is cited with approval. In *Griggsby v. Osborn et al.*, 82 Va. 373, the principal case is sustained, but it is added that such a parol gift must be definite in its terms and clearly proved. See also 2 Min. Inst. (4th Ed.) 949.

The rationale of these cases is luminously set forth by a paragraph in the principal case itself where it

title of land claimed under a parol gift, supported by a meritorious consideration, and by reason of which the donee has been induced to alter his condition and make expenditures of money in valuable improvements on the land.

Ludlam, Heineken & Co., and Taliaferro & Musgrove, judgment creditors of William Crumpton, filed their bill in the circuit court of the city of Lynchburg to subject certain real estate to the payment of their judgments against said Crumpton. The first judgment was obtained November 17th, 1866, and docketed in the hustings court of Lynchburg January 7th, 1877, and the second was obtained and docketed in said hustings court October 15th, 1866. A part of the real estate, which is the subject of controversy, was conveyed by William Crumpton to John W. Carroll, trustee, for the benefit of Mary E. Burkholder, the wife of Robert C. Burkholder, and a daughter of Crumpton, during her life, with remainder in fee to her children. This deed is dated December 10th, 1867, and was recorded in the hustings court of the city of Lynchburg April 11th, 1868. This real estate is valued at \$2,150, and the consideration in the deed is five dollars and "natural love and affection." The other part of said real estate was conveyed by deed from said Crumpton and wife to William A.

257 Lloyd, *trustee for the benefit of Una A. Crumpton during her life, with remainder in fee to her children. This deed is dated March 1st, 1866, and was admitted to record in the hustings court of Lynchburg August 6th, 1866. This real estate is valued at \$2,200, and the consideration named in the deed is five dollars and "natural love and affection." The plaintiffs prove the insolvency of Crumpton, and allege that these two deeds were without consideration and fraudulent as to them. The deposition of William Crumpton was taken twice, first without exception, until objection was made in the appellate court. The second deposition was objected to at the time it was

is said: "The ground of these last-named decisions is, that the parol gift, with the concurring facts established, rests on the same foundation with a parol contract for sale partly performed, and that equity will carry both into complete execution, notwithstanding the statute of frauds and injuries, for the same reason, to-wit: to prevent the statute which was designed to guard against fraud from being used as a means to perpetuate fraud." See Va. Code 1887, Sec. 2413.

Admission of Depositions—Time of Making Objections.—In the early Virginia cases, though with one dissenting decision, the rule was established that when the exception to the deposition is on the ground of the incompetency of the witness the appellate court will hear objections to the admission of the deposition although it was read without exception, in the court below. *Beverley v. Brooke*, 2 Leigh 426; *Fant v. Miller*, 17 Gratt. 228. In *Baxter v. Moore*, 5 Leigh 219, however, an opposite rule was laid down and in *Simmons v. Simmons*, 33 Gratt. 457, it was said broadly "objection to the competency of a witness cannot be taken for the first time in an appellate court" for general discussion of this question see 8 Enc. Pl. & Pr. 211.

taken, on the ground of the incompetency of the witness.

The other material facts of the case, and those on which the main point in the case turned, are fully stated by Judge Burks in the latter part of his opinion.

The circuit court, by a decree entered on the 16th day of November, 1871, dismissed the bill as to the defendants, Una A. Crumpton and her trustee and children; and without deciding whether the property conveyed to Carroll, as trustee for Burkholder and wife and children, was liable to be subjected to the payment of the plaintiff's judgments, directed an enquiry before a commissioner, to ascertain what real estate William Crumpton was entitled to at the date of the Carroll deed, and whether or not it had since been aliened, and on account of the liens on the real estate of said Crumpton, and their priorities. &c.

On the coming in of the commissioner's report, the court, by decree entered on the 13th November, 1872, held that the real estate conveyed to Carroll as trustee for Mrs. Burkholder and children, was liable to the payment of the plaintiff's liens, and 258 that the deed as to them *was void; and from this decree Burkholder and wife and Carroll, trustee, obtained an appeal.

John W. Daniel, for the appellant.

Mosby & Brown and John H. Lewis, for the appellees.

BURKS, J., delivered the opinion of the court.

The counsel for the judgment creditors of William Crumpton (appellees), in their brief, complain of alleged errors in the decree of the 16th November, 1871. It is a sufficient answer to say that the appeal allowed in this case does not bring that decree under review. It adjudicates matters wholly between the creditors and defendants other than the appellants. The only decree affecting the interests of the appellants is the decree of the 13th November, 1872, which is the decree appealed from, and the only one to be now examined. For the rule in such cases, see *Walker's ex'or & als. v. Page & als.*, 21 Gratt. 636, 652, and cases there cited.

The deposition of the appellee, William Crumpton, was twice taken. The one first taken was read at the hearing of the cause without objection or exception.

The objection to it here now for the first time comes too late.

The last deposition was excepted to when taken, by the judgment creditors, on the ground of the alleged incompetency of the witness. If it were excluded altogether, the exclusion would not affect the decision on this appeal, as it relates almost entirely to a question with which the appellants have no concern—the title to the lot claimed by the defendants, Una Crumpton and her children and trustee—as to whom the bill was dismissed under the first decree. But it is clear

259 that the witness was not incompetent. Although the transactions *to which he testified be treated as transactions

which were the subject of investigation in the suit, and Jesse Crumpton, the other party to such transaction was dead, yet he did not testify in his own favor, or "in favor of any other party having an interest adverse" to Jesse Crumpton or those claiming under him. On the contrary, he testified against his own interest, and against the complainants having an interest adverse to Jesse Crumpton. Code of 1873, ch. 172, § 22.

The principles of several recent decisions of this court, reported in 28 Gratt., to-wit: *Floyd, trustee, v. Harding & als.*, 401, 407; *Hicks v. Riddick & als.*, 418; *Borst v. Nalle & als.*, 423, 432, 433; *Shipe, Cloud & Co. v. Repass & als.*, 716, 723, establish the proposition that the lot claimed by the appellants is not subject to the lien of the judgments of the appellees, *Ludlam, Heineken & Co.*, and *Taliaferro & Musgrove*, if when these judgments were recovered against William Crumpton, the appellants, or either of them, had a valid, equitable title to said lot.

Whether they had such title, therefore, is the only question to be considered and determined.

The claim of the appellants to the lot in question, at the date of the judgments, was under a parol agreement, and if it were a contract for sale, to take the case out of the operation of the statute of fraud and perjuries and entitle the appellants to specific execution, on the ground of part performance, it is well settled that the agreement and acts of part performance must be clearly proved, and it must appear that the agreement is certain and definite in its terms, that the acts proved in part performance refer to, result from, or were done in pursuance of the agreement proved, and that the agreement has been so far executed that a refusal of full execution would operate a fraud upon

260 the party seeking execution *and place him in a situation which does not lie in compensation. *Wright v. Pucket*, 22 Gratt. 370.

The appellants, however, do not claim that the agreement was a contract for sale, but a parol gift of the lot. It becomes important, therefore, to enquire whether, as donees, under the facts and circumstances proved, they occupied any worse attitude than if they had been purchasers for value; whether they could have demanded a conveyance of the legal title without condition.

It is certainly true, that courts of equity do not aid in the execution of contracts or agreements purely voluntary; and notwithstanding respectable authorities to the contrary and what Mr. Justice Story pronounces the "very able" reasoning of Lord Chancellor Sugden, in *Ellis v. Nimmo* (*Loyd & Goold*, 333), it would seem also to be now the general rule that such aid will not be given to carry into execution contracts or agreements based wholly on a meritorious consideration—that is, the moral duty of a parent to make provision for his child, or of a husband to make like provision for his wife. 1 Story's Eq. Juris., § 793, and authorities cited in the notes.

But whether a court of equity will compel the conveyance of the legal title of land

claimed under a parol gift, supported by a meritorious consideration, and by reason of which the donee has been induced to alter his condition and make large expenditures of money in valuable permanent improvements on the land, is a question on which the authorities are not agreed.

Some adjudged cases determine the question in the negative. *Pinckard & Pool v. Pinckard's heirs and others*, 23 Alab. R. 649; *Rucker, for, &c., v. Abell and others*, 8 B. Mon. R. 566; *Adamson v. Lamb, adm'r*, 3 Blackf. R. 446. The doctrine of other cases is, that the donee, under such circumstances, becomes the equitable owner of the land, and may rightfully demand the legal title. *Syler's lessee v. Eckhart*, 1 Bin. R. 378; *Eck- 261 ert and *others v. Ekert and others*, 3 Penn. R. 332; *Eckert v. Mace and others*, Id. 364; *Stewart v. Stewart*, 3 Watts R. 253; *France v. France*, 4 Halstead Ch. R. 650; *Lobdell v. Lobdell*, 36 New York R. 327; *Bright v. Bright*, 41 Ill. R. 97; *Law v. Henry*, 39 Indiana R. 414; *Young v. Glendenning*, 6 Watts R. 509; *Mahon v. Baker*, 2 Casey R. 519; *Atkinson v. Jackson*, 8 Indiana R. 31; *Freeman v. Freeman*, 43 New York R. 34; *Peters v. Jones*, 35 Iowa R. 512; *Neale v. Neales*, 9 Wall. U. S. R. 1.

The ground of these last named decisions is, that the parol gift, with the concurring facts established, rests on the same foundation with a parol contract for sale partly performed, and that equity will carry both into complete execution, notwithstanding the statute of frauds and perjuries, for the same reason, to-wit: to prevent the statute, which was designed to guard against fraud, from being used as a means to perpetrate fraud.

Chief Justice Tilghman, in delivering the opinion of the supreme court of Pennsylvania, in the case of *Syler's lessee v. Eckhart*, supra, uses this language: "Although the courts are not disposed to extend the principles on which parol agreements concerning lands have been confirmed, farther than they have already been carried, yet they are bound by what has been decided. It has been settled that where a parol agreement is clearly proved, in consequence of which one of the parties has taken possession and made valuable improvements, such agreement shall be carried into effect. We see no material difference between a sale and a gift; because it certainly would be fraudulent conduct in a parent to make a gift which he knew to be void, and thus entice his child into a great expenditure of money and labor, of which he meant to reap the benefit."

Although the agreement in *King's heirs and others v. Thompson and wife*, 9 Peters R. 204, was not specifically executed, it was because of the uncertainty in the 262 terms *of the agreement. It was there said that the expenditures for the improvements constituted a valuable consideration. See also *Rerick v. Kern*, 14 Ser. & Raule R. 267; *Sheppard v. Bevin and others*, 9 Gill R. 32.

An early decision (1811) of this court seems to accord with the Pennsylvania cases,

supra. A testator having put his daughter's husband into possession of a leasehold tract of land and delivered him the lease, permanent improvements also being made by the son-in-law, with the assistance of the family, and parol declaration by the testator, that he had given him the land in consideration of his having married his daughter and to prevent his moving to Kentucky, being proved, it was decided that the son-in-law had an equitable title to the land for the time the lease had to run, and to a release of the legal title from the heirs or executors, according as the interest conveyed by the lease might be greater or less. *Shobe's ex'ors v. Carr and wife*, 3 Munf. 10. This was a decision by a court consisting of Judges Roane, Brooke and Cabell, and they were unanimous in the opinion.

We do not find the principles of this decision denied or questioned in any subsequent decision of this court which has come to our knowledge. In *Darlington v. McCooles*, 1 Leigh 36; *Reed's heirs v. Vannorsdale and wife*, 2 Leigh 569; *Pigg v. Corder*, 12 Leigh 69; *Cox & als. v. Cox*, 26 Gratt. 305, specific execution was denied, but there is nothing to be found in either of these cases in conflict or at all inconsistent with the decision in *Shobe's ex'ors v. Carr and wife*, supra. On the contrary, the reasoning of the judges in some of these cases would rather seem to confirm the principles of that case.

In *Reed's heirs v. Vannorsdale and wife*, no expense or loss was incurred by Charles Reed in foregoing his intention to remove to the west, and in moving to and settling on the land promised him by his brother, James Reed; and Judge Cabell took occasion to say that if it *had appeared that such expense or loss had been incurred, he should have been of opinion that specific execution ought to have been enforced.

The following are the material facts in the case before us: William Crumpton, the father of the female appellant, Mrs. Burkholder, resided in the city of Lynchburg in 1852, and until he removed to Danville, in 1865 or 1866. In 1852, the date of the marriage of his said daughter, he owned a good estate, estimated at from \$50,000 to \$75,000, and was free from debt. At the institution of this suit he had become insolvent. The year after his marriage, Burkholder purchased the lot in question, then unimproved, at the price of \$50, intending to build upon it. Finding himself without sufficient means to accomplish this, he turned the lot over to Crumpton, who paid for it and took the title to himself, declaring that he intended it for his daughter, Mrs. Burkholder, and commenced building a house upon it for her. Soon after this Burkholder removed with his family to Wytheville, and there engaged in his business, which was that of an architect, practical builder, and manufacturer of agricultural implements. While his business was in a promising condition, Crumpton proposed to him that if he would break up his business at Wytheville and return to Lynchburg, his wife "should have the lot, together with the unfinished improvements

thereon, as her own property." Burkholder acceded to this proposition, returned to Lynchburg with his family, paying his own expenses of removal, and took possession of the lot under the agreement mentioned, and has had and held actual, continuous, notorious, exclusive possession, with claim of title under the agreement thence hitherto. The possession commenced in the year 1855 or 1856. At the time he and his wife and family entered into possession, the building on the lot was about one-third completed. He finished the building out of

his own means and means saved by *the earnings of his wife. It must have been completed as early as 1858, for in that year the lot and buildings were assessed for taxation at the value of \$2,150. The delay in making the deed of conveyance was caused by inattention. The house and lot was evidently intended as a home for Mrs. Burkholder and her family, which included nine infant children at the filing of the bill in this case, and her right was never denied or called in question by her father, or any other person, until the institution of the suit. It was proved that Crumpton had made advancements to his children, and that the house and lot held by Mrs. Burkholder did not exceed in value the property advanced to any one of his other children. The two debts, upon which the judgments sought to be enforced against the lot were recovered, were contracted, the one in the year 1861 and the other in 1865.

Upon these facts, clearly and satisfactorily proved, without laying down any general rule, we are of opinion that at the date of the judgments of the appellees, Ludlam, Heineken & Co., and Taliaferro & Musgrove against William Crumpton, the appellant, Mrs. Burkholder had a valid equitable title to the house and lot in question, and that the said judgments are not liens thereon.

The decree of the circuit court of the city of Lynchburg must therefore be reversed, the bill of the appellees dismissed as to the appellants, and the cause remanded to the said circuit court for further proceedings against the remaining defendants, in order to final decree as to them.

The decree was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and *filed with the record, that the lot described in said decree as "lot No. 275 in the bill and proceedings mentioned" is not subject to the lien of the judgments in the bill mentioned of the appellees, Ludlam, Heineken & Co. and Taliaferro & Musgrove, or either of them, and the said decree is wholly erroneous. Instead of said decree, the said circuit court should have entered a decree dismissing the bill of the complainants (the said appellees) as to the appellants and the children of Robert C. Burkholder and Mary E. his wife (defendants in this cause), and ordering the payment by the

complainants to said defendants of their costs by them expended in their defence in this cause in the said circuit court.

It is therefore decreed and ordered, that said decree be reversed and annulled, and that the appellees, Henry Ludlam, Gustave Heineken, and George W. Palmore, late partners under the style of Ludlam, Heineken & Co., and Nathan C. Taliaferro and J. V. Musgrove, late partners under the style of Talliaferro & Musgrove, pay to the appellants their costs by them expended in the prosecution of the appeal aforesaid here. And this cause is remanded to the said circuit court, with directions to said court to enter a decree in the cause dismissing the bill of the complainants (who are appellees here) as to the appellants and the children of Robert C. Burkholder and Mary E. his wife (defendants in the cause), and ordering the complainants to pay to said defendants their costs by them in their defence in this cause in said circuit court expended, and for further proceedings, in order to final decree in conformity with the opinion and principles herein expressed and declared; which is ordered to be certified to the said circuit court of the city of Lynchburg.

Decree reversed.

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***Bowler v. Huston.**

[32 Am. Rep. 673.]

March Term, 1878, Richmond.

1. **Effect of Foreign Judgment—Constitutional Law.**—That the judgment of one state may have in another the effect provided for by the constitution of the United States, Article IV, section 1, and the act of congress of May 26, 1790, the court in which the judgment was rendered must have had jurisdiction of the case when it pronounced the judgment.
2. **Same—Same.**—Whether or not a defendant resides in the state in which the action is brought, he must be summoned, or appear in person or by attorney, in the suit, in order to give the court jurisdiction of the case, so as to give its judgment the effect in another state provided for by the constitution and act of congress.
3. **Same—Rights of Defendant.**—It is perfectly competent for a defendant, in an action in one state, on a judgment rendered in another, to plead and show in his defence that he was not summoned, and did not appear, in person or by attorney, in the suit in such other court; and that, too, even though it be expressly stated in the record of the suit in that court that he was actually summoned and did so appear.
4. **Pleading.**—This defence ought to be made by special plea.
5. **Partnerships—Dissolution—Right to Retain Counsel.**—One member of a dissolved

***Foreign Judgments.**—The principal case is cited, and its rulings as to what is necessary to give to a judgment of one state effect in another state is approved in *Piedmont, etc., Ins. Co. v. Ray*, 75 Va. 823. See also *Wilson et al. v. Bank of Mt. Pleasant*, 6 Leigh 570; 4 Min. Inst. (2nd Ed.) 795, 12 Am. & Eng. Enc. Law 148. The principal case is distinguished in *Stewart v. Northern Assurance Co.*, 45 W. Va. 740.

partnership has no authority, unless specially given, to retain an attorney to defend the other members of the late firm in an action brought against them. Such authority does not result from the partnership itself.

6. **Same—Same—Effect of Foreign Judgment—Rights of Partner Not a Party to Action.**—A judgment rendered in another state against all the members of a partnership, after the dissolution of the partnership, does not personally bind a member of said partnership not served with process and not appearing in the case, although the other members were served, or appeared and caused an appearance to be entered for all.
7. **Same—Same—Same—Constitutional Law.**—A judgment in New York under the Code of procedure of that state against the members of

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a dissolved partnership, *one of whom was not served with process and did not appear in person or by attorney in the suit, is not such a judgment as is contemplated by the constitution and act of congress, as to such person.

The case is fully stated by Judge Moncure in his opinion.

John Dunlop, for the appellant.

Robert Howard, for the appellee.

MONCURE, P., delivered the opinion of the court.

This is a writ of error to a judgment rendered by the circuit court of the city of Richmond on the 2d day of November, 1874, in an action of debt brought in said court on a judgment obtained at a supreme court of the state of New York for the city and county of New York.

A copy of the record of the case in which said judgment was obtained is set out in the declaration in said action of debt.

The parties to said case are described in said record as "Henry Huston, plaintiff, against — Bowler (whose given name is unknown to plaintiff), Charles C. Herbert, and Charles Illius, defendants." The case was commenced early in June, 1869.

In the complaint, which was filed on or about the same day, and was signed by the plaintiff's attorneys, it was charged that at all the terms thereafter mentioned — Bowler (whose given name is unknown to plaintiff), Charles C. Herbert, and Charles Illius, the defendants above named, were partners in business in the city of New York, under the firm name of Bowler, Herbert & Co.; that on the 17th day of November,

1864, certain persons, under their firm name of N. T. Carter & Co., *made their draft or bill of exchange in writing, dated on that day and directed to the defendants, under their firm name of Bowler, Herbert & Co., and thereby required the said defendants, three months after the date thereof, to pay to the order of themselves the sum of \$1,624, and the said defendants afterwards, to-wit: on the 22d day of November, 1864, for value received, accepted the said draft or bill; that thereafter, and before the maturity of said bill or draft, the plaintiff became, and then was, the lawful owner and holder for a valuable consideration; and

that the defendants had not paid the same nor any part thereof, except the sum of \$1,000, but were justly indebted to the plaintiff in the sum of \$624, with interest thereon from the 20th day of February, 1865. Wherefore the plaintiff demanded judgment against the defendants for the said sum of \$624 and interest, besides the costs and disbursements of the suit, &c.

The summons to answer said complaint was returned with an affidavit of service thereof, on the 24th day of June, 1869, on Charles C. Herbert, one of the defendants. It does not appear to have been ever served on either of the other two defendants, or that the defendant, Henry Bowler, the plaintiff in error, ever had any knowledge or information as to the existence of the case until after it had ceased to exist. But it does appear, as will presently be seen, that the defendant, Charles Illius, had knowledge of it soon after it was brought.

An answer was filed to said complaint in July, 1869, and was signed by "Sullivan & Bracken, defendants' attorneys, 29 Wall street, New York." It contains sixteen paragraphs, which are numbered accordingly, and states in substance, among other things, that on or about the 5th of October, 1864, a firm doing business as miners and shippers of coal in the city of Philadelphia, under the firm name of Carter & Co., through one Henry

Huston, the plaintiff in said case, **269** gained with the defendants' firm of Bowler, Herbert & Co., whereby said

Huston, on the part of said Carter & Co., agreed to sell and deliver to said firm of Bowler, Herbert & Co. a certain quantity of good, clean anthracite coal; that defendant's firm were to receive on their barge at Richmond, Pennsylvania, the said coal, and pay for the same by their note at three months; that in pursuance of said contract a certain quantity of coal was shipped by said Carter & Co. on a barge for defendant, and at the same time a bill and draft for the amount thereof, \$1,624, was sent to them; that said bill and draft were forwarded and received and accepted by said defendants' firm long before the arrival of the coal at Albany, New York, where the defendants were to receive the same, and that said bill was received and draft accepted by the defendants, relying upon the good faith and honesty of said Carter & Co., and believing that they had fulfilled the terms of the contract; that on the arrival of the coal at Albany, and its being unloaded, it was found to be not of the quality contracted for, and totally unfit for use; that defendants' firm immediately informed said Carter & Co. of this fact, and demanded, as same was bulky and expensive to load and return to Pennsylvania, that they should take the same under their control; that the defendants' firm not being able to re-ship and return said coal to Carter & Co., and the latter not having taken possession of the same, defendants, in order to save loss, notified them to have the same appraised, and that they would pay for the same at such appraised value; that said Carter & Co. were not willing to do this,

but requested defendants to leave the matter open for future adjustment, to which defendants agreed; that before any adjustment was had, and about May, 1865, and long after the maturity of the draft accepted by defendants, they, at the earnest solicitation of Carter & Co., accepted and paid them a

270 draft for the sum of \$1,000, on account, for the adjustment *that was to be made for the value of the coal; that though defendants' firm have ever desired, asked for and tried to obtain the adjustment as aforesaid, they have never been able to obtain one, said Carter & Co. ever putting it off from time to time, and eventually neglecting and refusing to make the same; that subsequently said Carter & Co. wrongfully and fraudulently passed the draft accepted by defendants' firm without consideration, and after its maturity to the plaintiff, for the purpose of harrassing defendants and forcing them to make an unjust settlement or purchase quiet, the said Huston, the plaintiff, having full knowledge of all the facts therein before alleged, and that the amount paid by defendants, to-wit: the sum of \$1,000, was more than sufficient to pay for the coal shipped to and forced upon defendants, and that said Carter & Co. and said plaintiff, their agent, were fully aware of this. Wherefore, defendants demanded judgment for dismissal of the complaint, &c.

Annexed to the said answer is an affidavit made by the said Charles Illius on the 17th day of July, 1869, stating that "he is one of the defendants above named, that he is acquainted with all the facts of the case, and that he has read the foregoing answer and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true."

A copy of said answer was served on plaintiff's attorneys, who, it seems, gave "notice of settlement or order" to defendants' attorneys; but having made default on the same, it was dismissed by order of the court; whereupon the defendants' attorneys gave notice to the plaintiff's attorneys on the 30th of July, 1869, that the said answer was reserved.

No further order or other proceeding appears to have been made or taken in **271** the case after the said 30th day of *July, 1869, until the 28th day of January, 1874, when notice was given by the said plaintiff's attorneys to the said defendants' attorneys that the bill of costs endorsed in the notice would be presented to the clerk of the county of New York for adjustment, &c., at his office in the city of New York, on Friday, the 30th day of January, 1874, &c.; and on the same day due service of a copy of said bill of costs and notice of taxation of the same was admitted by the said attorneys for defendants.

On the 30th day of January, 1874, John P. Reed, Jr., one of the attorneys of the plaintiff in the case, made oath that on or about the 22d day of January, 1874, Charles Illius, one of the defendants, informed deponent that the full name of the defendant, Bowler,

was Henry Bowler, and on the same 30th day of January, 1874, on motion of the said Reed, Jr., it was ordered that the summons and complaint in the case be amended by inserting the name Henry before the word "Bowler," in the style of the case, and that the words "whose given name is unknown," be stricken out. And on the same day the case was tried by the supreme court for the city and county of New York, and a jury, and the defendants not appearing, a verdict was rendered therein for the plaintiff for the sum of \$1,014.69, and his costs having been adjusted at \$210.73, on the motion of the attorneys for said plaintiff, it was adjudged that the plaintiff recover of said defendants the sum of \$1,014.69, found by the jury, with \$210.73 costs, together amounting to the sum of \$1,225.42.

On the 6th day of April, 1874, a little more than two months after the said judgment was obtained, an action of debt was brought thereon in the circuit court of the city of Richmond, as before mentioned, the parties to the action being described in the declaration therein as "Henry Huston, plaintiff," and "Henry Bowler, Charles C. Herbert and Charles Illius, late partners doing business 272 in the city of New York, under the firm name of Bowler, Herbert & Co., defendants." The said Henry Bowler, who resided in the city of Richmond, was the only one of the said defendants who was summoned and appeared to the said action, the other two being non-residents of the state of Virginia.

On the 2d day of November, 1874, came the parties by their attorneys, and the defendant, Henry Bowler, pleaded nil debet, and put himself upon the country, and the plaintiff likewise (issues having previously been also joined upon the pleas of nul tiel record and the statute of limitations) and the said defendant then tendered to the court three special pleas in writing, to the filing of which the plaintiff objected, and the court rejected said special pleas and refused to permit them to be filed (the same special pleas having also been tendered, objected to and rejected as aforesaid at previous term of the said court); and neither party demanding a jury, and the evidence being heard, it was considered by the court that the plaintiff recover against the defendant, Henry Bowler, \$1,225.42, with interest at the rate of seven per centum per annum on \$1,014.69, part thereof, from the 31st day of January, 1874, till paid, and his costs, &c.

To the opinion of the court rejecting the said special pleas, the defendant excepted, and the said pleas are set out in the bill of exceptions. They do not very materially vary from each other, and only one of them need to be set out here. The first is as follows:

"Plea No. 1.

"And for a further plea in this behalf, the said defendant, Henry Bowler, says that though said judgment was in fact obtained by plaintiff against said defendant, Henry Bowler, and two other certain persons,

named therein respectively, Charles C. Herbert and Charles Illius, in the supreme court of the state of New York, for the city 273 *and county of New York, said judgment was obtained fraudulently against this defendant, Henry Bowler, individually, insomuch as said defendant was not, at any time, served with process issuing out of said court at the suit of said plaintiff, for the cause of action upon which said judgment was obtained; nor did said defendant, Henry Bowler, ever appear in person in said court to answer the plaintiff in said action, for which said judgment was so obtained; nor did said defendant, Henry Bowler, at any time or in any way or manner authorize or empower any person or persons whomsoever to appear as his (said defendant's) attorney, or attorneys, in said court to answer the plaintiff in said action in which said judgment was so obtained; nor had he, the said defendant, Henry Bowler, at any time before the recovery of said judgment, any notice or knowledge of any process or summons, or of any proceeding in said action, or any means or opportunity of defending himself therein or therefrom; and this he is ready to verify. Wherefore said defendant prays judgment whether the plaintiff his action aforesaid ought to have and maintain against him, the said Henry Bowler. Henry Bowler."

An affidavit to the truth of the plea is annexed thereto.

The defendant applied to this court for a writ of error to said judgment, which was accordingly awarded. The main, if not the only error in the said judgment assigned in the petition for a writ of error, is the rejection of the said special pleas, which rejection is complained of for several reasons set forth in the petition.

Whether the said judgment be erroneous or not, is the question which this court has now to decide.

This is an action of debt brought in this state on a judgment of another state, to-wit: New York.

274 *By the constitution of the United States, Article IV, section 1, it is declared that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And the congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

The act of congress of May 26th, 1790, Vol. I, p. 115, after providing the mode by which they shall be authenticated, declares that "the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have, by law or usage, in the courts of the state from whence the said records are or shall be taken."

For the judicial decisions which have been made in regard to the aforesaid provisions of the constitution and the act of congress, reference may be had to 2 American Leading Cases, with notes by Hare & Wallace, 5th edition, pp. 597-664; the leading cases

there reported being *Mills v. Duryee*, 7 Cranch R. 481-487, and *McElmoyle v. Cohen*, 13 Peters R. 312-330.

In *Mills v. Duryee*, it was held that nil debet is not a good plea to an action founded on a judgment of another state; and such has been the uniform doctrine on the subject ever since.

As a necessary consequence, it has also ever since been uniformly held that nul tiel record is a good plea in such case.

In regard to the construction and effect of the provisions of the constitution of the United States and the act of congress aforesaid, it has been repeatedly held, and is firmly established by decisions of the supreme court of the United States, and of many, if not most of the several states, that the effect

thus given in an action in one state upon
275 a judgment obtained in *another, is based upon the assumption that the court in which the judgment was obtained had jurisdiction of the case when it pronounced such judgment. It is not necessary, of course, that a defendant against whom a judgment is obtained should reside in the state in which the judgment is rendered, in order to give the court rendering the judgment jurisdiction of the case. It will have such jurisdiction, though the defendant be a non-resident of the state, if he be summoned therein, or appear in person, or by attorney, to the suit. But whether he resided therein or not, he must be so summoned, or appear, in order to give the court jurisdiction of the case, so as to give its judgment the effect in another state provided for by the constitution and act of congress aforesaid. And it is perfectly competent for a defendant in an action in one state, on a judgment rendered in another, to plead and show in his defence that he was not summoned and did not appear in person or by attorney in the suit in such other court; and that, too, even though it be expressly stated in the record of the suit in that court that he was actually summoned or did so appear. The judgment is not conclusive on either of those points, though it may be conclusive on the merits if the court have jurisdiction of the case.

That such has been the course of the decisions on this subject, will appear by reference to the following, among others: *Bissell v. Briggs*, 9 Mass. R. 462 (1813); *Starbuck v. Murray*, 5 Wend. R. 148 (1830); *Mervin v. Kumbel*, 23 Id. 293 (1840); *Wilson v. Bank of Mt. Pleasant*, 6 Leigh, 2d edition, 570 (1835); *Gleason v. Dodd*, 4 Metc. R. 333 (1842); *Shelton v. Tiffin & al.*, 6 How. U. S. R. 163 (1848); *D'Arcy v. Ketchum & al.*, 11 Id. 165 (1850); *Rape v. Heaton*, 9 Wisc. R. 328 (1859); *Public Works v. Columbia College*, 17 Wall. U. S. R. 521 (1873); *Thompson v. Whitman*, 18 Id. 457 (1873). In the last case,

as in others, it was held that "the record
276 of a judgment *rendered in another state may be contradicted as to the facts necessary to give the court jurisdiction; and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did

exist." *Knowles v. The Gaslight & Coke Co.*, 19 Id. 58 (1873). In that case it was held that, "in an action on a judgment in another state, the defendants, notwithstanding the record shows a return of the sheriff that he was personally served with process, may show the contrary, namely, that he was not served, and that the court never acquired jurisdiction of his person." And the case of *Thompson v. Whitman*, supra, decided by the same court in the same year, was affirmed and applied. *Hill v. Mendenhall*, 21 Id. 453 (1874). In that case it was held by the Chief Justice Waite, delivering the opinion of the whole court, that "since the cases of *Thompson v. Whitman*, 18 Wall. U. S. R. 457, and *Knowles v. Gaslight & Coke Co.*, 19 Id. 58, it may be considered as settled in this court, that when a judgment rendered in one state is sued upon in another, the defendant may contradict the record to the extent of showing that in point of fact the court rendering the judgment did not have jurisdiction of his person. If such showing is made, the action must fail, because a judgment obtained under such circumstances has no effect outside of the state in which it was rendered. In *Underwood v. McVeigh*, 23 Gratt. 409, Judge Christian delivering the unanimous opinion of this court, laid down the principle, among others of a like kind, that "no sentence of any court is entitled to the least respects in any other court or elsewhere when it has been pronounced ex parte and without opportunity of defence." To the same effect is *Windsor v. McVeigh*, 3 Otto R. 274. See also the following books on the same subject, viz: 1 Kent's Com., eleventh edition, p. 261, marg. and notes; 1 Rob. Pr. 219; 1 Id. 277 437; 7 Id. 109; 1 Smith's Ldg. *Cas., 7th Am. ed. pp. 1118-1146; 2 Id. 828; 2 American Leading Cases, supra.

The summons to answer the complaint in the action of debt in New York appears from the record to have been executed on one only of the three defendants, to-wit: Charles C. Herbert; though another of them, to-wit: Charles Illius, had notice and joined in the defence of the action, and made oath to the truth of the facts stated in the answer. The third defendant, Henry Bowler, appears never to have been summoned to answer the complaint, nor to have appeared to defend the action, in person or by attorney, nor to have authorized any attorney to appear for him for that purpose, nor to have had "at any time before the recovery of judgment in said action any notice or knowledge of any process or summons, or of any proceeding in said action, or any means or opportunity of defending himself therein or therefrom," as he avers in his special pleas which he offered, but which were rejected in the action brought in this state on the said judgment as aforesaid. The said Henry Bowler no doubt resided in the city of New York when the contract was made, to-wit: in November, 1864, and probably, also, when the said action was brought thereon in New York in June, 1869. If he did not then reside in the city, he no doubt resided elsewhere in the state of New York, as he does not aver in his said special

pleas that he was then a non-resident of the state of New York. His christian name was then unknown to the plaintiffs or their attorneys in the said action, and continued to be unknown to them until about the 22d day of January, 1874, a few days before the judgment in the said action was rendered, when it was ascertained by one of the said attorneys; and a few days thereafter, and indeed on the very day on which the judgment was rendered, to-wit: the 30th day of January, 1874, it was inserted, for the first time, in the blank

278 which had been left for it in the *proceedings in said action. The said Henry Bowler ceased to be a resident of the city and state of New York, but at what time does not appear, though probably after the said action there was brought, but no doubt before the judgment was rendered therein. When the action was brought in the circuit court of the city of Richmond on the said judgment he resided in the said city, but how long he had previously resided therein does not appear, nor is the fact material.

It was insisted by the counsel for the defendants in error in their argument of this case, that it appears from the record of the action in New York that the defendants appeared in that action by their attorneys, which means that all of the defendants so appeared; and that any or either of the defendants had a right to employ attorneys to appear for all in the action, even though the partnership may have been, as it no doubt was, previously dissolved; the said counsel contending that a partnership, though actually dissolved for all purposes of carrying on the business of the partnership, is considered as continuing until all its business is settled and ended.

In regard to what the record shows as to the appearance of the defendants by their attorneys, it was insisted by the counsel for the plaintiff in error that the word defendants here means only the two defendants, Herbert and Illius, who were actually before the court. But even if it was intended to embrace the third defendant also, Bowler, we have seen that it was still competent for that defendant to traverse the fact that any attorney was employed in the case by him or on his authority.

In regard to the authority of any of the members of a dissolved partnership to retain an attorney to defend the other members of the late firm in an action brought against them, it seems to be now well settled that no such authority exists, unless specially given. It does not result from the partnership itself.

279 *This was held in a very recent case, decided in 1875 by the supreme court of the United States, *Hall & al. v. Lanning & al.*, 1 Otto 160. There it was held that a member of a partnership residing in one state, not served with process and not appearing, is not personally bound by a judgment recovered in another state against all the parties after a dissolution of the firm, although the other members were served, or did appear and cause an appearance to be entered for all, and although the law of

the state where the suit was brought authorized such judgment; and that after the dissolution of a partnership one partner has no implied authority to cause the appearance of another partner to be entered to a suit brought against the firm. And a quære is added by the reporter to his caption of the report of said case: Whether such implied authority exists during the continuance of the partnership? But it is unnecessary to decide that question in this case.

It is obvious, and indeed seems to have been admitted by the counsel on both sides in their argument of this case, that the action in New York was under section 136 (as amended in 1866) of the Code of Procedure of that state, page 101, which, so far as it relates to this case, is as follows: "Where the action is against two or more defendants, and the summons is served on one or more of them, but not on all of them, the plaintiff may proceed as follows: 1. If the action be against defendants jointly indebted upon contract, he may proceed against the defendants served, unless the court otherwise direct; and if he recover judgment, it may be entered against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all and the separate property of the defendants served, and if they are subject to arrest, against the persons of the defendants served," &c.

Supposing the proceeding to have 280 been had and the *judgment to have been obtained in New York under the section aforesaid, it is obvious that the judgment can have effect only in the state of New York, and against the joint property of all the defendants and the separate property of such of them only as were served with process there, and against the persons of the latter if they were subject to arrest; and that it cannot have any effect extra territorium. And at all events, that it cannot have the effect of a judicial proceeding of one state on which judgment may be recovered in another, under the provisions of the constitution of the United States and act of congress aforesaid, against a defendant who was not served with process in such judicial proceeding, and did not appear therein, in person or by attorney. The only purpose of an action in another state on such a judgment, is to obtain a personal judgment against the defendant residing or who may happen to be therein, and who was not served with process and did not appear to the first action. The judgment in that action is no evidence against him in an action brought thereon in another state. In its very nature it is confined in its operation to the state in which it was obtained and by which it was authorized. It was not, and could not have been, authorized with a view to another state, or to the provision of the constitution and act of congress aforesaid. At all events it can have no greater effect than would a judgment of a foreign state in an action brought thereon in this state.

The proceedings in this case illustrate the wisdom of confining the operation of a

judgment obtained under the aforesaid section of the New York Code of Procedure to the jurisdiction in which it is obtained, and not extending it to other states under the provision of the constitution and act of congress aforesaid, and show that the greatest injustice might otherwise be done.

The defendant in the action in this
 281 state was not served *with process in the action in New York, and did not appear therein, and had no knowledge or information, as he says on oath, of the pendency of that action. He was a member of the firm in the city of New York, which made the contract with the firm in the city of Philadelphia, on which contract that action was brought. The contract was for the purchase of coal, to be shipped from Richmond, Pennsylvania, to Albany, New York. It was made in October, 1864; shortly after which the coal was shipped and a bill of exchange at three months was drawn by the vendors on the vendees for \$1,624, the price of the coal, according to the contract, which bill was accepted by the vendees before they received the coal. When the coal arrived at Albany it was found, as the vendees contended, to be not of the quality contracted for and totally unfit for use, and they offered to cancel the contract; but as that was inconvenient to the vendors, it was agreed, as the vendees contended, that the coal should be retained by them on terms to be adjusted afterwards between them. In May, 1865, long after the maturity of the said bill, the vendees, at the earnest solicitation, as they said, of the vendors, accepted and paid their draft for \$1,000, on account of the adjustment that was to be made for the value of the coal; which said sum, the vendees insisted, was more than sufficient to pay for the coal. It does not appear that any further demand was made of the vendees, on account of the coal, until the 5th day of June, 1869, between three and four years after the said payment of \$1,000, when the action in New York was brought by Henry Huston, to whom the said bill of exchange was endorsed, and who, it seems, was privy to all the facts of the case. The amount claimed in that action was \$624, with interest thereon from the 20th day of February, 1865, being the amount of said bill, after crediting the said payment of

282 *\$1,000. That action was promptly defended by the defendants, Herbert and Illius; the other defendant, Bowler, not having been served with process or appeared therein, or had, as he says, any knowledge or information thereof, and of course not taking any part in the defence. The grounds of the defence were such as to show that, in the view of the parties making it, they owed nothing on account of the claim. It seems that there was in July, 1869, some attempt made by the plaintiff in the action to have a settlement with the defendants, but having made default in his proceeding therefor, the same was dismissed by order of the court.

Nothing further appears to have been done in the case from July, 1869, aforesaid, until four and a half years thereafter, to-wit: the 28th day of January, 1874, when the plain-

tiff's attorney served the defendant's attorney with the notice of the taxation of costs in the case, service of which notice the latter thereupon admitted. Two days thereafter, to-wit: on the 30th day of January, 1874, John P. Reed, Jr., one of the plaintiff's attorneys, made oath that on or about the 22d of January, 1874, Charles Illius, one of the defendants in the case, informed deponent that the full name of the defendant, Bowler, therein was Henry Bowler; on said deponent's motion on the said 30th day of January, 1874, it was ordered by the court, that the summons and complaint in the action be amended by inserting the name Henry before the word "Bowler" in the style of the cause, and that the words, "Whose given name is unknown," be stricken out. And on the same day last named, the cause was tried by the court and a jury, the defendants not appearing; and a verdict was rendered therein for the plaintiff, for the sum of \$1,014.69; and his costs having been adjusted at \$210.73, on the motion of his attorneys it was adjudged that the plaintiff recover of the defendants the aggregate of said two sums, \$1,225.42.

283 *It does not appear why the defendants, who appeared to the action in New York, and at first made so earnest a defence therein, upon grounds so plausible, should, after the lapse of more than three years, without any further action having in the meantime been taken in the case, have abandoned altogether their defence, discharged their attorneys, and suffered judgment to go against them by default for the whole amount of the plaintiff's demand.

It does not appear that any attempt was made after the judgment was rendered, to recover the same or any part of it of the defendants, or either of them, who alone were served with process and appeared and defended the action in New York. Nor does it appear why no such attempt was made, which might have been done by merely suing out process of execution there. The reason may have been that they were bankrupt or insolvent, and that such an attempt would have been vain. And the same reason may account for their having withdrawn their defence and suffered judgment to go by default as aforesaid.

It does appear, however, that immediately after that judgment was rendered, the plaintiff forwarded an exemplification of the record to the city of Richmond, Virginia, and just two months and a few days after the rendition of said judgment, to-wit: on the 6th of April, 1874, an action was brought thereon against the said Henry Bowler in the circuit court of said city for the whole amount of said judgment.

Under such circumstances we think that great injustice might, and probably would be done, by considering the said judgments as coming under the operation of the constitution of the United States and the act of congress aforesaid. But we do not so consider, for the reasons before mentioned.

We have not noticed all the cases
 284 referred to in the *argument, deem-

ing it unnecessary to do so, and this opinion has already been too much prolonged.

We are, therefore, of opinion, that the New York court had no jurisdiction to render judgment against the defendant, Henry Bowler, at least such a judgment as could be the foundation of an action thereon against him under the constitution of the United States and the act of congress aforesaid; and that such want of jurisdiction is a good defence in this action; and we are of opinion that such defence may and ought to be made by special pleas; that the three special pleas offered by the defendant were good in form and substance, and ought not to have been rejected by the court below. The defence could not have been made under the plea of nul tiel record; and the plea of nil debet was not a good plea. It is contended, however, by the counsel for the defendant in error, that though not a good plea, yet as it was actually plead, and he did not object to it, but joined issue upon it, the defence might have been as well made under it as under a special plea. Without deciding whether it might have been or not, we think the circuit court erred in excluding the special pleas; and that for that error the judgment ought to be reversed and a judgment rendered for the admission of the pleas, and that the cause ought to be remanded for further proceedings to be had therein to a final judgment, according to the foregoing opinion.

The judgment was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that each of the three special pleas in writing tendered by the defendant to, and rejected by the said circuit court, presented a good and valid legal defence to the action, and
285 the said circuit court erred in *rejecting the said special pleas and refusing to permit them to be filed.

Therefore it is considered that the said judgment of the said circuit court is erroneous, and that the same be reversed and annulled, and that the plaintiff in error, Henry Bowler, recover against the defendant in error, Henry Huston, his costs by him expended in the prosecution of his writ of error and supersedeas aforesaid here. And it is further considered, that the cause be remanded to the said circuit court, with instructions to the said court to accept the said special pleas and permit them to be filed, and for further proceedings to be had therein to a final judgment in the case; which is ordered to be certified to the said circuit court of the city of Richmond.

Judgment reversed.

286 *Morris' Ex'or v. Grubb.

March Term, 1878. Richmond.

Witnesses—Death of Other Party.—In an action of debt by W for the use of G, against the

***Witnesses—Death of Other Party.**—See also 4 Min. Inst. (2nd Ed.) 767; Ellis v. Harris' Ex'or, 32 Gratt. 691, citing the principal case approvingly; Parent v. Spitzer, 30 Gratt. 819; Burkholder v. Ludlam, 30 Gratt. 255 and note.

executor of M, upon two bonds purporting to be executed by M and R, the administrator pleads *non est factum*, and payment. The only proof of the execution of the bonds by M, is proof of an acknowledgment by M to an agent of G, made after the assignment to G, and the proof as to the payments are of payments made by R to G in the lifetime of M—**Held:** G is not a competent witness under the statute to testify in his own behalf.

The case is fully stated by Judge Anderson in his opinion.

C. H. & R. H. Lee, for the appellant.

No counsel for the appellee.

ANDERSON, J., delivered the opinion of the court.

This is an action of debt which was instituted in the county court of Loudoun county, in the name of William B. Grubb, for the use of Joseph P. Grubb, against Craven James, executor of Mahlon Morris, deceased, on two bonds, each for the sum of \$532.50, together \$1,065, purporting to have been executed on the 12th day of April, 1856, by Robert W. Morris and Mahlon Morris jointly and severally, to the said William B. Grubb, payable, one of them, on the first day of April, 1860, with interest from the first
287 day of January, 1856, and *the other on the first day of April, 1861, with like interest. Both of said instruments were assigned by William B. Grubb to Joseph P. Grubb, for whose use this suit was brought.

The defendant pleaded two pleas, one *non est factum*, and the other, payment; on each of which issue was joined. The jury found for the plaintiff the sum of \$651.81, with interest from the first day of April, 1861. Thereupon the defendant moved the court to set aside the verdict and grant him a new trial; which motion was overruled by the court and judgment entered for the plaintiff; and the defendant excepted.

In the progress of the trial, on motion of the defendant, the following bill of exceptions was signed and sealed by the court and made a part of the record, viz: "Be it remembered that on the trial of this case the plaintiff having introduced evidence tending to prove that Joseph P. Grubb, the assignee of the bonds sued on in this case, and the person for whose use this suit was brought, sent his brother, Samuel N. Grubb to Mahlon Morris to obtain from Morris an acknowledgment and delivery of said bonds, and then offered as a witness said Joseph P. Grubb. To the examination of said Grubb as a witness the defendant, by his counsel, objected, but the court overruled the objection of the defendant as to the competency of said Grubb, and allowed the said Grubb to be sworn as a witness, to which action of the court the defendant excepted, and tendered this his bill of exception," &c.

It appears from the foregoing bill of exceptions that the objection to the introduction of Joseph P. Grubb as a witness was to his competency, but the ground of his incompetency is not expressed; but that may be gathered from the fact of the death of Mah-

lon Morris, the suit being against his executor, from the character of the issues, and the purpose for which the evidence referred 288 *to in the bill was introduced; and it is that Joseph P. Grubb, the substantial plaintiff in the suit, was a party to the transactions which were put in issue by the pleas, and were the subject matter of investigation, the other party to the transaction, Mahlon Morris, being dead.

The defendant, in his plea of non est factum, craved oyer of the instruments upon which the suit is founded; and it appears upon the face of the assignment of the first bond, that it was made on the 12th of April, 1856, and the assignment of the second bond is dated as of the same date; and it appears from the list of payments filed with the plea of payment, that they were all made subsequently to the said assignments; and it is conceded by the judge of the circuit court, in the lifetime of Mahlon Morris. Consequently, if made at all, they were made to Joseph P. Grubb, in the lifetime of Mahlon Morris, the testator of defendant. Consequently, the said Joseph P. Grubb was a party to the transaction which was the subject of investigation under the plea of payment; and the said Mahlon Morris being jointly bound with Robert W. Morris, if bound at all, in the bonds in satisfaction of which the payments were claimed to have been made, was a party to the transaction which was the subject of investigation under the plea of payment, as well as to that which was the subject of investigation under the plea of non est factum.

The court is of opinion that the transaction under investigation, upon the first issue being the factum of the bonds, and the evidence introduced by the plaintiff being for the purpose of showing an acknowledgment and delivery of the bonds by Mahlon Morris to his agent for him after he became the assignee thereof, shows that he relied upon the declarations and act of delivery by Mahlon Morris in his lifetime, made to him or his agent, in support of the issue on his part. The transaction, which was the subject of investigation upon that is-

289 sue, was consequently *a transaction between Joseph P. Grubb and Mahlon Morris, in the lifetime of the latter, and he being dead, Joseph P. Grubb was incompetent to testify in the cause.

But it is contended that he was competent to testify under the issue of payments. All the payments claimed to have been made, were claimed to have been made in the lifetime of Mahlon Morris, and whether made by him or Robert W. Morris, they were payments which he was jointly bound with the said Robert to make. They were payments upon obligations, for which the plaintiff alleges he was jointly bound, and which were in discharge pro tanto of his obligations, if any such devolved on him. Mahlon Morris, as is aptly said by counsel for plaintiff in error, "may have been cognizant of the facts connected with the payments—the amount—source from whence derived—and the understanding as to their application."

It is immaterial whether the payments were made by him or by Robert Morris, they were made in satisfaction of his alleged obligation, which was matter in issue in this suit. Mahlon Morris was one of the original parties to these transactions, and was dead; and Joseph P. Grubb was an original party to the transactions under investigation, upon both of the issues—to the former, if he could establish the factum by showing the acknowledgment and delivery of the bond by Mahlon Morris to his agent after he had acquired possession of the instruments by assignment from William B. Grubb; to the latter, as all the payments were made and claimed to have been made to him in the lifetime of Mahlon Morris. He was not competent to testify in relation to their transactions, when the other party, in consequence of his death, could not testify.

But his competency must be determined by his relation to the subject matter of investigation, and not by his testimony

290 *given at the trial. *Mason & als. v. Wood*, 27 Gratt. 783. The principles of that decision are reaffirmed in *Grigsby & als. v. Simpson, ass'ee, &c.*, 28 Gratt. 348. Judge Christian, speaking for the whole court, said: "If the contract or transaction was with a person who has deceased, the other party is not admitted as a witness at all, and cannot testify to any fact in the case."

The court deems it unnecessary to express any opinion upon the exception to the ruling of the court refusing a new trial, as the cause will have to go back upon the assignment of error, already considered, and the defendant below will have the benefit of a new trial, and inasmuch as there is no question of law arising upon the latter assignment of error, which needs to be decided now for direction to the court below in the new trial, and it is not proper for this court, as there is to be another trial, to express unnecessarily any opinion on the facts of the case as they are set out in the bill of exceptions.

A writ of error was awarded by the circuit court of Loudoun county to the aforesaid judgment of the county court, which affirmed the same, and the cause is here upon a writ of error to the judgment of the said circuit court.

The court is of opinion to reverse the judgment of the circuit court with costs, and to remand the cause to said circuit court with instructions to that court to reverse the judgment of the county court, to set aside the verdict and grant the defendant below a new trial, upon which second trial, if Joseph P. Grubb should be again offered as a witness he should be excluded.

The judgment was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the county court of Loudoun erred in overruling the objection of the defendant below to the competency of Joseph P. Grubb to tes- 291 tify *in the cause, and in admitting him to give testimony to the jury on the trial of the issues in the cause, and that

consequently the judgment of the circuit court affirming the judgment of the county court is erroneous. It is therefore considered, that the judgment of the circuit court be reversed and annulled, and that the defendant in error do pay to the plaintiff in error his costs expended in the prosecution of his writ of error here. And the cause is remanded to the said circuit court with instructions to reverse the judgment of the county court, set aside the verdict of the jury, and grant the plaintiff in error a new trial. And if upon said trial the said Joseph P. Grubb should be offered again as a witness, he should be excluded as incompetent to testify in the cause, according to the principles declared in the opinion of this court filed with the record.

Judgment reversed.

292 *Cammack v. Soran & al.

March Term, 1878, Richmond.

Conveyance of Land—Consideration—Pre-Existing Debt—Liens—Attachments—Failure to Docket.*—The consideration for the sale and conveyance of land is a debt due at the time by the vendor to the purchaser. The purchaser is a purchaser for valuable consideration within the meaning of the recording acts. And such a purchaser having purchased and received a conveyance of the land without notice of an attachment which had been previously levied upon it, but which had not been docketed, is entitled to hold the land free from the lien of the attachment.

This was an action of debt in the county court of Richmond county, and afterwards transferred to the circuit court of the county, brought by William Cammack against T. W. Soran, a non-resident of the state, to recover the sum of \$1,114.89 with interest. The case was regularly proceeded in against Soran by order of publication, and the plaintiff in October, 1872, sued out an attachment against him, which was levied on a tract of land in said county; but said attachment was not docketed.

In April, 1874, Mary L. Stephens, of the city of Washington, filed a petition in the cause, in which she claimed that she was the owner of the land on which the attachment was levied; that she had purchased the same of T. W. Soran for the sum of \$3,274.72, which had been paid in full, as would appear by the deed of Soran to her bearing date January 25, 1873, and duly recorded in Richmond county on the 15th of February following. And she avers that at the time of her purchase of the land, and

at the time of the execution of the deed to *her, she had no notice or knowledge of any suit or attachment against said Soran; and said attachment was not docketed.

Cammack responded to this petition, and insisted that Mrs. Stephens was not a bona fide purchaser for valuable consideration without notice, within the meaning of the recording acts. And he alleges that the only consideration for the said purchase by the petitioner was a debt due to her from Soran, and that she did not part with any money or other valuable thing, or release to Soran any right, or suffer any loss in consideration of said pretended purchase.

From the evidence it appears that Soran, who was the brother of Mrs. Stephens, and her agent in collecting the assets of her late husband's estate, of which she was the administratrix, was indebted to her, and this indebtedness was the consideration for the sale and purchase of the land. It was a fact also, that she had no notice of the attachment when the conveyance was made to her, and that the transaction was bona fide on her part.

In June, 1874, the cause came on to be heard, when the parties waived all other questions except those presented by the petition and answer, and the court sustained the petition of Mrs. Stephens and her claim to the land attached as against the lien of the attachment. But the plaintiff having established his claim against Soran, the court rendered a judgment against him for the sum of \$1,114.89 with interest, and thereupon Cammack applied to a judge of this court for a writ of error and superseas; which was awarded.

H. O. Claughton, for the appellant.

Walker & Walker, for the appellee.

STAPLES, J., delivered the opinion of the court.

294 *The plaintiff in error claims a lien upon the land in controversy under an attachment duly executed. The defendant's title is founded upon a deed executed to her by the debtor for the same land subsequent to the date of the attachment. It is conceded that at the time this deed was executed the attachment was not recorded or docketed, as required by the 5th section of chapter 182, Code of 1873, and that the defendant had no notice of the existence of the attachment. The evidence shows that the grantor in the deed was, at the date thereof, indebted to the defendant in various sums of money, amounting in the aggregate to more than three thousand dollars. Upon a settlement between the parties the land was conveyed to the defendant in full satisfaction of the debt due her. There is no question as to the bona fides of the transaction throughout.

The only question is, whether the defendant is a purchaser for valuable consideration within the true intent and meaning of the section of chapter 182 already cited. It is contended, on the part of the plaintiff, that while a pre-existing debt is in all cases

*Purchaser for Value—Pre-Existing Debt.

—In *Chapman v. Chapman*, 91 Va. 400, the court on this subject sustains the ruling in the principal case and cites *Evans v. Greenhow*, 15 Gratt. 153; *Wickham v. Lewis*, 13 Gratt. 427; *Exchange Bank v. Knox*, 19 Gratt. 739; *Shurtz v. Johnson*, 28 Gratt. 657, 667; *Williams v. Lord*, 75 Va. 404; *Witz v. Osburn*, 83 Va. 230. For general discussion of the subject, see 14 Am & Eng. Enc. Law (2nd Ed.) 226, and 2 Min. Inst. (4th Ed.) 696.

a valuable consideration for the transfer of property as between the parties, or for a sale or mortgage within the statutes relating to fraudulent conveyances, it is not a valuable consideration within the meaning of the recording acts, that in order to constitute such a consideration, the grantee must part with money or property at the time; he must advance some new consideration, or he must relinquish some previous valid security, and at all events it must appear he did some act on the faith of the sale by which his position was changed for the worse. In support of this view the learned counsel for the plaintiff has cited a number of decisions from other states, some of which fully sustain his position. On the other hand, there are numerous cases which hold the opposite

doctrine, and the great weight of authority elsewhere is believed to be **to the contrary*. See 2 Leading Cases in Equity, Part I, pp. 84, 85, 86, last edition. But whatever may be the conflict of decisions in other states, in this state the law must be regarded as well settled that the transfer and acceptance of real or personal property in payment of a pre-existing debt constitutes a purchase for valuable consideration within the true intent and meaning of the recording acts. In *Davis v. Miller*, 14 Gratt. 16, Moncure, P., said: "It will be conceded on all hands, I presume, that a pre-existing debt is a valid consideration for the pledge of a negotiable note, as of any other property. The endorsee of a note so received can maintain an action upon it, not only against the maker, but the endorser. He could not maintain an action against the endorser if he were not an endorsee for value. A mortgagee of property as collateral security of a pre-existing debt is a purchaser for value in the meaning of the registry laws." These observations, it may be said, were not called for by anything in the case, and cannot, therefore, be regarded as authority. They expressed, however, the opinions of a majority, and it may be of the whole court. And they have been since followed by other cases which are directly in point. The case of *Wickham & Goshorn v. Lewis, Martin & Co.*, 13 Gratt. 427, 436, is a very strong illustration of this principle. There a vendee, having obtained goods by a palpable fraud practiced upon his vendor, conveyed them in a deed of trust to secure the payment of pre-existing debts, it was held that the vendor could not recover the goods, because the trustee was to be regarded as a purchaser for value without notice. And yet all will agree that the equity of the vendor was stronger than that of the creditor, who had merely obtained a lien upon what did not justly belong to his debtor, but to the vendor.

In *Evans v. Greenhow*, 15 Gratt. 153, the contest was between an execution creditor claiming a lien upon a **chase* in action, and a trust creditor claiming an assignment of the chose under a trust deed given as a security for the payment of a debt. The lien of the execution was prior to that of the deed, and the only question was whether the parties claiming under the deed

were to be considered as assignees or purchasers for value without notice. Judge Moncure, after stating that there was no proof of notice, said: "A pre-existing debt is of itself a valuable consideration for a deed of trust executed for its security, which deed, if it be duly recorded and was not executed with a fraudulent intent known to the trustees or beneficiaries therein, will be valid against all prior secret liens and equities, and all subsequent alienations and incumbrances." Again, after stating that the lien of the execution was given by statute subject to certain exceptions, he proceeds to say: "Among them is the exception in favor of an assignee for valuable consideration without notice. The propriety of this exception, so far as it applies to an assignment for value paid at the time, is not denied, nor will it be denied that it applies to an assignment in discharge of a pre-existing debt. But it is contended that the exception does not apply to an assignment for the security of a pre-existing debt. Such an assignment seems to be as well within the spirit as the letter of the law. * * * It will not do to say that an assignee for the security of a pre-existing debt would only be placed in statu quo, and would therefore not be injured by being deprived of the benefit of his lien. He may have reposed on that security and been thereby prevented from seeking satisfaction in any other way. At all events, having obtained that security bona fide, he ought not to be deprived of it, and is fairly entitled to all the advantages to which he would be entitled in any other case as a bona fide purchaser for value and without notice." The other judges fully concurred in this opinion. It is

very true that the case does not turn directly upon **the construction and operation of the recording acts*, but the principle is precisely the same. It was a contest between two creditors, each claiming a lien—the first by operation of law, the second by act of the parties—and it was held that the second was entitled to priority because the trust creditor was to be considered a purchaser for value without notice. The present case is much stronger for the application of the rule, because here the attachment creditor is in default in failing to record the memorandum of his attachment, whereas the execution creditor had done all that he was required to do. See also *Exchange Bank of Virginia v. Knox*, 19 Gratt. 739.

In 1st Lomax Digest, page 512, it is said: "A pre-existing debt, where the purchase or mortgage is made in payment or satisfaction of that debt, will clearly be a valuable consideration as much as the actual payment of so much money." This rule is laid down by the learned author as well-settled law.

There is no hardship or injustice in this rule. The law points out a plain duty to the attaching creditor, and that is the delivery to the clerk of a memorandum of his attachment for recordation. This is essential to the preservation of his lien as against third persons. If he fails to do so, he cannot complain that parties having no notice

of his lien deal with the property precisely as if that lien had no existence. The idea that the legislature used the words "purchaser for valuable consideration" in one sense in the statute relating to fraudulent conveyances, and in an entirely different sense in the statute relating to registration, is purely conjectural and not warranted by anything in our legislation. The party receiving property in payment of a debt has paid value for it as fully as if he had advanced so much money at the time. He has surrendered not

merely the right to proceed to judgment and execution, but the debt itself is extinguished. How is it possible for the court to say that he might not or could not have obtained payment in some other way, or provided himself with some other security? What claim has a mere attaching creditor, who himself is in default, to throw upon an innocent purchaser the hazard of losing both money and property, or to deprive him of the honest fruits of a superior diligence? In this case the appellee is a bona fide purchaser of the property, and for a valuable consideration; she is therefore within the very letter of the statute, and this court can defeat her title only by a judicial repeal of the law.

Judgment affirmed.

299 *March, Price & Co. v. Chambers & al.

March Term, 1878, Richmond.

Sales of Land—Unrecorded Contracts—Creditors.—In January, 1866, C, by an agreement in writing, sold to W a lot in Danville, and in the same month conveyed it to him. The agreement was never recorded, and the deed was not recorded until September 18, 1873. W having paid all the purchase money to C, conveyed the lot to R, to secure to him a debt of \$4,000. This deed was recorded on the 24th of August, 1866. In April, 1868, W was declared a bankrupt, giving in the lot as a part of his estate. In May, 1868, the register in bankruptcy conveyed to the assignee in bankruptcy; and in September, 1868, on the joint application of the assignee and R as a lien creditor of the bankrupt, the court in bankruptcy ordered a sale of the lot, and the sale was made to R, and on the 18th of November confirmed, and the assignee directed to convey the lot to R, which was done on the same day, and R took possession. In July, 1872, M recovered a judgment against C in the corporation court of Danville, which was docketed on

***Sales of Land—Unrecorded Contracts—Creditors.**—See *Dobyns' adm'x v. Waring*, 82 Va. 169; *Young v. Devries*, 31 Gratt. 304 and *note*, 2 Min. Inst. (4th Ed.) 967, also *Anderson v. Nagle*, 12 W. Va. 98.

Same—Parol Contracts.—But it is well settled that land sold and purchased under a *parol* contract, where the contract is followed by possession before a judgment against the vendor is recovered, the purchaser is not liable to satisfy such judgment. *Floyd v. Harding*, 28 Gratt. 401; *Hicks v. Riddick*, *Id.* 418; *Eidson v. Huff*, 29 Gratt. 338. See also *Burkholder v. Ludlam*, 30 Gratt. 255 and *note*; *Pack v. Hansberger*, 17 W. Va. 313.

the 11th of March, 1873.—**Held:** Though M had notice of the sale by C to W, the lot is liable to satisfy this judgment, notwithstanding all the subsequent conveyances and proceedings in relation to said lot.

This was a suit in equity in the circuit court of Danville, brought in October, 1873, by March, Price & Co. against A. B. Chambers and John G. Raney, to subject to the satisfaction of a judgment they had recovered against Chambers a lot in the town of Danville which had been once owned by Chambers, but which Raney claimed as his property. The circuit court dismissed the bill, and the plaintiff applied to this court for an appeal; which was allowed. The case is fully stated by Judge Burks in his opinion.

300 *Robertson and Greene, for the appellants.

No counsel, for the appellees.

BURKS, J. The appellants, March, Price & Co. filed their bill in the circuit court of Danville against the appellees, A. B. Chambers and John G. Raney, to subject a house and lot in the possession of Raney to satisfy the lien of a judgment recovered by the appellants against said Chambers. Raney and Chambers filed separate answers to the bill, and no depositions being taken on either side, the cause was heard on the bill, answers and exhibits, without replications to the answers, and a decree was entered dismissing the bill at the costs of the complainants. From this decree an appeal was allowed the complainants by one of the judges of this court.

The answers, whether responsive or not, there being no replications thereto, must be taken as true. 2 Rob. Prac. (old ed.), 312, and cases there cited. This is most favorable for the appellees; for, if replications had been filed, many of the essential statements in the answer being affirmative in their character, the case, without proof in support of these statements, must of necessity have been with the appellants.

The case made by the bill, answers and exhibits is, in substance, the following:

March, Price & Co. recovered their judgment in the corporation court of Danville, against the appellee, Chambers, on the 1st day of July, 1872, and the judgment was docketed in said court on the 11th day of March, 1873. The lot, which is claimed to be subject to the lien of the judgment, lies within the corporate limits of the town of Danville. It was purchased by Chambers from one S. H. Turner, and conveyed to the former by deed of Turner and wife, dated, executed and duly recorded in the

301 *year 1860. On or about the 1st day of January, 1866, under an agreement in writing, entered into between Chambers and William T. Raney, the former sold the lot to the latter, and on the 24th day of January, 1866, by deed of that date, conveyed the same to him, reserving on the face of the deed a lien on the lot for the payment of the purchase money. On the 15th day of

August, 1866, William T. Raney having paid all the purchase money owing to Chambers, conveyed the lot to the appellee, John G. Raney, by mortgage deed to secure the payment of \$4,000, with interest, owing by the said William T. Raney to the appellee. The mortgage was duly admitted to record in the corporation court of Danville, on the 24th day of August, 1866.

On the 8th day of April, 1868, William T. Raney was, on his own petition, adjudged bankrupt by the district court of the United States for the district of Virginia. One Joseph A. Hobson was appointed assignee in bankruptcy of his estate, and on the 29th day of May, 1868, the register made the usual deed of conveyance of the bankrupt's estate to the assignee. On the 22d day of September, 1868, on the joint application of the assignee and of the said John G. Raney, as a lien creditor of the bankrupt, the court of bankruptcy ordered the sale of the lot aforesaid, which had been surrendered by the bankrupt in his petition as a part of his estate. The assignee made sale of the lot under the order, and the said John G. Raney became the purchaser. The sale was reported, and by order of the 18th November, 1868, was confirmed, and the assignee directed to convey the lot to the purchaser by proper deed, it being recited that the terms of sale had been complied with and the whole of the purchase money paid. In pursuance of this order, the assignee, by deed dated and recorded the same day (18th November, 1868), conveyed the lot to the purchaser, the said John G. Raney,

302 who *thereupon took possession of the lot under said deed and had such possession at the date of the judgment of the appellants and continuously since.

The written contract for sale between Chambers and William T. Raney, was never recorded, nor was the deed of conveyance from the former to the latter recorded until the 18th day of September, 1873, more than twelve months after the appellants recovered their judgment against Chambers, and six months after the judgment was docketed.

As the answer of the appellee, John G. Raney, avers that the appellants had actual notice of the deed of conveyance from Chambers to William T. Raney, although the deed was not recorded when the judgment was recovered, such notice, in the absence of any replication to the answer, must be accepted as a fact, not deemed by me material, however, in the decision of the matters arising on this appeal.

Upon this case, made by the answers taken as true and exhibits filed, the defence of the appellee, John G. Raney, is thus summarized in the conclusion of his answer: "Respondent relying upon the written contract between Chambers and William T. Raney, and the full payment for said land; afterwards the deed from Chambers to William T. Raney, which put in said Raney both the legal and equitable title to said property, and divested said Chambers of the same; upon the deed of mortgage from W. T. Raney to him, his purchase and payment for said property, and

the several deeds, &c., to him, and the recordation thereof fully justifies this respondent in denying all the allegations of complainants' bill tending to establish a lien against said property, and he does hereby expressly deny them, and upon all matters of allegations not depending upon exhibits of records made and furnished, calls for strict proof."

The case thus presented by the record is essentially *different from Floyd, trustee, v. Harding & als., 28 Gratt. 401. In that case, the contract for sale was in parol, and had been so far performed, that the purchaser, before the date of the judgment against his vendor, had become invested with a perfect equitable title, and it was held that although the deed of conveyance was void under our registry laws, because so expressly provided, yet those laws do not apply to a parol contract for the sale of land, and that where the purchaser under such contract has acquired a valid, equitable title to the land, it is not subject to the lien of a judgment subsequently acquired against his vendor.

In the case before us, the contract for sale was in writing, and such a contract is literally within the terms of our recording acts, as fully so as a deed of conveyance, and each is declared to be "void as to creditors and subsequent purchasers for valuable consideration without notice, until and except from the time that it is duly admitted to record in the county or corporation wherein the property embraced in such contract or deed may be." See Code of 1873, ch. 114, §§ 4, 5, 6, 7.

The executory contract for the sale, no less than the deed of conveyance, being void as to the creditor, whether he be a creditor with or without notice, the lien of the judgment is paramount to the title of any alienee claiming under such void contract and conveyance.

I regard this proposition as fully established by the case of Eidson v. Huff & al. (argued before I came to the bench, and therefore I did not sit in the case), 29 Gratt. 338. In that case, the purchaser had a title bond from her vendor, went into possession under it, paid all the purchase money, and afterwards had a deed of conveyance. The title bond was never recorded, and the deed was not recorded until after judgment was recovered against the vendor. The judgment, although not docketed until after the deed was recorded,

304 was docketed *within twelve months after it was recorded, and therefore operated as a lien from and after its date. It was decided that the title bond and deed were both void under the statute as to the judgment creditor, and that the surety bound with his principal by the judgment, having paid it for his principal, was entitled to stand in the shoes of the creditor and enforce the judgment against the lands in the hands of the alienee of the purchaser from the principal judgment debtor. That case, in its equity, was even stronger for the purchaser and his alienee, than the one now under consideration, for there the purchaser from the judgment debtor went into possession under her title bond, while in the present case,

it does not appear that the purchaser ever had possession. It does not appear in either case, that there was ever any other contract than the written contract under which the purchaser claimed. This may be a hard case on the purchaser and his alienee, but, as was said by Judge Staples in the opinion in *Eidson v. Huff & al.*, concurred in by the court: "This court cannot construe away a plain statute to avoid cases of individual hardship. The legislature has thought proper to place all written contracts for the sale of land upon the same footing with deeds of conveyance, so far as they come within the influence of the registration acts, and we have no alternative but to enforce the law as it is written."

The written contract and the deed from Chambers to William T. Raney being void as to the appellants, creditors of Chambers, all the subsequent alienations are in like manner void as to these creditors. The effect of the statute is that, as to the appellants, Chambers must be regarded as entitled to the Danville lot at the date of their judgment against him, in like manner and to the same extent as if he had never alienated it. As respects this matter, the mortgagee, assignee and purchaser under the bankruptcy proceedings occupy no
305 higher ground *than William T.

Raney, the bankrupt and first purchaser, does. The assignee took the bankrupt's title and nothing more, and the purchaser from the assignee took the same title, and both are void as to the judgment of the appellants. There is nothing in the bankrupt law, or in the bankruptcy proceedings, which, in a case like this, assures to the purchaser from the assignee under an order of the bankruptcy court any other or better title than the bankrupt had. The rule caveat emptor applies to such a purchaser as in other judicial sales. The appellants were not parties to the proceedings in bankruptcy for the sale of the bankrupt's property, and their rights are not impaired or affected thereby.

It appears by the admission of the appellee, John G. Raney, in his answer to the bill, that the rents and profits of the lot will not satisfy the judgment of the appellants in five years. I am of opinion to reverse the decree of the circuit court of Danville and remand the cause, with directions to said court to enter a decree for the sale of the lot to satisfy said judgment, and for further proceedings to final decree in conformity with this opinion.

MONCURE, P., and CHRISTIAN and STAPLES, J's, concurred in the opinion of BURKS, J.

ANDERSON, J., dissented.

The decree was as follows:

This day came again the parties, by their counsel, and the court having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with record, that the lot of land, with the buildings and improve-

ments thereon, in the bill of the appellants *mentioned, situate in the town of Danville, and as stated in said bill, "designated on the plan of said town as lot No. 134," is subject to the lien of the judgment of the appellants in the bill mentioned, and is liable to be subjected to the satisfaction of said judgment, and that the said decree is wholly erroneous. It is therefore decreed and ordered that the said decree be reversed and annulled, and that the appellees pay to the appellants their costs by them about the prosecution of the appeal aforesaid here. And this cause is remanded to the said circuit court of Danville; and as it appears by the admission of the appellee, John G. Raney, in his answer to the bill of the appellants, that the rents and profits of said lot will not satisfy the said judgment in five years, the said circuit court, by proper decree for the purpose, should order the sale of said lot to satisfy said judgment, and otherwise proceed to final decree in the cause in conformity with the opinion and principles herein expressed and declared; which is ordered to be certified to the said circuit court.

Decree reversed.

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*Latham, by, &c., v. Latham.

July Term, 1878, Wytheville.

1. **Chancery Practice—Divorce Suits.***—In suits for divorce the pleadings and rules of evidence are the same as in other suits in equity, except that the bill shall not be taken for confessed, and the cause must be heard independent of the admissions of either party on the pleadings. But where the answer is responsive to the allegations of the bill, the defendant is entitled to the benefit of it, as in other cases in equity.

***Chancery Practice—Divorce Suits.**—The principal case is cited, and its holdings in regard to the rules of pleading and practice in divorce suits is approved in *Throckmorton v. Throckmorton*, 86 Va. 769.

Same—Evidence—Admissions.—In *Cralle v. Cralle*, 79 Va. 182, it is held that in divorce suits the admissions of the plaintiff are competent evidence to support the averments of the answer, the court saying "These admissions are not only competent evidence in support of the averments of the evidence but are evidence of the *most satisfactory character*." In *Bailey v. Bailey*, 21 Gratt. 43, where the act Code, 1869, ch. 109 sec. 9 is for the first time construed, the court says in reference to the statute "Their purpose was to prevent a divorce from being obtained by the collusion of the parties. * * * But surely it could never have been the intention of the legislature to change the rules of evidence, when the suit was a suit for divorce and provide a different mode of proving facts in such a case. * * * We are of the opinion that the letters of the parties may be admitted in evidence in a suit for a divorce (except where it is shown they were written by collusion for the purpose of obtaining a divorce) just as in any other case." In *Hampton v. Hampton*, 87 Va. 148, a letter from defendant was excluded, on the ground, however, of fraud and duress. See 9 Am. & Eng. Enc. Law (2nd Ed.) 844.

2. Adultery—Evidence.—Although the fact that a married man is seen in a house of ill-fame is strong evidence of the crime of adultery, yet it is not of itself conclusive, and the act is open to explanation; and it was satisfactorily explained in this case.

3. Grounds for Divorce—Desertion.—Desertion is a breach of matrimonial duty, and is composed, first, of the breaking off of the matrimonial cohabitation; and, secondly, an intent to desert in the mind of the offender. Both must combine to make the desertion complete. A mere separation by mutual consent is not desertion by either party.

4. Same—Cruelty.—The cruelty that authorizes a divorce is anything that tends to bodily harm, and that thus renders cohabitation unsafe; or, as expressed in the older decisions, that involves danger of life, limb or health.

5. Same—Same.†—There may be cases in which the husband, without violence, actual or threatened, may make the marriage state impossible to be endured. There may be angry words, coarse and abusive language, humiliating insults, and annoyances in all the forms that malice can suggest, which may as effectually endanger life or health, as personal violence, and which therefore would afford grounds for relief by the court; but what merely wounds the feelings, without being accompanied by

***Adultery—Evidence.**—The fact that a married man is seen in a house of ill-fame, is not of itself conclusive proof of the crime of adultery on his part, though it is sufficient to establish the crime *prima facie*. *Throckmorton v. Throckmorton*, 86 Va. 708.

Desertion—What Constitutes.—The rule in the third headnote in regard to what constitutes desertion is sustained in *Bailey v. Bailey*, 21 Gratt. 43; *Carr v. Carr*, 22 Gratt. 168. See also *Alkire v. Alkire*, 33 W. Va. 517; *Martin v. Martin*, 33 W. Va. 695; *Burk v. Burk*, 21 W. Va. 445.

†Grounds for Divorce—Cruelty.—The cruelty that authorizes a divorce is anything that involves danger of life, limb or health; and angry words, coarse and abusive language, humiliating insults, and annoyances in all the forms that malice can suggest, may as effectually endanger life or health, as personal violence and will, therefore, afford grounds for relief by the court. *Myers v. Myers*, 83 Va. 806; citing the principal case. See also *Kinsey v. Kinsey*, 90 Va. 16. But in *Carr v. Carr*, 22 Gratt. 168, it was held a wife has no legal grounds to leave her husband because he is rude and dictatorial in his speech to her, exacting in his demands and sometimes unkind and negligent in his treatment of her even when she was sick and worn and weary in watching and nursing their sick child. In *Hutchins v. Hutchins*, 93 Va. 68, it is held that if the husband permit the inmates of his house to treat his wife with cruelty the cruelty is his and she may leave his home without furnishing him with cause for a divorce.

Custody of Children.—Where a wife has left her husband without good legal grounds, and taken their child with her, though there is no imputation of unchastity or other bad conduct, the child will be restored to the husband upon a decree for divorce *a mensa et thoro* at the suit of the husband on the ground of desertion though the child is a female and but three years old, and this though the husband's treatment of his wife has been coarse, rude, petulant, close, exacting and penurious, leaving her to bear alone the burdens and trials which it should have

bodily injury or actual menace, does not amount to legal cruelty.

6. Custody of Children.—The father is the legal custodian of the minor children, and they will not be taken from his custody without the strongest reasons *therefor; and this right is not affected by the voluntary separation of the parties.

7. Same.—If the application by the wife for divorce is refused, if the court is satisfied that she is the chief obstacle in the way of a reconciliation, and that the husband is, under all the circumstances, entitled to the custody of the child, it is impossible to impose terms upon him and to say he shall be compelled to have the child, under the decree of the court, at particular places and times, to gratify the wishes and feelings of the mother.

8. Alimony.—It may be there are cases in which the court might refuse a divorce, and yet allow alimony to the wife. But if the husband is willing to be reconciled to the wife upon terms she can properly accept, if he has not abandoned her, if his conduct has not been such as to justify her separating from him, she is not entitled to alimony.

9. Depositions.—Notice is given to take depositions at two distant places on the same day. The other party may attend at one of the places, and object to the depositions taken at the other place for want of notice; but if he attends by his counsel at both places, he cannot except to the depositions taken at either or both places.

This case was argued at Richmond, but was decided at Wytheville. It was a suit in equity in the corporation court of Lynchburg, brought in February, 1877, by C. Fannie Latham, by her next friend, against her husband, Robert E. Latham, for a divorce. The original bill prayed for a divorce *a mensa et thoro*, on the ground of cruelty and desertion, and by an amended bill she prayed for a divorce *a vinculo matrimonii* on the same ground and the ground of adultery of the defendant, and in both bills she prayed that the child of the marriage, a boy, between two and three years old, might be placed in her custody and control on the ground that the father was morally and socially unfit to have the care and training of him.

The defendant answered both bills. To the first he denied strongly both the cruelty

been his highest pleasure to share and to relieve. *Carr v. Carr*, 22 Gratt. 168. See also *Myers v. Myers*, 83 Va. 806.

Alimony—Independent Right.—Courts of equity have from an early period in Virginia exercised the power of granting alimony in independent suits—where no divorce was granted. *Purcell v. Purcell*, 4 Hen. & M. 507; *Almond v. Almond*, 4 Rand. 662. See also 2 Am. & Eng. Enc. Law (2nd Ed.) 95.

Same—Where Wife Is in Fault.—The following cases, in accordance with the principal case held that where a wife leaves her husband without good legal grounds she is not entitled to alimony. *Carr v. Carr*, 22 Gratt. 168; *Harris v. Harris*, 31 Gratt. 13. See also 2 Am. & Eng. Enc. Law (2nd Ed.) 118.

Depositions—Opportunity to Be Present.—The rule laid down in the principal case in regard to cases where notice is given to take depositions at two different years on the same day is sustained in *Fant v. Miller*, 17 Gratt. 187.

and desertion, and he replied in detail to the specific facts stated in the bill, and *he denied emphatically the adultery charged in the amended bill.

A great number of witnesses were examined by both parties, but it is not possible and certainly not desirable, to set it out in this report. Both parties were more successful in sustaining their own fair name than impugning the conduct of the other. The result of the evidence is sufficiently stated in the opinion of Judge Staples to show the grounds of the decision and the application of the principles on which the decision is founded. Judge Anderson's views may be seen in his dissenting opinion.

The cause came on to be finally heard on the 25th of August, 1877, when the court dismissed the original and amended bills, each party to pay her and his own costs. And thereupon Mrs. Latham, by her next friend, applied to a judge of this court for an appeal; which was allowed.

John Daniel and Goggin, for the appellant.

Kirkpatrick and Blackford, for the appellee.

STAPLES, J. The appellant filed her bill in the corporation court for the city of Lynchburg, asking for a divorce a mensa et thoro from the appellee. Cruelty and desertion are alleged as the grounds of the application. Both are positively denied by the appellee in his answer. Subsequently the appellant filed an amended bill, in which she not only reiterates the charges of cruelty and desertion, but avers lewdness of conduct and adultery on the part of the appellee. The latter filed his answer, denying the charges in the most positive and explicit terms. In the progress of the suit numerous depositions were taken, in many of which the examination was protracted to great length, one of the appellant's witnesses being asked on cross-examination one hundred and one questions, and one of appellee's witnesses being
310 *asked one hundred and twenty-nine questions. The record, numbering some four hundred pages, exhibits a controversy through all its stages conducted with the greatest bitterness and asperity. Even the private letters of the parties, written in the confidence of friendship and affection, have been subjected to the ordeal of public scrutiny and criticism. The counsel on both sides have argued the case with an ability and fervor which plainly show how deeply their feelings are enlisted in the cause of their clients. And not merely the parties, their counsel and friends, but it is apparent a large part of the community where the case originated are deeply interested in the controversy. This is not at all surprising, for both parties are persons of high social position. The appellant is represented as a lady of many personal attractions, and of the highest culture and refinement; and the appellee as a man of excellent character, of amiable temper, and of unimpeached integrity. This court—no court—could view without the deepest concern such a contro-

versy, not only on account of its disastrous consequences to the parties, but from its deleterious effects upon the community. The difficulties of the case are greatly increased by the fact that, in addition to the matter of the divorce, we are called upon to decide the question of custody and control of the helpless infant, the only fruit of this unhappy marriage. Our consolation is that, in performing this duty, we have neither partiality nor prejudice, that our utterance is but the voice of the law as the wisdom of sages has established it. We are powerless to prevent or to settle controversies; we can only decide them as they are brought before us.

The first question, if not in order of time, certainly in importance, is the one involving the charge of adultery. The bill avers that the appellee has committed adultery on various occasions. Only one instance, however, is specified, and that is that the appellee
311 was guilty *of adultery in the city of Philadelphia, at a house of ill-fame, in a certain street named, on Sunday, the night of the 10th September, 1876, the names of the females being unknown. In support of this charge a single witness is introduced, who states that during the centennial exposition he saw the appellee in a house of ill-fame, in the city of Philadelphia. The witness states that as he entered the door of one of the parlors, he saw the appellee, in company with a friend, arise from a sofa, and that he was bidding one of the women of the house goodbye. He supposes the appellee had had some words with her; he, the appellee, turned around and left the parlor door; he does not know whether the appellee went to the street or to some other part of the house. This is the whole case, allegation and proof, with respect to the commission of adultery.

The appellee, in his answer, says he admits that on the evening of the 10th September, 1876, he, in company with a friend, J. H. Ballard, did visit a house in Philadelphia, which, after he entered it, he found to be a house of ill-fame. He states that he and Ballard, being in that city without comfortable quarters, on Sunday evening appellee suggested they should look out for another room. Ballard said he had seen a placard on a house just around the nearest corner with "rooms to let" on it. They went to the house, ringing the bell at the front door, which was opened by a white woman, supposed to be a servant, who, upon being told what was wanted, conducted appellee and Ballard to the parlor. On stating the object of their visit, one of the women said they could accommodate them with rooms, but she thought it probable they had made a mistake, and that they, the inmates, were rather too fast for them. They at once got up and left the premises. This was the only time appellee was ever in said house. He was there only for a few minutes.

312 During *the time, he uttered no word and committed no act in violation of the strictest propriety.

This is the appellee's explanation. To sustain it he adduces the testimony of Bal-

lard. I do not deem it necessary to state any portion of that testimony here. It is sufficient to say it fully corroborates the account given by the appellee. The learned counsel for the appellant quotes an observation of Lord Stowell, that "the act of going to a house of ill-fame is characterized by our old saying that 'people do not go there to say their pater nosters,' that it is impossible they can have gone there for any but improper purposes, and that it is universally held as proof of adultery." To this it is answered by an eminent writer, "Obviously, however, such a visit is open to explanation, as it may be one of philanthropy, or of accident, or even of lawful business, which should not be construed into an act of guilt." 2 Bishop on Marriage and Divorce, § 626.

And this would seem to be the dictate of common sense and common justice. For nothing could be more manifestly unjust than to say that a man who should go to a house of ill-fame, necessarily goes there for an improper purpose. Such an act, wholly unexplained, might be considered evidence of guilt, but it is clearly not one which precludes explanation.

In this case the appellee, in direct response to the charge in the bill, has made a statement of the circumstances of his visit to the house in Philadelphia. He is called upon to answer, and he has given his answer, and I think he is entitled to the benefit of it, as in other cases in chancery. The statute provides that the suit for a divorce shall be instituted and conducted as other suits in equity. The single exception is that the bill shall not be taken for confessed, and that whether the defendant answer or not, the cause shall be heard independently of the admissions of either party, in the

313 *pleadings or otherwise. As was said in *Bailey v. Bailey*, 21 Gratt. 43, 90, the purpose of these provisions was to prevent a decree being obtained by collusion of the parties, and not to change the rules of evidence, or to provide a different mode of proving the facts from that pursued in other cases.

The defendant, in every case, may respond to the charges in the bill in his answer; and he is entitled to the benefit of it. It is the law of the forum, and all who apply to it for relief must submit to have their causes tried according to the established mode of procedure. *Thornton v. Gordon*, 2 Rob. R. 719-725. Cases of divorce, so far from justifying a relaxation of this rule, would seem to call for its special observance. For while the plaintiff, for reasons of public policy, cannot obtain a decree upon the admission of the defendant, clearly the latter, against his or her express denial, ought not to be convicted of a violation of the marriage vow; nor should so important a relation be dissolved upon less evidence than is required to annul an ordinary contract for the sale of property. If it be conceded, in the present case, that the circumstances of suspicion against the appellee are of a grave character, this court cannot refuse him the benefit of his answer, nor would it be inclined to do so, especially

when such refusal would be to fix upon him the imputation of perjury, in addition to the crime of adultery.

But, discarding this view entirely, we have the testimony of Ballard. No effort has been made to impeach his reputation as a man of veracity. No witness says he is unworthy of belief. He was subjected to a very rigorous cross-examination, but I think it wholly failed to throw any discredit upon his testimony. It is true that the appellant's witness, Dawson, says he does not think

Ballard is the friend he saw with the
314 appellee on the *occasion of the visit to the house in Philadelphia. He says, however, he is by no means certain—he could not see the person plainly that night—he was not acquainted with him, and did not take particular notice of him. It must be borne in mind it was not the appellant, but the appellee who brought out this testimony. It was the appellee who confronted appellant's witness with Ballard, and demanded of the former to say whether he was not the same person seen in Philadelphia, which I think would scarcely have been done if the account of Ballard's presence had been a fabrication. Ballard says that upon his return from the centennial, he mentioned to several persons in Lynchburg—and he gives the names of some of them—the fact of this visit to the house of ill-fame, as a good joke upon the appellee and himself. None of the persons named are called to contradict him; and it is to be presumed he did mention the subject of the visit. If he did, it would go far to show that the parties regarded the whole affair as a harmless joke, of which they were the victims, and that they made no effort whatever to conceal the occurrence. Upon the whole I am satisfied that the account of this affair given by Ballard and the appellee, is true in every material particular, and that the charge of adultery is not sustained by the proof.

The bill contains another charge, not of actual adultery, but of improper solicitation on the part of the appellee, introduced, no doubt, for the purpose of showing the adulterous intent. The charge is that the appellee, in the month of September, 1876, solicited Eliza Patterson, a young mulatto woman, then a servant of his wife, to have carnal intercourse with him. It is not pretended that adultery was actually committed, but simply that there were repeated solicitations to that effect. The only witness relied on to support this charge is Eliza Patterson

herself—without a single corroborating
315 circumstance to *support her. The force of her testimony is entirely destroyed by the evidence of three witnesses. It is true they are the mother and brothers of the appellee. But the record shows they are persons of high social position, and it is impossible to believe they are capable of wilful and corrupt perjury with respect to the matters to which they testify. If these witnesses speak the truth, it is manifest that the story as told by Eliza Patterson is an entire fabrication from beginning to end. In this connection it is worthy of observation

that this witness, previous to the present deposition, had given an affidavit in which she detailed, with great particularity, numerous acts of an objectionable character on the part of the appellee; but she made no allusion whatever to the alleged solicitations stated in her deposition. When asked the reason of her silence in this respect, she could only say she did not think of them at the time. I am of opinion that this charge is not sustained.

Another charge bearing upon the question of adultery, not made, however, in the bill, but brought out for the first time in the evidence, is that the appellee was an attendant upon a ball given at a house of ill-fame, in the city of Lynchburg, in the year 1876, during the session of the United States court in that city. Two witnesses are introduced who say they saw him on that occasion. Now it is a little remarkable that, although the person of the appellee was well known in the community, out of some thirty or forty persons who must have been present at this ball only two can be found who testify to his being present on the occasion referred to. One of these is proved to have been much intoxicated at the time; and the other had but a slight acquaintance with the appellee. On the other hand, the appellee has taken the depositions of some ten or twelve witnesses, including young men to whom he was well known, and police officers

whose occupation makes them familiar *with the haunts of vice, and whose duty requires them to be present on such occasions, and all of them concur in saying the appellee was not present at the ball described by the appellant's two witnesses. At all events, they did not see or hear of his being there—that, if a married man had attended such a place, it would have been the subject of conversation at the time, and on the streets the next day. These witnesses say they never at any time saw the appellee in a house of ill-fame, and they never even heard of such a thing until this charge was made. This evidence is, of course, purely of a negative character, but it is certainly very persuasive. One can but be struck with the fact that the appellee has himself throughout opened the door to the severest enquiry. His witnesses, men most likely to be informed, were not confined to the charge of attendance upon this particular ball, but were asked to speak with reference to his habits generally, in respect to such places—to tell not only what they had seen, but what they had heard, as to his attendance upon other balls, and other houses of ill-fame; and upon these points the testimony, so far as negative testimony can go, is a very satisfactory vindication of the appellee.

With respect to the only remaining charge, bearing upon the question of adultery, also brought out in the evidence, that of making the signal upon the Danville bridge, I deem it unnecessary to discuss it. It is fully and completely disproven by the evidence.

Before passing from this branch of the case, it is proper to allude to the earnest

efforts made to fix upon the appellee the commission of adultery, or some other lewdness of conduct inconsistent with his marital duties. The evidence strongly tends to show that, to this end, extraordinary efforts were made, rewards were offered, detectives were put on the track, and all the sources and avenues of information fully explored. The only result *has been the several charges already considered. I do not allude to this for the purpose of attaching censure to any one. I think it is proper to say that a man who can pass through such an ordeal unscathed has shown a correctness and propriety of deportment deserving, at least, some notice and consideration.

The next subject of enquiry is the charge of cruelty. As this is, perhaps, mainly relied on as a ground of divorce, it becomes necessary to examine the allegations of the bill, and the evidence bearing upon this point, with more minuteness than is required in other branches of the case.

The appellant, in her original bill, states that "among the acts of cruelty which characterized the earlier portion of her married life, she was required by her husband, before they went to Danville, to conceal her want of sympathy with his political course; that her obedience to his injunctions in this respect cut her off from all other sympathy, and that she found herself alone with him a social pariah." This certainly is a most extraordinary statement, in view of the fact, disclosed by this record, that the parties lived together for several years in the greatest harmony and affection, and that, both in Danville and in Lynchburg, wherever they resided, or wherever they visited, they were received into the best society and were upon terms of friendship, if not of intimacy, with the best people in those cities. It will be seen further on how groundless is this charge, as well as many others contained in this record. The parties were married in the fall of 1873, and shortly thereafter removed to the town of Danville, Va., where they resided until the summer of 1875. They then went to Kentucky upon a visit, remaining there some four or five months. Numerous witnesses have been examined as to their conduct during this period—witnesses living upon terms of the closest intimacy with them

—and not one of them testifies to any *unkindness, in acts or words, on the part of the appellee to the appellant, on any occasion. It is very clear that their difficulties did not commence until after their removal to Lynchburg, in the winter or spring of 1876, and after they had become inmates of the family of Woodville Latham, Jr., the brother of the appellee.

Let us, then, enquire into the conduct of the appellee during the period of the residence at the house of Woodville Latham, Jr., and subsequent to it.

Some of the witnesses state that the appellee was very indifferent to the appellant, and studiously neglected her on many occasions; but when pressed upon the cross-examination, they are only able to say they

have seen him pass her on the streets without speaking to, and apparently without noticing her. Others testify that it was the habit of the appellee to take the child away with him in the morning, and not to return with it until the afternoon, thus depriving the mother of its company and its nurture. And yet one of these witnesses, a lady of intelligence, living near the parties, upon being asked if she noticed where the child was kept before and after their difficulties were made public, states that she usually saw the child in the parlor, playing about the window, and that it was there very often. This was after their differences were made public. Before this, she never noticed it at any particular place, saw it playing in the porch and with its mother, but after this usually saw it at the parlor window.

Again it is said that the relatives and friends of the appellant were not treated with civility and respect by the family of the appellee. Miss Graves, a sister of the appellant, visited the latter at the house of Woodville Latham, Sr., in November, 1876, and remained there sometime. Upon leaving there she expressed herself as highly pleased with the manner in which she had been entertained, and grateful for the kind-

ness she had received. *In her deposition, given in this case, she admits that, upon arriving at the house of Mr. Woodville Latham, Sr., she was received very cordially, and politely, and so treated for a few days. After that, they were polite and civil, but not at all cordial she thought. It has been asserted and reiterated, again and again, that the family of Woodville Latham, Sr., were hostile to the appellant, and that they had banded together to destroy her peace and happiness. I have examined this record with the greatest care, and I have not been able to find a scintilla of evidence tending to show that either the father, mother or sisters, on any occasion, were guilty of incivility or unkind acts or words to the appellant. It may be there were such, and that they have been carefully concealed from the public eye. The record does not exhibit anything of the kind; and this court cannot act upon mere conjectures and presumptions having no support from the evidence.

Again it is said, and this charge is reiterated with great earnestness, that the appellee actually sold the bed and bedding of the appellant, and left her without the common comforts and necessities of life. The evidence shows that the appellee owned the furniture, including the bed and bedding in the room occupied by the appellee and appellant in the house of Woodville Latham, Sr., and that this furniture, with the exception of some articles belonging to the appellant, was sold by the appellee to his mother. It is manifest, however, that this sale was made after the appellant had left there, after all efforts at an adjustment had failed, and the appellant had determined to live separate and apart from her husband.

I have thus attempted to notice briefly all the charges of cruelty brought against the appellee. Most of them have reference to a

period when the difficulties between the parties had become open and notorious, and when both had become embittered by the controversy in which *they were engaged. It is no part of my duty to vindicate the appellee any further than is proper to a right understanding of the merits of the case. It may be conceded that his conduct has been far from blameless, but if each and every specification of cruelty had been established it would not constitute such legal cruelty as would justify a decree for a divorce. The appellant in her bill charges coldness on the part of her husband, non-appreciation of her efforts in the discharge of her wifely duties, his treatment often degenerating into sneers and taunts and bitter complaints. But she does not charge any acts of cruelty or violence, or even threats and menaces. Her brother states that, during the whole of his visit in the fall of 1876, he never observed anything like a disturbance, a dispute, or quarrel between them. With respect to the bruises upon the wrists of the appellant, they are fully explained. The appellant coming down stairs, and finding the front door locked, attempted, in a paroxysm of excitement, to jump through the parlor window into the street. She was caught by the appellee and held by the wrists. The door was immediately unlocked, and she was implored to go out by that way; but she refused to do so, persisting in her purpose of going through the window. There is no doubt that the sole purpose of the appellee was to prevent a scene on the street mortifying to all concerned. With this exception, if exception it can be considered, there is not a particle of testimony showing any act of cruelty or violence on the part of the appellee, or any menaces, or conduct to justify an apprehension of bodily harm, or that the appellant was, at any time, molested or in any manner restrained in her perfect freedom of action.

In applying the law to the evidence just considered, I shall not attempt any definition of cruelty, as used in our statutes, beyond what is laid down in the books. According to the authorities, the cruelty that authorizes * a divorce is anything that tends to bodily harm and thus renders cohabitation unsafe; or, as expressed in the older decisions, that involves danger of life, limb or health. I agree there may be cases in which the husband, without violence, actual or threatened, may render the marriage state impossible to be endured. There may be angry words, coarse and abusive language, humiliating insults, and annoyances in all the forms that malice can suggest, which may as effectually endanger life or health as personal violence, and which, therefore, would afford grounds for relief by the court. But it is obvious that what merely wounds the feelings without being accompanied by bodily injury or actual menace—mere austerity of temper, petulance of manner, rudeness of language, want of civil attention and accommodation, or even occasional sallies of passion that do not threaten harm, although they be high offenses against moral-

ity in the married state, does not amount to legal cruelty. It is so laid down by the leading authorities in England, and in this country, and is so declared by this court in *Carr v. Carr*, 22 Gratt. 168, 175; 1 Minor Institutes and cases cited, 256, 257. In the language of a very great judge: "Under such misconduct of either of the parties, for it may exist on one side as well as the other, the suffering party must bear, in some degree, the consequences of an injudicious connexion; must subdue, by decent resistance of prudent conciliation; and if this cannot be done, both must suffer in silence. And, if it is complained that by this inactivity of the courts much injustice may be suffered, and much misery produced, the answer is that courts of justice do not pretend to furnish cures for all the miseries of human life. They punish or redress gross violations of duty—they cannot make men virtuous; and as the happiness of the world depends upon

its virtue, there may be much unhappiness *which human laws cannot undertake to remove. * * Petty vexations applied to a diseased and exquisite sensibility of mind, may certainly, in time, wear out the animal machine; but still they are not cases for legal relief. People must relieve themselves as well as they can by prudent resistance, by calling in the means of religion, and the consolations of friends; but the aid of the courts is not to be resorted to in such cases with any effect." I have thus quoted, at length, some of the observations of Sir William Scott, in *Evans v. Evans*, 1 Hagg. Cons. R. 35, because they are very appropriate to the present case, and because they express the rules which govern the courts upon questions of this kind with a force, a wisdom and an elegance which command almost universal approbation. Tested by these rules, the application for a divorce on the ground of cruelty, cannot be sustained.

The next subject of enquiry is the charge of desertion. And here it is important to consider what constitutes desertion, as described in the books. Fortunately we are saved any discussion of that question, or reference to authorities elsewhere, by an adjudication of our own court. The case of *Baily v. Baily*, 21 Gratt. 43, was decided by a unanimous court. It was followed and approved in *Carr v. Carr*, 22 Gratt. 168, and is sustained by the general current of authorities. In *Baily v. Baily*, the doctrine is thus laid down by Judge Christian, speaking for the whole court: "Desertion is a breach of matrimonial duty, and is composed first, of the actual breaking off of the matrimonial cohabitation, and secondly, an intent to desert, in the mind of the offender. Both must combine to make the desertion complete. The intent to desert is usually the principal thing to be considered. Obviously a mere separation by mutual consent is not desertion in either. Nor, as a matter

of proof, can desertion be inferred 323 against either from the mere *unaided fact that they do not live together, though protracted absence, with other circumstances, may establish the original in-

tent. The courts have not laid down any particular rules of evidence for determining whether a separation does or does not, as matter of proof, amount to desertion; and the question does not admit of such rules. but each case must rest on its own circumstances."

Bearing these principles in mind, we are now to consider whether the evidence sustains the charge of desertion. A brother of the appellant, who was examined as a witness, states that in a conversation had with the appellee in February, 1878, he proposed that the appellee should take his wife and child and go to Kentucky or Texas. The appellee replied there could be no reconciliation between him and his wife; that the matter had gone too far; that they would never live together again as man and wife. I do not think that the appellee by this, intended to avow a purpose on his part not to be reconciled to his wife, or not to live with her again; but rather to convey the idea that the difficulty had proceeded so far as to preclude all hope of reconciliation. The same witness proves that but a few months previous the appellee mentioned to witness their difficulties, telling him he thought his wife was attached to witness and was greatly under his influence, and that he asked witness if he could not bring about a better state of feeling between them. Witness replied that he did not think he could, that he had never tried to exercise any special influence over his sister in his life; that she was perfectly conscientious in everything she said and did, and when she had formed an opinion was firm and uncompromising in it; that he could see no present remedy for their misfortunes; that he sympathized deeply and sincerely with them, and that he hoped time and their mutual interests would produce the harmony that was so desirable between man and wife.

324 *Certainly nothing had occurred to warrant the belief that between the dates of these two conversations the state of feelings between the parties was at all improved or modified. The appellee, in his answer to the averment of the bill, that he was unwilling to be reconciled to his wife, says it is not true he ever refused to be reconciled to her. On the contrary, he has hoped for such reconciliation more than for anything else on earth. He has never to this dark and miserable hour abandoned all hope that she would yet see the error of her ways, and thus save him from a life of unendurable wretchedness. The evidence does not discredit this declaration; it is in direct response to the bill, and the appellee cannot be denied the benefit of it. In the correspondence between the counsel for the appellant and the counsel for the appellee, respecting their several clients, the latter, in their letter of the 9th of January, 1877, say: "We assure you and Dr. Dulaney (it seems a friend and relative of the appellant), most earnestly, that we wanted to settle this controversy first by reconciliation if possible, if not, then by some fair and just

compromise." There is no doubt of the perfect sincerity of this declaration. The counsel of the appellant, in reply, on the same day, after expressing their conviction that there was no possible way of settling the trouble out of court, say: "We cannot close this letter without again assuring you of our appreciation of your kind and christian disposition in this case, with which we have all the time sympathized." Whatever may be the real state of the case, the inference fairly to be drawn from the record is, that the appellant, and not the appellee, presented the chief obstacles in the way of reconciliation. The fact or facts mainly relied on to show the desertion are that the appellee, in February, 1877, sold his furniture, left the city of Lynchburg, and went to the town of Danville secretly and clandestinely taking the child with him, without consultation with
 325 the *appellant, and without her knowledge or consent. The note written by the appellee to the appellant at the time shows that neither his purpose nor destination was concealed. That the note informed her that the condition of his business made it necessary he should go to Danville that day; that he would go to his brother's house; that for obvious reasons he took Roy (the child) with him, and that she (the appellant) might follow the next day. Whether he was sincere or not in stating she might follow him, he certainly did not prohibit her from so doing. Possibly he hoped the desire to see her child might induce her to do so and eventually lead to a reconciliation. Had she followed him, or even written him, and he had refused to receive her, or provide for her, the entire aspect of the case might have been changed. But, without taking a step to ascertain his purpose, this suit was brought mainly upon the idea that the conduct of the appellee justified the charge of desertion.

The appellee states that he went to the town of Danville for the purpose of attending the United States court then in session, which was no doubt the fact. It is very probable—indeed, it seems to be very clear—he took the child with him because he feared that if he left it behind the appellant would get possession of it and remove it out of his reach beyond the limits of the state. This apprehension, I think, explains much of his conduct throughout this entire controversy with reference to the control and management of the child. I attach no sort of importance to the sale of the furniture, because, in view of the separation of the parties, it was of no use or benefit to the appellee.

But with whatever motive the trip to Danville was made, even though a change of residence was contemplated, it would not constitute a desertion. All prospect of reconciliation or compromise had then vanished; the counsel for the appellant had declared there was no hope
 326 *of adjusting the difficulty out of court. It is vain to say that the removal of the appellee to another place of residence, even without the knowledge of the appellant, would constitute a desertion.

Even where the parties separate by consent, neither can complain of desertion in the other unless there is some desire expressed for reconciliation—some overture made in good faith for a restoration of the conjugal relation. 1 Bish. on M. & D. § 784a.

In looking over this record it is not very difficult to find an explanation of the causes which led to the estrangement, and finally to the separation of the parties. It seems that they differed a good deal with respect to the management, control and training of the child. Who is to blame upon this point, it is impossible to say. It is very probable that both were wanting in a true spirit of conciliation and compromise. This, however, was not the real cause of the dissension. Its origin lies much deeper. It is manifest that the appellant had made up her mind to bear no more children to the appellee; and in that temper she had denied him access to her bed. This was no mere whim or caprice, but a determined purpose, founded, as she said, upon conscientious convictions. I know it had been suggested that disease was the cause, and the deposition of Doctor Dulaney, her cousin, has been taken to show that during the appellant's visit to Kentucky in the fall of 1875, he treated her for local affection. But it is most remarkable that during the whole of her sojourn, both in Danville and Lynchburg, which embraces nearly the entire period of her married life, the appellant never required any medical treatment whatever. And nowhere in the record is it pretended or claimed by any of her friends that her conduct, in the particular alluded to here, was the result of local disease, or infirmity of any description. Her counsel, in the eloquent and exhaustive brief filed by
 327 him *in which he alludes to the subject, does not justify her conduct on any such ground. On the other hand, it is in proof that a short time before her confinement in August, 1874, the appellant said to a lady friend she would die and go to perdition before she would have another child; that she considered a woman disgraced who had children. She was told if she persisted in that course she would drive her husband away from her, and be the means probably of his going among bad women. She replied, it would be much better, and she greatly preferred it. And in 1876, she told a distinguished physician of Lynchburg she did not intend to have any more children; she knew how to prevent such an occurrence. And upon another occasion, upon being told by him that the differences between her and her husband ought to be settled—they were nothing but words—that she must consent to act as other women did, and allow her husband the privileges which other husbands had, she replied that her conscience would not allow her to do it, without saying why. Her exact language was: "You can't surely ask me to do a thing which is against my conscience?" Doctor Owen says he did not understand her to give even an intimation that ill health was the obstacle in the way. He says she was apparently in good health; she looked badly then, but was apparently in good health at all other times.

Against this overwhelming array of facts and circumstances, it was vain to say that the conduct of appellant was due to disease, when neither she nor her intimate friends, nor her counsel, have ever, at any time, put forth such a pretension.

This is a topic of so much delicacy that I feel the greatest hesitation and repugnance even in alluding to it, much more so in discussing it. I shall therefore dismiss it with the remark that, in my opinion, this has

been the main cause of all these troubles
 328 —it is this that has cast its shadow over the pathway of these parties, producing controversy, estrangement and separation. In no other way does this record explain how it is that two people, remarkable, as their friends say, for their many good qualities, should so rapidly have fallen from their happy estate into their present deplorable condition.

My belief is that the remedy for these troubles is with the appellant; that she is to blame for the evils that have overtaken her, and she cannot ask, with any hope of success, for the aid of the courts so long as she persists in her present views and purposes.

But if the causes suggested be not the real ones—if the true ground is in a want of congeniality of temper and character—it is obvious that the court cannot grant a divorce because the parties cannot live together in harmony and peace. As was said by Chancellor Kent in *Burwell v. Saunders*, 4 Johns. Ch. R. 502, the law regards the marriage contract as a stable and sacred contract of natural as well as of municipal law. It is a contract *juris gentium*, and parties cannot lawfully rid themselves of its duties at the pleasure of either or of both of them. And Sir William Scott, in *Evans v. Evans*, already cited, says: "The law has said that married persons shall not be legally separated upon the mere disinclination of one or both to cohabit together. When people understand that they must live together, except for a few reasons known to the law, they learn to soften, by mutual accommodation, that yoke which they know they cannot shake off. They become good husbands and good wives from the necessity of remaining husbands and wives; for necessity is a powerful master in teaching the duties which it imposes. If it were once understood that upon mutual disgust, married persons might be legally separated, many couples who now pass through the world with mutual comfort—with attention to their

common offspring, and to the moral
 329 order of civil society—might, at this moment, have been living in a state of mutual unkindness—in a state of estrangement from their common offspring and a state of the most licentious and unreserved immorality. In this case, as in many others, the happiness of some individuals must be sacrificed to the greater and more general good."

Before passing from this branch of the case, it is proper to notice a fact much relied on by the appellant's counsel; and that is, that the appellee himself had brought

suit for a divorce from the appellant a short time before the filing of this bill. Whatever may have been the motives of the appellee, or the grounds on which he relied, they can have no sort of influence upon the decision of this case. Upon this record, as it now stands, the appellee, in applying for a divorce, would have shared the same fate as the appellant. Neither is entitled to it upon any or all the grounds stated. Marriage is a contract formed with a view not only to the benefit of the parties themselves, but to the benefit of third persons, to the benefit of their common offspring, and to the moral order of civil society. Husband and wife cannot, by their conduct, pave the way to a divorce, or by agreement to live separate, entitle themselves to the aid of the courts to make valid that separation. In this state the courts and the legislature have adhered to the policy of refusing divorces except for a few and weighty causes. Amid the demoralization of the times, and the attacks now elsewhere made upon the sanctity of the marriage tie, this policy has preserved and consecrated the domestic hearth and the domestic circle in Virginia. Holding these views I am of the opinion the appellant is not entitled to a divorce from her husband.

It only remains to consider the question of the custody of the child. It is manifest that to the parties this is the paramount question. With them the matter of the
 330 divorce derives its chief interest from its bearing upon the fate of the infant, the only issue of the marriage.

The bill charges that the appellee is not a fit and proper person, socially or morally, to have the raising of the child confined to him; and upon that ground it asks the court to decree to the appellant its custody and control.

As a general rule, it would seem that, upon application for a divorce, if the bill is dismissed, the court will decline to interfere either way, but leave the parties to such remedies as they may have by *habeas corpus* or otherwise. It is only when the divorce is granted that the court goes further and makes such order touching the proper custody and nurture of the offspring, as to it may seem right under all the circumstances. Our statute provides that the court, upon decreeing the dissolution of a marriage, and also upon decreeing a divorce, whether from the bond of matrimony, or from bed and board, may make such further decree as it shall deem expedient concerning the estate and maintenance of the parties, or either of them, and the care, custody and maintenance of the minor children, and may determine with which of the parents the children, or any of them, shall remain. Code of 1860, ch. 109, § 12. So it would seem that the court in which the divorce suit is pending is authorized under this statute to make an order touching the custody of the minor children only where there is a decree for a divorce.

There is another statute which confers a general jurisdiction upon the circuit, county and corporation courts in chancery to hear

and determine controversies between guardians and wards, to remove guardians, &c., and make any orders for the custody and tuition of an infant, and the management and preservation of his estate. Code 1860, ch. 127, § 13. It has been made a question whether this statute does not relate exclusively to matters of controversy between

guardians and wards, and to the custody and tuition of the infants who have estates and thus become wards of the court. See Rev. Code of 1819, p. 406.

It is unnecessary to express any opinion upon either of these points, and I do not wish to be understood as doing so. It may be conceded it is competent for a court of chancery, in pursuance of its general jurisdiction, for good and sufficient reasons, to make any proper order touching the custody and tuition of an infant; and that this may be done in a pending suit for divorce, even when the divorce is denied. All will concede that this jurisdiction is of the most delicate nature, and to be administered with the utmost caution. 2 Rob. Prac. 154; 1 Minor Inst. 399.

When the application for divorce is by the wife, and the application is refused, the question of taking from the custody of the husband or father the minor child, is one of great difficulty and delicacy.

The father is the legal guardian of the infant; the law gives it to him against all the world. The right of the father (say all the cases) to the custody of his legitimate minor children, of whatever age they may be, is perfectly clear—too well settled to admit of dispute. 1 Minor Inst. 397, and cases there cited; 2 Kent, 194; Tyler on Coverture and Infancy.

Is this right effected by the voluntary separation of the parents? If so, to what extent? Does the mother thereby acquire any additional powers and privileges? Does the father forfeit any of his? In England the courts have uniformly adhered to the common law doctrines, holding that the father has an absolute right to the custody of his children, and to the exclusion of the mother from all access to or communication with them, however pure and virtuous she might be, and however profligate might be his habits. To remedy this evil a statute was passed, known as Mr. Justice Tal-

fourd's act, which gives the equity courts a very large discretion with respect to the control and possession of the infant children, where the parents live separate and apart. But even under this act the courts still accord to the father the paramount right to the child; and they will not interfere with that right, unless in cases of gross misconduct on his part, or unless the interest or happiness of the child imperatively require it. Wellesly v. Duke of Beaufort, 2 Rus. R. 1, 43; Exparte Bartlett, 2 Coly. R. 661; In re Curtis, 28, L. J. ch. 458.

In a very recent case of Symington v. Symington, decided by the house of lords, and reported in 12 Eng. R. 109, 2 Sch. & D. App. L. R. 415, the subject received a very exhaustive discussion. It was there said: "The father's right to the guardianship of

his child is high and sacred, the law holds it in much reverence, and it should not be taken from him without gross misconduct on his part and danger of injury to the health or morals of the children." And further, the court would consider all the circumstances of the particular case, the circumstances of the misconduct which led to a separation, the circumstances of the general character of the father and of the mother, and above all, the court would look to the interests of the children.

In this country the doctrine is not materially different from that now held by the English courts. The father is universally considered as having claims paramount to those of the mother, his legal authority only yielding to the claims of the infant, whenever the morals or interests of the latter strongly require it. Whenever the father so conducts himself that it will not be for the benefit of the children to live with him, if his domestic habits, associations or opinions are such as to tend to the injury of his children, the court will withdraw them from him and confer the custody of them upon the

mother, or take the children from both and commit them to some third person to nurture and educate. When the child is a daughter of very tender years, and the mother is deemed a suitable person, the custody is given to her, as essential to the health and life of the infant; while in conformity with the English rule the male child is given to the father, except in very extreme cases. In passing upon the claims of the parents, the court will enquire who is most to blame for the separation, giving the preference to the innocent party, because with such a party the infant is most likely to be cared for properly. 2 Bishop on Marriage and Divorce, 532.

In New York they have a statute equally liberal with the English act conferring upon the courts very enlarged powers with respect to infants when the parents do not live together. It is there uniformly held that the father has the paramount right to the child in the absence of any positive disqualification for the discharge of his parental duties; that when the wife has separated from her husband without any sufficient cause, she ought not to have the custody of the child, unless its health and present condition imperatively require it. People v. Humphreys, 24 Barb. R. 526; People v. Brooks, 35 Barb. R. 85. It is also there held that the welfare of the child will presumably be promoted by delivering it to its father, its rightful guardian; and those who maintain the contrary must show the fact. The same view is taken in Ohio. Gishwiler v. Dodez, 4 Ohio n. s. 615.

A very noted case arose in New York some years ago: The People v. Mercein, 3 Hill's R. 363, 25 Wend. R. 64. An English subject having married a lady of New York, had by her two children, a boy and a girl. He wished to go to Nova Scotia to live, but his wife refused to accompany him. It was finally agreed she should retain the girl, and he should take the boy. He returned not long after, and a controversy arose between him

and his wife as to the custody of the
334 girl, an infant *about twenty-three months of age. The supreme court of New York decided that the father was entitled to the child. This decision was reversed by the court of appeals of that state upon several grounds, one of which was that a child of such tender years stood in need of maternal care and attention. Afterwards, when the child had attained the age of four years and six months, the case was again brought before the supreme court, and determined in favor of the father, upon the ground that the infant could now be delivered to the father without injury. The court held that, in cases of voluntary separation between husband and wife, there must be some rule in relation to the custody of their minor children, because without one the matter will probably be determined by violence, and that which the law had established should be followed; that although the court had a discretion in the matter, it was not an arbitrary discretion; on the contrary, the father had a paramount right to the custody of his infant child which no court could disregard in the absence of some positive disqualification on his part. It was not to be presumed, without proof, that the welfare of the child would be promoted by leaving it with the mother. The law has settled the question otherwise by preferring the father. This claim could not be set aside on slight grounds, or because it was conjectured that the interests of the child required it. The court further held that where a wife left her husband without cause, his right to the custody of the children was indubitable, and should be vindicated, from a regard to the interests of society, not less than of the parents. See *Leading Cases in Equity*, Vol. II, Pt. 2, pp. 1507-1514 for numerous cases on this subject.

The same doctrines are laid down in Massachusetts in the construction of a statute similar to that of New York—*Commonwealth v. Briggs*, 16 Pick. R. 203—and indeed in most of the states. See also *Johnson v. Terry*, *34 Conn. R. 259. See cases cited at page 1517, Vol. II, Pt. 2, *Lead. Cases in Equity*; *Anonymous case*, 4 Des. R. 94, 102.

In *Carr v. Carr*, 22 Gratt. 168, this court affirmed a decree of the circuit court giving to the father the custody of a female child of the age of four years, the mother having left the house of her husband without sufficient cause. Judge Bouldin, delivering the unanimous opinion of the court, said: "The conduct of the husband was far from blameless. His conduct towards his young and inexperienced wife was, in many respects, in the highest degree reprehensible. He had treated her with too little tenderness and consideration. He had been at times coarse, rude and petulant, when he should have been gentle, soothing and affectionate; but as these were not sufficient grounds to justify the wife in abandoning her home, this court would not sanction her conduct by awarding the child to her."

In the case before us the infant is a male child four years of age—not sickly or feeble—with nothing in its condition requiring the special attention of the mother beyond that of any other infant of like age. As was said by Judge Bouldin in *Carr v. Carr*, "with it the tender nursing period has passed by, and the time for moral training and impressions has arrived." The child is now in custody of its father, and was in his custody when this suit was brought. Can we take it from him and confer it upon the mother? She has failed in her application for a divorce; but she avers he is not a fit person, socially or morally, to be entrusted with its custody and nurture. Is she sustained by the proofs? Upon this, as upon all other questions, we must look to the record, and to the record alone.

The appellee lived in Culpeper for eight or ten years previous to this marriage. Evidence has been taken there as to his character. Mr. James Barbour says his
336 *standing was as high as that of any other young man in the community. He moved among the best people in the town. His moral and social character was without reproach. He was a man of remarkable amiability and good temper; and (so far as the witness observed) without any tendencies towards dissipation or immorality in his life or conduct. Other witnesses of the highest respectability, among them the Honorable James G. Field, present attorney-general, testify to the same effect. Dr. Samuel Rixey says: "His character was good—he was respected and beloved by all who knew him—I never knew a more popular man among his associates here; he was very temperate, and I never knew him to indulge in dissipation of any kind; he was regarded as a very remarkably amiable man, and thought more like a woman than a man, in that respect." This is the uniform testimony as to his character before his marriage. The witnesses at Danville speak of him after his marriage as having a very happy temperament—as cheerful, agreeable and playful in his disposition; as affectionate and warm-hearted, as refined and gentlemanly in his deportment, and as respectful, kind and considerate to his wife, and cheerfully disposed to carry out all her wishes. The evidence taken at Lynchburg is that he is a man of good temper, polite, unexceptionable in his manners and conduct—a man of firmness, not impulsive, but quiet; not addicted to any habits of dissipation. Against all this array of testimony there is not a scintilla of evidence except the specific charges of misconduct which have already been fully noticed as unsustained by the proofs.

Among all the witnesses examined in this case there is not one, except the brother and sister of the appellant, that proves the appellee ever gave her an unkind speech. They testify to sneers and taunts, and bitter complaints, but nothing more.

On the other hand, it must be
337 conceded the evidence *shows that the appellant is a lady of very high character, socially and morally—

beautiful in appearance—elegant, accomplished and attractive in her manners—and possessing, in an eminent degree, all those qualities which adorn and beautify the sex. There is also evidence tending to show that she is a person of very pronounced and positive character, and when once forming an opinion, not likely to abandon it. And long before these troubles occurred, her manner towards her husband was far from respectful, treating him rather as an inferior than an equal.

It is, however, not with the appellant's character and conduct we have to deal. She is not on trial. All the encomiums pronounced upon her may be conceded to be just. No one can justly question her devotion to her child, her anxiety for its welfare. It is the appellee who is arraigned. It is he who is on trial, whose conduct and life are the subject of investigation here. The question is not whether the appellant may be properly entrusted with the custody of the child, but whether there is anything in the conduct, habits, opinions of the appellee which will justify this court in depriving him of the custody of the child, and in conferring it upon the mother. The testimony, as exhibited in this record, is an answer to the question.

In this case all our sympathies are naturally with the appellant; but sitting here to administer the law as we find it established by the wisdom of ages, we are not permitted to indulge our personal sympathies and feelings. For myself, I can say I never read a record with more regret than this. I never undertook to decide a cause with half the sorrow that moves me in this. The evidence, in my judgment, shows nothing, absolutely nothing, to prevent a complete reconciliation of the parties upon terms honorable and acceptable to both of them. But this

338 failing, *I was inclined to the opinion that suitable provision should be made to secure access on the part of the appellant to her child. Subsequent reflection has satisfied me this cannot be done. If the application for divorce is refused, if we are satisfied that the appellant is the chief obstacle in the way of a reconciliation, and that the appellee is, under all the circumstances, entitled to the custody of the child, it is impossible to impose terms upon him, and to say he shall be compelled to have the child, under the decree of the court, at particular places and times, to gratify the wishes and feelings of the appellant.

Another objection made to the decree of the court below is the failure to allow alimony to the wife.

Alimony is an allowance made to the wife out of the husband's estate or income upon a decree of separation.

In England, and in some of the United States, it is a mere incident to the divorce, and is never allowed when the divorce is refused, or even upon an independent bill for separate maintenance. The reason assigned is that it is against the policy of the law to make a separate judicial provision for the wife out of the husband's estate, to be expended apart from him, except in

those cases where the separation is sanctioned by the courts.

In Virginia the statutes allow alimony as incident to a decree for a divorce. But this court has gone farther, and held that equity has jurisdiction in an independent suit to decree in favor of the wife in proper cases—as, for example, when she has been abandoned by the husband, or driven from his house by ill treatment, and compelled to seek an asylum elsewhere. In *Almond v. Almond*, 4 Rand. 662, Judge Carr, delivering the opinion of the court, said: "Suppose the husband turns his wife out of doors, or treats her so cruelly that she cannot live with him; suppose him to persevere in refusing to take her back, or to provide a cent to feed and clothe her. Surely, in a civilized coun-

339 try, there must be some tribunal *to which she may resort. In such a case a court of equity would unquestionably stretch out its arms to save and protect her."

The difficulty in the present case is that the wife has applied for a divorce, and has failed upon every ground upon which she could rely for a separate maintenance.

I do not mean to assert that there may not be cases in which the courts might refuse a divorce and yet allow alimony. But is this one of them?

If the appellee is willing to be reconciled to the wife upon terms she can properly accept, if he has not abandoned her, if his conduct has not been such as to justify her in separating from him, upon what basis or principle is she to be decreed the means of living apart from him?

It may be that the appellee, after the marriage, possessed himself of a portion of her property, but it was done with her consent; and even though without her consent, there is nothing to show he had not the right, as husband, to reduce it into his possession. If the husband, by virtue of his marital rights, obtain the control of his wife's property, not settled to her separate use, this court has no power to decree its restoration because the parties refuse to live together. Until separated by judicial proceeding they are husband and wife, invested with every right and subject to every duty involved in that relation.

I am, therefore, brought to the conclusion that this is not a case in which the court is authorized to allow alimony.

It only remains, before concluding this opinion, to notice an objection made by appellant's counsel to certain depositions taken by the appellee. The latter gave notice that he would take depositions at Culpeper Courthouse on the 25th day of May, 1877, and at Danville on the same day. An exception was made on this ground at both places, and these exceptions were overruled by the

340 *court below. The mode of proceeding pursued by the appellee in giving such notices was, of course, very objectionable; but it is difficult to see how this court or the court below could apply a remedy. The appellant's counsel ought, upon receiving the notices, to have elected which place they would attend; and the court would have suppressed the depositions taken at the other

place, and the appellee would have been afforded an opportunity of re-taking the objectionable depositions. Upon this point the case of *Fant v. Miller & Mayhew*, 17 Gratt. 187, is a direct authority. Instead of pursuing this course, the appellant's counsel attended at both places and cross-examined the witnesses, and thus removed all the difficulties arising out of the two notices to take depositions at different places on the same day. I think, for this reason, there was no error in overruling the appellant's objections.

I have thus endeavored to go over all the grounds, to discuss all the questions arising in this case. It has been my earnest desire to avoid saying anything hurtful to the feelings of the appellant, who has my most sincere sympathies. It is proper to state that the testimony of the solitary negro witness—an old family servant—introduced by the appellee, and the letters of the appellant and her mother, have not been considered at all by me in forming the conclusions now arrived at. Although these letters, in my opinion, have no proper place in this record, I must say I do not concur in the severe denunciations of the appellee because he has thought proper to introduce them. He has certainly had great provocation. Denounced as tyrannical to his wife, charged with adultery and lewdness of conduct, with attempting to debauch his own servant, almost in the presence of his own family, with being a frequenter of bawdy-houses, it is not unnatural that the appellee has exhibited considerable temper and a spirit of retaliation.

341 *All these are the natural fruits of such a controversy. They will pass away with the occurrence which has produced them. Time and reflection, it is hoped, will satisfy both parties that their true happiness, and the comfort and welfare of the child, can only be found in that union which has the sanction and pledge of both Divine and human laws.

ANDERSON, J. I have taken a very different view of this case from that which has just been presented. And considering the magnitude of the interests involved, I feel it my duty to give, as fully as I can within the limits of an opinion, the facts and reasons which have brought me to my conclusions.

The defendant, who was temporarily residing in Kentucky, in the year 1866, found the plaintiff, a school-girl at a celebrated female college in that state, at the head of her class. She is represented by the testimony as unusually beautiful, and attractive in her person and manners, as amiable and affectionate in her disposition, as well educated and elegantly accomplished, and distinguished for her excellent qualities of mind and heart. She was the daughter of a widowed mother, who was eminent for her virtues. The family occupied the highest social position, and she was trained by her excellent mother to practice the duties which she owed to God and man. She is represented as being the favorite of her teachers and schoolmates, and as being universally beloved and admired in the community in

which she lived. And she was in possession of an inheritance from her deceased father, which placed her above want and dependency.

Such was Miss C. Fannie Graves when the defendant, a young man of about twenty-five or twenty-six years, of handsome person and fine physique and pleasing society manners, was introduced to her as a Virginian 342 *of good social position in his native state, and who had done his duty to his state as a Confederate soldier. He succeeded in winning her young heart, and after an engagement of about five years, they were married at her mother's residence in Kentucky, on the 30th of September, 1873. He brought her to the city of Danville, in the state of Virginia, where they lived until about June, 1875. About that time she returned to Kentucky with her infant son LeRoy, who was born on the 17th of August, 1874. After a visit there, she returned to Virginia with her husband, who came for her. He brought her to his brother Woodville's, in the city of Lynchburg, where they stayed about a month. He then took her to board at his father's, whose family consisted of his wife and four grown maiden daughters. She besought her husband to select some other place for their abode, but unsuccessfully. There it was that this unhappy breach became flagrant.

In December, 1876, Mrs. Graves, mother of plaintiff, was in Lynchburg on a visit to her daughter, when she received a communication from defendant's counsel, dated December 23d, 1876, informing her that they had been instructed by the defendant to procure a divorce or separation from his wife. They say: "We have drawn all the necessary papers looking to a divorce, but have declined to file them in court, hoping that such publicity might be avoided by some private agreement for a *perpetual* separation." (*Italics mine.*) They say further, that they have advised their client that, upon the facts stated, and which he says he will be abundantly able to prove, the court will decree him a divorce a mensa et thoro. Their client had actually presented his bill for a divorce, and upon his *exparte* statement, had obtained an injunction from the judge of the hustings court restraining his wife from removing her child from the state.

343 Fruitless efforts were made by the counsel and friends *of the parties to effect a private adjustment; and finally, Mr. Latham, in person, broke off a negotiation with the brother of his wife by declaring to him that there never could be a reconciliation between him and his wife, and that they never could live together again as man and wife. This was on the 16th of February, 1877, and on the 21st following, without the knowledge of his wife, or notice to her of such intention, he moved off to Danville, a city near the border of the state, clandestinely carrying her infant son with him, then just two years, six months and four days old. Before leaving, he dismissed her servant maid and sold the furniture of his wife's chamber to his

mother, as claimed by her, including the bed upon which she slept,* and the next day caused his other effects to be sent after him. It is true he left a note for his wife, informing her that he would leave that day and would take Roy with him, but it was so arranged that the note was not delivered to her until after night, when he was in Danville with her baby. I will have more to say in relation to this note and this transaction.

Mrs. Latham feeling herself thus abandoned by her husband, and bereft of her darling child, as her last resort, exhibited her bill in chancery for a divorce a
 344 *mensa et thoro upon the grounds of cruelty, reasonable apprehension of bodily hurt and desertion or abandonment, and for the custody of her child. Her bill was filed on the 26th of February, 1877, and was answered by the defendant on the 7th of March following.

Before considering the evidence in support of the allegations of the bill, it is proper

*NOTE BY THE JUDGE.—It is admitted in the opinion of the majority of the court that he sold the furniture of his wife's chamber to his mother, but it is suggested that he sold it after he went to Danville. If that is so he must have sold it on the 22d of February. On the 21st he went to Danville. On that day he dismissed his wife's servant-maid. The next day, the 22d, his trunks were sent after him. The next day, the 23d, Charles A. Graves was informed by the defendant's mother that he had sold the furniture to her. He testifies that on the 23d he went to the house of W. Latham, Senior, to remove the plaintiff's personal effects, and he says: "I met Mrs. W. Latham at the door, to whom I stated my errand. She said Fannie had only a few things—her trunks, sewing-machine, a small stand, with perhaps some few other things; that everything else in the room Robert had sold to her, and that she had paid him the money for them. (*Italics mine.*) I mentioned a work-table (and) pair of chromos, which Robert had presented to Fannie. She stated that she had bought those things of Robert, and that I must not take them."

I understood from the foregoing that the sale was made by the defendant to his mother before he left for Danville, and that, I think, is the fair inference. Besides, there was not time for the negotiation and sale and payment of the money between the 21st and the 23d of February—one party being in Danville and the other in Lynchburg. There was no correspondence between them in that brief interval or time, so far as appears. If there had been the letters could have been produced. That was not pretended in the argument. But if it was after the defendant got to Danville it does not help him; it only shows a more deliberate intention to break up and abandon his home in Lynchburg. It can't be said that it was because his wife was seeking a divorce from him. She did not sue out her spa in chancery until the day after this claim was made to the furniture by old Mrs. Latham by purchase from the defendant, to-wit: on the 24th day of February, 1877; and her bill was not filed until the 26th. Doubtless he sold his wife's furniture because he had deserted her chamber some time before he left for Danville, and had resolved they never could live together as man and wife, as he had declared to her brother, a few days before he left for Danville.

that I should consider the charges made by the defendant against his wife in this most remarkable answer. In this he occupies the place of assailant; and in the investigation of these charges against the plaintiff, and of the whole case, I feel it to be my duty to strip the case as far as I can of its glosses, and to place those who have acted a part in it in their true light. I have no prejudices or predilections to indulge. The parties and nearly all of their witnesses are strangers to me; I know nothing of them except what I have learned from this record; and it would be more pleasant to throw a mantle over the faults and errors of all than to expose them, if it could be done with justice to the wronged. But the interests involved in this controversy are too great in magnitude to be passed over superficially or in palliation of offences. I feel that justice requires that the conduct of every one who has acted a part in this unhappy drama should be placed in its true light. Let truth cut its way.

The answer abounds in affirmative
 345 allegations of the *conduct, character, temper and disposition, and principles of the plaintiff, which are exceedingly disgraceful and disreputable to her if true. They constitute the defendant's indictment. The onus is upon him to prove them, and those which are unsupported by evidence are not entitled to the weight of a feather in the decision of this cause. Of this description are the following:

The allegation that the plaintiff called him a liar on a particular occasion whilst they were boarding at his father's in Lynchburg. There is no proof of this allegation. He says himself that he said to his wife that "no man, woman or child ever called him a liar before." But he attempts to establish it by the testimony of a negro woman, which he shall hereafter notice, that she heard her call him a fool and a liar, too, at a previous time, when they were occupying rooms in Mr. Dugger's house in Danville, thus contradicting his own declaration. But he admits that he threatened to "punish" his wife.

His allegation as to the cause of his removal from the house of his brother Woodville is not supported by any evidence in the record. But the allegation in the bill that it was occasioned by a quarrel between the brothers has some support in the testimony of Mrs. James Lea.

The allegation that respondent wishing to spend a short time with his father who was about to leave home, and his little boy asking to go down with him, his wife, then in a very bad humor, ordered him to leave the child behind, but that he took the child with him, and after a little while she came down, remarking as she entered the room, "as you have brought the child down here you may have the pleasure of having my company also," and at once commenced to abuse his father. She denounced him in the bitterest terms, &c. I find no proof in the record of this allegation, and it must be rejected as untrue.

346 *The allegation in which he under-

takes to give verbatim a conversation between his wife and his brother Woodville, which was begun by her requesting him not to speak to her child, &c., is not proved, and can receive no other weight than a sketch of fancy.

The allegation that she threatened again and again to leave him, and take her child, never to return, is unsustained by proof, and must also be rejected. The allegation that she took from her trunk and showed respondent one of those filthy and wicked publications, in which it is declared that sexual intercourse is not a necessary or proper consequence of marriage, and that she said that they were her sentiments, is not sustained by a particle of proof in the record. Even in her most confidential letters, written with perfect freedom from restraint, and which he has published in this record, an expression cannot be found which indicates in the slightest degree that she entertained such sentiments, or that she had any sympathy with the dogmas known as "woman's rights," which he ascribes to her. Fortunately for truth and justice, he was furnished us with evidence of what were her serious views on the subject of marriage, in one of her confidential letters addressed to him during their engagement of October 5th, 1870, before referred to. In that letter she says: "I have always believed that a marriage based on respect, appreciation, sympathy, and above all, devoted and abiding love, is the most sacred and grandest relation of life, and would surely be followed by happiness as complete as any we are permitted to enjoy in life. But I also think most marriages failures; and why? Because the parties entering into it are influenced by unworthy motives, and because husbands being considered superior in station to their wives, therefore being in authority, do not exercise it aright—failing in the tenderness and consideration which is their due." She does not object to but

347 recognizes *their position of authority, and only claims that it should be exercised with tenderness and consideration, which she rightly claims is due to the wife. Let the record show how this just claim has been respected by her husband for several months prior to the institution of this suit.

With regard to their contemplated union, having said that before she knew what love was she would not have risked matrimony for his happiness regardless of her own, she says: "But now believing that such a union as ours would be, God and his angels would sanction as true, I am willing (not to risk it, for it could be no risk,) to be yours; to travel with you the flinty or flowery path of life, for I know that only as your wife can joy and content be found for your 'darling' (a quotation), and I am satisfied 'that you will prove to me it is not so great a humbug as I at first supposed.'" Again marks of quotation, implying it was a promise contained in his letter. But, alas! what a dark and sorrowful disappointment has she been doomed to experience in a few fleeting years.

The allegation that he has longed for reconciliation with his wife, and that he has

never abandoned all hope that she would see the error of her way and save him from a life of unutterable wretchedness, is eloquently expressed by the draftsman, but is not consistent with his conduct towards her, is disproved by his conduct and declarations when not employed in the pleadings; nor does it comport with the assaults upon her character in this answer.

The allegation that his wife, without his permission, when she supposed that all the family were at dinner, tried to leave the house secretly, taking the child with her, the nurse meanwhile being sent down for her dinner, is not proved. But if she had taken the child with her out on the street, the fact of her having sent for her dinner to 348 *be taken to her room, showing that she expected soon to return, was the right of the mother without asking his permission. And his conduct in going after her and forcing the child from her on the street and bringing it back in despite of her wishes, was ungenerous and unbecoming in the extreme. It was arbitrary, tyrannical and cruel, and was not calculated to restore the reconciliation which he professes to long for. The pretence that he was afraid she would run off with the child from the state without any prearrangement for the removal of her clothing and effects, or the child's, which were in his power, and a guarantee against any such vain fear, cannot excuse the outrage.

The allegation that he deserted her room upon her command is not proved. I do not think there is any proof that she desired him to leave it; on the contrary, it seems that at the time of her sister's second visit to her, on the 30th of December, 1876, the day of her arrival in Lynchburg from Covington, Kentucky, Mr. Latham had not then been ordered by his wife to leave her room, but that at that time he occupied the room with his wife; and it would seem from what then transpired it is improbable that she would have ventured to order her husband to leave her room, or if she had, that he would have obeyed. It is improbable from what is disclosed by the testimony of Miss Lou. Graves, who I take to be, from her deposition and her whole bearing as it appears in the record, a lady in the highest sense of the word, and a lady of great self-possession, truthfulness and intelligence. On her arrival in Lynchburg, she says she stopped at the Lynch hotel, and sent word to her sister that she was in the city, and she came to see her. She says: "I went home with her that afternoon; she told me that she wanted to go to see Mr. Williams on business, and wished me to stay in the room with Roy while she was gone and stay

349 all night with her. I told *her that I could not stay all night with her unless I asked Robert's permission, for I did not care to stay in any room but her own, and I would have to ask him to give up his place."

"Question. Please state whether or not you hear Robert Latham say anything to your sister about your staying all night; if so, what did he say?

"Answer. When she came back from Mr. Williams' I heard the parlor door open, and

Robert called out in a very loud and angry tone, 'Is Lou going to stay here all night?' She (sister) said 'Yes, of course.' He said, 'Why of course?' and went in and banged the door.

"Question. Upon your arrival at their house the evening above referred to, did any of his father's family speak to you, or make their appearance; if so, who of them?"

"Answer. No, I did not see any of them until my sister sent down for the baby, then Miss Mamie came up; she was the only one I saw.

"Question. Did Robert Latham present himself when you called?"

"Answer. No, I did not see him until I sent for him. When sister came up, after her return from Mr. Williams', I asked her to go down and tell Robert that I wanted to see him a few minutes, and after a good while he came up; I asked him if he would give up his place to me that night; he said, 'Yes, to-night.'

"Question. Do you know whether he, or any of the family, knew of your being in the house?"

"Answer. I suppose they all knew it; the nurse went down to bring the baby up and to tell them that I was there; he certainly knew it, or he could not have called out to know if I was going to stay all night.

"Question. Were you at the house at supper-time; if so, were you invited to supper, or was your supper sent to your room?"

350 "Answer. Yes, I was there at supper-time, but was not asked to supper, nor whether I would have any sent to me. None was sent to me.

"Question. Did you stay all night; if so, when did you leave there?"

"Answer. Yes, I stayed all night and left there about eight o'clock the next morning, before breakfast, and went to the Lynch house to breakfast.

"Question. Were you invited by Robert Latham or any of his family to stay to breakfast or to return again?"

"Answer. I did not see Robert again, nor any of the family, nor was I invited to breakfast, or to return again.

"Question. Did you pay any subsequent visits to your sister while she remained at Robert Latham's father's?"

"Answer. Yes, I was there almost every day until I was shut out of the house and refused admission."

I have deemed it proper to give the foregoing literal transcript from the deposition of this intelligent and reliable witness to show not only that Mr. Latham was not denied by his wife, at that time, access to his wife's chamber, but that his right to it was unequivocally recognized by his wife; but also to show what was the temper and disposition of himself and his father's family towards his wife, which is still more fully developed in the progress of the cause, as we shall see in the course of this opinion. But enough has been shown of the conduct and disposition of the wife and of the husband to repel the allegation, of which there is no

proof, that he deserted her room upon her command.

His allegations that she is unfit to have the control and training of her child on account of her unwifely and unwomanly course and her unbridled temper, and the disparagement of her affection for her child, is not 351 only *not proved, but is disproved by the overwhelming weight of evidence in the cause.

A very considerable part of the defendant's answer consists of transcripts of letters written to him in strict confidence by Mrs. Graves, the mother of his wife, and which she directed him to burn, but which he preferred to keep in violation of her injunction, and has presumed to break the seal of confidence, as he did in the case of letters written to him by the plaintiff during their engagement and before their marriage, with the confiding spirit of trustful love and innocence. I had supposed that if there was any one sentiment upon which society was agreed it was that the seal of confidence was sacred, and could not be broken without dishonor. The letters of Mrs. Graves were doubtless written upon representations made to her by defendant, in whom she then had confidence, which impressed her with fears that her daughter was to blame for the difficulties she had with her husband; and they were written to conciliate and to entreat his forbearance, in strict confidence. But it is evident that Mrs. Graves had then heard only one side, and I think this is clearly shown by the record. The love which the plaintiff had for her husband, notwithstanding her ill treatment and her desire to conceal his faults from her family, and her refined sensibility and womanly pride prevented her from communicating to her mother and sister his ill treatment of her, until it had become unsupportable and flagrant, and probably not until after she had been informed that her husband was seeking a divorce. (See Lou. Graves' deposition.) After she had talked freely with her truthful daughter and had obtained from her a true representation of the facts, Mrs. Graves entirely changed her opinion. But these letters which the defendant had drawn from the mother he preserved, and by breach of confidence incorporated in his answer, and then offered them as evidence against 352 his wife. But *they are not evidence against her, as was rightly held by the court below, and were improperly transcribed in his answer, and ought not to be read, and if read ought not to have the slightest influence in the decision of this cause.

The plaintiff charged in her bill that before they went to Danville the defendant required her to conceal her want of sympathy with his political course. She says the shock was great to her when she found, after her marriage, that her husband, whom as a girl she had admired and honored as one who had done his duty to his native state in arms, and whom she supposed to be still true, had in fact allied himself with what are known in Virginia as Radicals, &c.

The defendant in his answer avers that it is not true that the complainant was ignorant of his political relation; and he avers that before he sought the office he now holds he consulted her wishes, and she advised him to seek it, and that the second time he met with her she was a guest in the house of the most decided and out-spoken Republican in all that section of Kentucky, then on a long visit to his daughter, the most intimate friend she ever had. This might all be so—but there is no proof of it in the record—yet it is not responsive to the allegation of the bill. The vice charged was not political, for doubtless honorable and patriotic men are Republicans; but the shock and mortification to her was to find that her husband had not been true; that he had deserted his friends with whom he had made common cause, and with whom he had been confederated during the war, and had gone over to the enemy and joined him in waging a more cruel war against them than the war of arms whilst arms remained. It was the perfidy—the moral taint—which she felt attached to him, and which would likely exclude him from the best society of the state. It was the idea that

353 *her husband was not true that caused her the shock and sense of humiliation.

And now it was, when her husband was about to introduce her at Danville into such associations, she says that he required her to conceal her want of sympathy with his course. Such would naturally have been his wish, but he denies it, and it is not susceptible of proof. But he shifts the subject and introduces another count into his indictment, and charges her with holding the principles of "woman's rights" and "strong minded women," and says he advised her to conceal from his mother and sisters her opinions on that subject, as it would injure her in their estimation. These are affirmative allegations, and the onus is on him to prove them; yet in this whole record there is not a syllable of evidence to be found—not even in her most confidential letters, which he has broken the seal of confidence to spread upon the record—to indicate that she ever entertained such sentiments, or a sentiment allied to them. He attempted to prove it by Mrs. Rose Allen Neal, whose love for him and hatred for his wife would not have inclined her to conceal anything that would have been to her prejudice, but wholly failed.

He charges that she refused to cultivate the good will and friendship of those who sought her acquaintance in Danville, and habitually showed, and in her letters to respondent's family expressed, her dislike for the most intelligent and refined citizens of Danville who called to see her.

From the genial, refined and cultivated society in which she had been reared defendant transferred his beautiful, refined and elegantly accomplished wife to a society at Danville composed, in the main, of his political associates, their families, dependants and

354 retainers: an association with which she had no sympathy, and *which want

of sympathy he doubtless felt it was desirable she should conceal from his associates. And this he construes into a refusal to cultivate the good will and friendship of the most refined and intelligent citizens of Danville. And to establish this charge he produces certain letters written by her to his mother. These letters show upon their face that they were written in confidence, with perfect freedom from restraint, often carelessly, sometimes jestingly and playfully, as one writing to a trusted friend who would be ready to overlook any indiscreet or thoughtless expression, or even erroneous sentiment, as merely the suggestion of the moment, without due consideration—the writer just dotting down her thoughts as they were suggested the moment of writing, feeling that they were communicated only to one who appreciated her and who would be ready to make allowances for all errors and mistakes, and that what she wrote would be communicated only to the friend to whom it was confided, and would go no further. Private letters thus written by the plaintiff to the mother of her husband were preserved by her and given up to her son, who, disregarding the circumstances of confidence under which they were written, has exposed them to the public view by spreading them upon this record, and has made them evidence in this case.

And they prove not what the defendant claims—her dislike for the most intelligent and refined citizens of Danville and her refusal to cultivate their good will and friendship—but her opinion of many of those, it may be the mass of them, whom the defendant desired to introduce to her friendly association, and whose friendship he desired her to cultivate. She is evidently a woman of penetration, and whatever her opinion of those people to whom she refers is worth, he has made it evidence. And the opinion she formed of them was so unfavorable that it is not strange that she was not disposed

355 to cultivate *them. This was not so with regard to all the ladies and gentlemen with whom she met in Danville. Doubtless there were many as refined and cultivated people in Danville as those in whose society she had been reared and educated; with but few of them, it would seem, she had an opportunity to cultivate an intimate association. Such were Mrs. Rice, Mrs. Carrington, Mr. Dugger and his family, Dr. and Mrs. Martin, Mrs. Gravely, and doubtless there were others; but as proved by Mr. Dugger, Mrs. Carrington, Mrs. Rice and others, she was polite and respectful to all. She would be so through respect for her husband; but whilst she was so, in her free and unrestrained correspondence with her husband's mother, she expressed her private opinion of many of them; and she must have been impressed with a horrible idea of their grovelling nature when she compares them to "fishing worms." She calls them "fishing worms," and apologizes to her mother-in-law for the use of that expression, saying: "R. (her husband) taught me that bad word." It would seem from this that he had no better opinion of them

than she had, and yet he complains that she refused to cultivate their good will and friendship. She speaks of these calls on her as having been a perfect bore.

But there were exceptions. There were many, numerous exceptions in the society of Danville, with a few of whom, in her new relation, she was thrown. And in this letter she expressly mentions Dr. Martin and his wife, and speaks of Mrs. Martin as "charming." We know from the record there were others with whom she was associated on the most intimate terms. One is mentioned by Miss Lou. Graves. In answer to defendant's question, upon her cross-examination she testified that on one occasion, when her sister was on a visit to her mother, in 1875, she entered the parlor and saw they all looked

356 a little disturbed. She asked what was the matter? *Her sister, she thinks it was, said that she had made a remark about her friend Mrs. Gravely of Danville, that she was one of the most refined ladies that she ever saw, and that Robert had said that was as much as to say his mother and sisters were not refined, and she told him that she had no reference to his mother and sisters, or to any one else; that they were not even in her mind. I think we may fairly conclude, therefore, that her visitors, to whom she refers in her letter to her mother-in-law, did not embrace the intelligent and refined citizens of Danville, but only those who were not embraced in that description, to whose association her husband had introduced her. Nor does it show that she refused to cultivate their good will and friendship, although she had no sympathy or congeniality with them. It is only her private opinion of them, expressed in a letter, not addressed to a mere acquaintance, but the mother of her husband, in whose bosom she then felt free to confide every thought and feeling of her heart, as I think the record abundantly shows. But whilst her opinion of them was so unfavorable and their calls were a bore to her, she may have felt it her duty, through respect to her husband and her own good breeding, to treat them politely and with respect; which it appears from the evidence in the cause she did.

I have now traveled over the bulk of this most remarkable answer, and there remain but few items yet to consider, but they will require careful consideration.

He alleges that his wife's "temper is oftentimes so irritable and sometimes so morose and gloomy that respondent has often suspected that possibly her mind was unhinged." If so, it should have excited his sympathy and compassion instead of a disposition to crush her and to overwhelm her with ignominy and disgrace. The evidence, however, shows that he had no ground for such an apprehension.

357 *But making a sudden departure from that view, he charges that "it is habitual with her to see only her own interest, utterly to disregard the rights and feelings of others, and to magnify beyond all reason any infringement of her rights, as

she sees them, and any offence or slight received from others, and she prides herself on her inability to forget or forgive an injury."

The above is a very grave charge. It is a charge of moral depravity of a heinous character. It involves a charge of uncharitableness, want of candor, injustice, dishonesty and gross malevolence. This is the first branch of this count. The second is as follows, viz: that "though she has often confessed that she was wanting in ordinary maternal affection, and has declared that she looked upon her child as a curse which Providence has inflicted upon her, yet she has insisted on the exclusive control and management of that child, declaring that respondent, as its father, had no rights in the matter, and that its management should, under no circumstances, and to no degree, be interfered with by him." And she adds that "she not only hates her husband, but has sought to make his little child look on him as the vilest creature of the earth." I will say at once that in my opinion, after a most thorough and careful reading and analysis of the evidence in this voluminous record, not one of these charges is sustained, and the just tribute to the character of this lady, in the opinion of the majority of the court, repels them.

But let us consider the evidence in relation to the first branch of this allegation. I will first examine the testimony relating to the plaintiff's conduct and character whilst domiciled by her husband at Danville in the society to which he sought to introduce her whilst there, to which I have before alluded. And first the defendant's depositions in support of the charge.

Mrs. Susan Allen, with whom the 358 defendant and his *wife first boarded in Danville about four months, is a relative, and seems to be a warm personal friend and admirer of the defendant, and is his witness. Even she testifies that Mrs. Latham was "respectful" to her husband. She says: "I never saw her disrespectful, but never saw any great display of affection." And she discreetly adds, "that is not unusual with ladies; ladies who have great affection frequently fail to show it." Consequently, unlike Mrs. Edmonia Washington, another of defendant's witnesses, she did not conclude they were not affectionate, because "she did not see them kiss and hug."

Mrs. Allen was asked upon her examination in chief to give her opinion of plaintiff, as formed from her association with her during her stay; and she undertakes to give it upon a four months' acquaintance, which seems not to have been at all intimate.

Most likely this hostess thought, when the young bride came to live with her, that she would be very yielding, and that she should take the direction of her and mould her to suit herself, particularly as she was the friend and relation of her husband; and she found herself disappointed. She found that the young bride had an opinion of her own and was not willing to be moulded, and acted towards her, not as an invited guest, which she was not, but as a pay-boarder

(which she was) had a right to act. And it is not unlikely that the hostess felt, not only disappointment, but chagrin and mortification, and she concluded that she was a woman of unyielding will, great self-esteem, extremely selfish, and thinks she does not appreciate a kindness. But this, as bad as it is, does not come up to the charge. If this woman was correct in her opinion, which evidently she is not, it is not that "it is habitual with her (the plaintiff) to see only her own interest, utterly to disregard the rights and feelings of others and to magnify beyond all reason any in-

359 fringement *of her rights, as she sees them, and any slight or offence received from others, and she prides herself on her inability to forget or forgive an injury." The infamous character thus described, and ascribed to the plaintiff by the defendant, is not sustained by this witness either in the facts or the opinions to which she testifies. It falls far short of it. She admits that she was kind and respectful to all in her house, except in two instances which she refused to explain. And what is more to the point in this suit, she admits that she was respectful to her husband; she never saw her otherwise.

Mrs. Rose Allen Neal, a daughter of the aforesaid Mrs. Allen, who says she is a third or fourth cousin of Mr. Latham, and his friend, expresses pretty much the same opinion that her mama entertains of Mrs. Latham. She thought Mrs. Latham tyrannical and exceedingly vain. Tyrannical, because she insisted on having a tin set for her chamber, and a grate instead of a stove, and a wardrobe; and particularly because as soon as she got one she insisted upon having the others. And she thought she showed her vanity by her manners and the care she took of herself and her appearance. Is it remarkable that a young lady, and particularly a bride, should be particular in her toilet and endeavor to make a good appearance?

We next come to the deposition of Mrs. Isabella Lewis, wife of assistant United States attorney for the western district of Virginia. Mr. Latham took his wife there next to board. She seems to be very much embittered against Mrs. Latham. The main causes of offence, as I can gather from her deposition, are, because Mrs. Latham required her chamber to be cleaned out neatly and thoroughly every morning, and not merely once a week on Friday mornings, and kept the chamber-maid employed as long as it was necessary to have it well done, when she, the hostess, needed her; and more-

360 over, because she *cut out her work in the parlor; and because, when she sent for her to call her to account for sending her a message, which she says was unlady-like, though she does not tell us what it was, Mrs. Latham acknowledged that she had sent the message, and in rather plain terms told her to her face what her opinion was of her, to-wit: "that she was a perfect tyrant, and that she had not only ruled her, but every one on the lot, with a rod

of iron." That was too much for Mrs. Lewis to stand, and she formed a very unfavorable opinion of her character, but it seems not more unfavorable than Mrs. Latham had formed of her. In answer to the defendant's seventh question-in-chief, she says: "She only made one exhibition of temper in my presence," which she afterwards somewhat varied. And she concluded that she was a very high-tempered woman and a very exacting woman; but she says she never saw Mrs. Latham display any temper towards her husband. This is the only point of her testimony bearing on the main issues, and yet I think if the record vindicates the character of the plaintiff from such aspersions, it is due to an injured woman that it should so appear. Her testimony, though splenetic, also falls very far short of ascribing to the plaintiff the infamous character which the defendant's allegation imports.

Then we have the deposition of Mr. D. S. Lewis, assistant attorney of the United States for the western district of Virginia. His feelings were, of course, not very amiable towards Mrs. Latham, after learning the grievances of his wife, if there was not a deeper seated cause of ill-will in him. He could not say that he ever heard Mrs. Latham speak an unkind word to her husband, but he thought her bearing was that of a superior to an inferior, and that her expressions were sometimes contemptuous; but he refused to give any instances. From

her conduct towards those in the house

361 with her, *he considered her to be a person of high temper, though he could recall no particular facts that induced him to form that opinion. The deposition of this witness, though like the others showing strong prejudice, fails to sustain the defendant's charge in its atrocity.

Then we have the deposition of Mary J. Waldron. She is the witness who was hunted up by C. P. Latham, clerk of the United States district and circuit courts at Danville, and brother of defendant, and who got his wife to write out her affidavit and sign her name to it. Her deposition shows that she knew nothing prejudicial to the plaintiff, whilst it shows at the same time a great disposition to say something, and a desire to conceal and cover up what she seemed to think would be prejudicial to her friend. But it really amounts to nothing, and I dismiss it with that remark.

As countervailing this testimony and proving the falsehood of this atrocious charge, we have the following testimony: Chrissy Hairston's deposition is very conclusive as to the propriety of Mrs. Latham's conduct to all, and her respectful and affectionate deportment towards her husband whilst they boarded at Mrs. Allen's, which is consistent with her deportment whilst they boarded at Mr. Lewis', and lived at Mr. Dugger's, as proved by Mrs. Rice, Mrs. Carrington and Mr. Dugger.

Mrs. M. J. Rice had a room in Mr. Lewis' house at the same time Mr. and Mrs. Latham boarded there, and saw a great deal

more of them than Mr. or Mrs. Lewis. Their rooms were only separated by the hall or passage. She saw Mr. and Mrs. Latham very often every day, sometimes three or four times a day. She and Mrs. Latham were in one another's room, off and on, all during the day, and witness was often in her room at night. And she testifies: "I never saw Mrs. Latham out of temper in my life; they, her husband and herself, were

362 *just as kind to each other as they could be. When I heard of the difficulty between them, of their trying to get a divorce, I thought it was a joke, and didn't believe it until I was told that it was so, because I never heard them speak an unkind word to one another in my life." She says she remarked to Mrs. Harvey several times, that she thought they were a happy couple together. She visited Mrs. Latham after she left Lewis', at Mr. Kingsley's, and also when she kept rooms at Daniel Dugger's.

Mrs. Ellen A. Carrington, whose high character is known to at least one member of the court, who lived in the same house in Danville with Mrs. Latham (Mr. Daniel Dugger's) for seven months, testifies as follows: "I saw her from four to six times a day. I always found her to be a lady of the greatest delicacy and refinement of feeling, exceedingly kind and polite to every one in the house, and had the very strictest regard for the truth. I never knew her to give way to any bursts of temper on any occasion, but she was always amiable and gentle and very kind to the inmates of the house who were sick." Both of these ladies had the best opportunities of knowing Mrs. Latham, of witnessing her deportment, and of forming a just opinion of her character. Mr. Dugger, in whose house she lived for about seven months, testifies that so far as he knows anything about it, "her conduct was that of a high-toned lady." As to her disposition, he says: "I regarded Mrs. Latham as a lady of decided will of her own, at the same time I never saw anything in Mrs. Latham that was not in entire harmony with her husband." He says she was regardful and considerate of the feelings and the rights of those around her, as far as he knew. He says she was pleasant and agreeable to his own family and others about her. The testimony of these highly respectable witnesses falsifies this atrocious charge, and so does the testimony of that eminent divine

363 and excellent gentleman, *Dr. Allen Martin, whose church she regularly attended, though not a member, and to whose Bible-class she belonged, and whom he visited frequently. He tersely says: "I regarded her as an amiable, well-principled, high-bred lady." He saw her with her husband occasionally during his visits and at other times, and on such occasions, he says, "her conduct was wifely and lady-like."

And such was the opinion formed of her character by the ladies of Lynchburg who became acquainted with her after her removal to that place, as appears from the testimony of Mrs. Ella H. Ford, Mrs. Eliza Boyd, Mrs. Marion C. Tyree and others.

The latter says: "I will say she is not only womanly, modest and refined, but honorable and truthful in a high degree. I have always been struck with her truthfulness." And the estimation of her character formed by these respectable witnesses, comports with the character given her by people of highest standing in Kentucky, gentlemen and ladies, in the midst of whom she was reared and educated, and who knew her from infancy.

But the limits of an opinion will not allow me to do more than to compress the testimony of these witnesses, which shall be, for the most part, in their language. The following traits of character are established by their testimony: Her truthfulness: "Her love of truth was a part of her." "Never knew her, as a girl or a woman, to prevaricate, and she had a contempt for one who would." "She was sound in morals, brought up by Christian parents, and was perfectly just and conscientious." "She was a girl of strong individuality, decided in everything, nothing negative about her, high-toned, courageous and true in every respect, scorning what was mean, little or under-handed." "Remarkable for her kindness to old persons and desirous to do all she could for their

364 comfort;" and for "her love for children, her *gentleness and tenderness with them. They always loved her." "She was a favorite with her teachers and stood at the head of her class." "Her moral and intellectual qualities were of the highest order, as were also her education and accomplishments." In respect to her moral qualities, she was a woman of "chastity, integrity, purity, charity, justice, truth, conscientiousness, refinement, cultivation, attractiveness and right feeling toward her Creator and her fellow-man?" "A true woman, of sterling constancy and fidelity." Just the reverse of the charges under consideration, and proves them to be false and slanderous.

"In respect to her mental qualities, she has a mind of unusual natural vigor and brilliancy, developed by careful training to well-balanced reliant action." "She is a woman of independent thought, untrammelled by ignorance, superstition or prejudice, yet not erratic or unreasonable in her will, actions, or motives." She is a woman who feels sorrow or grief keenly, though she may appear cheerful. In disposition she was affable to all, though reserved as to her personal affairs. Her character was of the highest order. She excelled in music, both vocal and instrumental; and, one of her classmates says, "in everything she undertook." "Her personal appearance was very striking. She was unusually beautiful;" and was in her manners and mental culture, in the language of one of her teachers, "an elegant young woman." "She had many friends at Shelbyville, by whom she was loved and admired, and in fact by the whole community." Such is the tribute to her loveliness of character and person and eminent virtue, by the testimony of nine witnesses, gentlemen and ladies of the highest

standing in their state, who knew her from her childhood and who knew how she was appreciated by the people amongst whom she was born and reared. How differ-

365 ent the portraiture they *have given of her from that infamous one drawn by the defendant, and how differently she is esteemed by these intelligent and respectable witnesses, who have known her all her life, and by Mr. and Mrs. Lewis, and Mrs. Allen, and Mrs. Rose Allen Neal, though they fell far short of proving defendant's atrocious charge. Yet looking at her through a jaundiced medium, she appeared to them in a different light from the true light in which she appeared to all the other witnesses who have testified at Danville, Lynchburg and Kentucky. It is worthy of note that not a witness in this cause has testified in any manner to the disparagement of the plaintiff, who was not connected in some way with the defendant's coterie of friends and political associates, unless Mrs. Edmonia Washington should be excepted.

We now come to consider the other branch of this count in the indictment. It is in substance:

I. That she has often confessed that she was "wanting in ordinary maternal affection."

II. That "she has declared that she looked upon her child as a curse which Providence had inflicted upon her."

III. That "she has insisted on the exclusive control and management of that child, declaring that respondent, as its father, had no rights in the matter, and that her management of it should, under no circumstances and to no degree, be interfered with by him."

IV. That "she not only hates her husband, but has sought to make his little child look on him as the vilest creature of the earth."

These are grave charges. We will not consider them in their exact order, but will proceed to enquire. Has the defendant sustained them by evidence? The onus is upon him.

To support these charges he introduces as a witness a negro woman by the name 366 of Edmonia Washington, to *whom I have before alluded. This woman had been employed by Mr. Latham as a cook and nurse, whilst they had rooms at Mr. Dugger's and the conversations with Mrs. Latham, which she professes to detail, she represents occurred during the time Mr. and Mrs. Latham had rooms at Mr. Dugger's. She represents Mrs. Latham as "sitting down, talking like anybody else in the room;" that is, as I take it, putting herself on an equality with her, and saying to her that her love for Mr. Latham was getting weaker and weaker, and "that she didn't love enough to be married no how; that she ought not to have married." She said she didn't bring any particular charges against him, but "said she thought he loved his mother better than he did her." Some time afterwards, upon her cross-examination, in answer to the question, "Has she ever told you she thought he loved his mother more than he loved her?" she answered: "She

never told me anything about that; she said once that she thought he did pay more attention to his mother and sisters than he did to her, but she never told me that he loved his mother better than he did her." At this point in her deposition it appears on the record, that the counsel turned to her examination-in-chief to see if she had not directly contradicted what she had testified in her direct examination, which she observing, added: "There was one time she said she thought he loved his mother and sisters better than her, and she wanted to go to Texas," &c., thus testifying backward and forwards. Now, it will be remembered that she professes to be detailing a conversation which took place while they lived in Danville, in the house of Mr. Dugger, before they went to Lynchburg, and when they had been very little with Mr. Latham's mother and sisters, when kindly and affectionate relations existed between them and Mrs. C. Fannie Latham, and she could have had no cause 367 of jealousy, and when it is *shown by the testimony of Mrs. Rice and Mrs. Carrington that Mr. and Mrs. Latham were very happy in their married life; which is fully confirmed by the contemporaneous evidence of her letters which the defendant has spread upon the record. And the language which she attributes to her, that she didn't love enough to be a married woman, is in conflict with the affectionate marital relations subsisting between her and her husband at that time, as abundantly proved, and about which there is no difference of opinion in the court, and also with the evidence of her devoted love to the defendant, by her constancy and devotion during their long engagement, under circumstances of great trial, and by her letters to the defendant during that period, which he has made evidence in the cause.

She says she heard her call him a fool and liar, but in this she contradicts the defendant himself, as we have seen, for long after this he says he told his wife that no man or woman ever called him a liar before, and it is contradicted by the whole testimony as to their deportment towards each other whilst they occupied rooms at Mr. Dugger's. All her statements about the temper the plaintiff exhibited towards her husband during this period are contradicted by all the witnesses who testify as to this period, both the plaintiff's and the defendant's, except D. S. Lewis, and his testimony yields it no support.

She further testifies that she told her during this same period "that she did not love children as other mothers did; that she did not have that tender feeling for them like other mothers; that she loved it well enough to make clothes for it, and keep it comfortable and feed it. She said it was a curse sent upon her from the Almighty," &c. Now, at the time this woman says these declarations were made to her by Mrs. Latham, Mrs. Rice testifies: "I never saw her treat it (her child) amiss in my life, and thought she was perfectly devoted to 368 it. I don't *think I ever saw a mother more devoted to a child than she was

to hers when I saw her at Mr. Dugger's." Mrs. Carrington, who lived seven months with Mrs. Latham, all the time this witness was a cook and nurse for her there, says: "I saw her with him (her child) daily and constantly, and never witnessed tenderer care and devotion from any woman. And I also saw her with it when it was sick, and she nursed it untiringly. In its sickness she was extremely anxious and attentive." Dr. Martin, her pastor, testifies that "I saw her from time to time with her child (it was during the same period); on such occasions she impressed me as a devoted mother. She appeared to me to be a mother proud and happy in her child." And yet this unscrupulous servant-woman swears that during the period to which the testimony of these respectable ladies and Dr. Martin relates, Mrs. Latham told her that this child, which the foregoing testimony, and in fact the overwhelming weight of testimony in the cause, proves she most tenderly loved, and in which she took so much pride, "was a curse sent on her from the Almighty." If the character of our wives or sisters or daughters are to be tested by such a witness, there would be no security to the most exalted character. And yet this is the only testimony in the record to support this allegation of the plaintiff. The allegation must have been made upon information from this witness that she would swear to it; yet she swears that she had no conversation with him, with his father or brothers, during the two months she was with them in Lynchburg, or before, as to what would be the character of the testimony she would give in the cause. It is incredible, as is her whole story. It is not only unsustained, but it is in conflict with the established facts in the record.

As to the specification, which I have designated as No. 1 in the charge, "that she had often confessed she was deficient in maternal affection," there is not a particle 369 of *testimony, if we throw out the deposition of Edmonia Washington, which I feel bound to do, as utterly unworthy of credit. And there is no evidence of her having often made such confession, or at all, but the evidence is overwhelming, not only conclusively to show that she is not deficient in maternal affection, but that her maternal affection was intense and absorbing.

Miss Lou. Graves, sister of the plaintiff—whose clear, intelligent, consistent, calm and unimpassioned testifying in this case, and her lady-like deportment under a rigorous and scrutinizing cross-examination, which was not at all times courteous, in which she sustained herself throughout, I confess inspires me with great confidence in her testimony, and great respect for her character—was called on to testify as to the affection of her sister for her child, and her treatment of it. She was asked to state whether her sister was regardful and anxious of the welfare of her child or otherwise. Her answer is: "Yes, she has always been so. She seems to be miserable if she does not know where he is, and whether he is happy and comfortable. She has always been so since I have known

her, with her child. There was never anything which she could contribute to its comfort or happiness which she did not do. She was perfectly self-sacrificing, never thinking of her own comfort or rest, but giving up all to him. It was always her habit even to wash his flannel clothes for fear the wash-woman might spoil them. She always washed and dried his hair herself, and took care that the water for his bath was of the right temperature. She always took the greatest pains in cutting and fitting his clothes, so that they would be perfectly comfortable. She would never leave him by himself, and would stop anything in the world she was at in order to play with and amuse him, often when she was too tired to

do so. I would often beg her not to do 370 it myself. *When she was at our home in Kentucky, we would often try to persuade her to leave him a day and go to places: the Cincinnati Exposition, &c. I offered, and mother offered to stay and take care of him, but she would not go unless she could take him with her."

To the same effect, and with at least equal force, is the testimony of Mrs. S. Willie Lyle, Dr. J. J. Dulaney, Mrs. Belle Buckner, Mrs. Mary E. Graves, of Kentucky, and Mrs. R. L. Owen, wife of Dr. W. O. Owen, of Lynchburg, who says: "From little incidents I know, I judge she is a very affectionate mother." And Mrs. C. M. Jordan, who testifies: "I have never seen a more tender, loving, devoted mother." Mrs. Lyle says: "She fondled and nourished him herself; she washed and dressed him, watched him, slept with him and sat awake with him in her bed several times at night (whilst she was with her), holding him asleep in her arms, because he did not sleep well when laid on the bed." I might refer to other witnesses who testify as strongly, but it is sufficient to say that the testimony from Danville, Virginia, Kentucky and Lynchburg, abundantly shows that never was a mother more ardent in her affection and devotion to her child. He seemed to be her pride and joy and the light of her life, and never did mother exhibit a more anxious and earnest desire and purpose fully to meet her responsibilities for his right training and treatment, morally, intellectually and physically. We look in vain in this record to find any evidence that she was wanting in ordinary maternal affection, or that she had ever made such a confession, which the whole record shows is not true.

Nor is there any evidence to support the other allegations, that she insisted on the exclusive control and management of the child, declaring that his father had no rights in the matter, and that her management of it should, under no circumstances and to 371 no degree, be *interfered with by him, and that she hates her husband, and has sought to make his little child look on him as the vilest creature of the earth. We look in vain in this record for the slightest proof in support of these charges, but we find much to disprove them.

All the witnesses, both for plaintiff and defendant, who testify as to her deportment

towards him while they lived in Danville, say they never heard her speak an unkind word to him or of him. And after she left Danville, to spend four or five months in Kentucky, the testimony is that she invariably showed respect and affection for her husband; and after they went to Lynchburg the testimony is that when she spoke of her troubles to her friends, she spoke with leniency of her husband and sought to apologize for his conduct.

Mrs. Ella H. Ford says, that when speaking of her troubles, she would speak with leniency of her husband, and say she thought he would not have acted so if he had not been influenced by others. She says: "I never heard her speak harshly of him or reproach him." The testimony of Mrs. Boyd and Mrs. Tyree is to the same effect. Miss Sue Matthews, one of her most intimate friends, with whom she has had regular correspondence both before and since her marriage, says "she loved him devotedly and was almost blinded to his faults. Not once in all the long years (alluding to their long engagement, I suppose), did her feelings change. She believed in him implicitly, never doubted him, but was perfectly true to him, as she was in everything else. * * * Since her marriage she has always spoken of him in the most respectful, loving manner until this unfortunate affair; and never since has she said anything unkind of him in any of her letters—not even since this suit began; but she has shown herself the true, noble, lovable woman she is under all trying circumstances."

We come now to the consideration
372 of the last count *in this remarkable indictment of a husband against his wife, which will disclose (without considering the influence which questions of property may have had, as indicated by the remark made by the defendant's mother to Miss Lou. Graves, and the enquiries as to property made by the defendant of the plaintiff's brother, and the cross-examination of Miss Lou. Graves by defendant on the question of property), the probable origin and chief cause of the cruel treatment which this unfortunate lady has received from her husband. He charges that for months before this controversy became flagrant, and, with short intervals, for long periods before, that she had refused respondent access to her bed, sometimes on one pretext and then on another, but finally on the ground of her sovereign will and resolution, never again to bear children by him. A pretty complaint for a man to make to a court of justice against his wife! If it was true, why didn't he put her privately away and let her take her child with her? How much better, more manly and magnanimous and noble, than to come into a court of justice with this indelicate complaint on his lips against his wife. But as it has been made, indelicate and unpleasant as it is, we will have to look into it and get at the truth, if we can. Why didn't he let his wife go and stay with her excellent mother, as she requested, and take her infant child, of such tender years, with her.

and spend a few months with her in peace and quiet under the treatment of her confidential physician, and see whether all impediments to the conjugal happiness which they had previously enjoyed would not be removed, which I think, in the light of this record, would most probably have been the result if he had been a man to have pursued that course, and had treated his wife with that tenderness and consideration she was entitled to? But if such had not been the result, and time had shown that there
373 was an immovable impediment *to a reunion as man and wife, as indicted by the allegation, then it would have been better, and more noble, and more just for him to have given her up, and the child too—better for him and far better for the child—than to have tortured her maternal feelings as he has done, and to have exhibited towards her the coldness and indifference he has, and the ill feeling and bitterness he has, and to have come into court with such a complaint against his wife.

But what real ground has he for complaint against his wife on this score?

There is no doubt that during her visit to Kentucky in 1875 she was and had been suffering from diseases for which she was not responsible or in any manner culpable, which should have shielded her from the censure, complaint and resentment of her husband. I will only refer to the deposition of Dr. J. J. Dulaney, her distinguished and confidential physician and relative, who conclusively establishes this fact (p. 247 of the record). After describing her situation, he says he "procured for her a mechanical support, and prescribed remedies suited to her diseased condition." It now seems that in following the prescribed remedies of her physician she incurred the complaint and censure of her husband and his bitter and cruel resentment.

"At Lynchburg, Va., in January 1877." Dr. Dulaney says, "I last saw her, and she was at that time still feeble and debilitated; she was not suffering as much from local disease as she was in 1875, and I think she would have appeared better at that time if it had not been for the mental distress occasioned by the suit then pending between her husband and herself for divorce." He must have referred to the suit brought by her husband against her, as this suit had not then been commenced.

Dr. W. O. Owen, an eminent physician of Lynchburg, and relation of defendant,
374 and his witness, concurs in *opinion with Dr. Dulaney as to the effect of such diseases, and I think, also, as to the remedy.

The doctor had said upon his direct examination: "I told her (Mrs. Latham) that she must consent to act as other married women did, and allow her husband the privileges that other husbands had. She replied that her conscience would not allow her to do it, without saying why. Her exact language was, 'You surely can't ask me to do a thing which is against my conscience?'" And now plaintiff's counsel asked him, when Mrs. Latham used this expression, might

she not have referred to what she regarded as her duty in respect to her physical health? To which the doctor answered, "I suppose it is susceptible of that construction, but I did not so understand it." She had not been under Dr. Owen's treatment, and he could express no opinion as to her diseased condition; but he did say that he noticed a change for the worse in her physical condition. But the testimony of Dr. Dulaney is conclusive on this point, and her disease existed during the whole period embraced by the defendant's allegation, and doubtless had much influence in producing the trouble. But it appears from her reply to Dr. Owen that her refusal to take his advice was not put on that ground, but was made a point of conscience. And yet she could not have meant that she had moral or religious scruples on the subject of cohabitation between husband and wife; the fruit of her marriage is a standing and conclusive fact against such a conclusion. It is impossible to believe that a woman whose principles were so decided and matured on moral subjects could be brought suddenly to regard that as sinful which the Bible sanctioned, and which the christian world has ever practiced, and without which the human race would become extinct. Her well balanced mind and christian principles could never have allowed her to embrace any such false and morbid notions of religious
 375 *or moral duty; and especially must we so conclude when her difficulties in conscience can be accounted for on high and honorable principles.

About the middle of December, 1876, the defendant had a bill of divorce prepared, and presented it to the judge, and obtained an injunction to restrain her from removing her child. I am of opinion that the hustings court erred in overruling the motion of plaintiff to require defendant to produce that paper and file it in the cause. It was an important act in this painful drama, and would have been evidence of the animus with which the defendant persecuted the plaintiff, and would have had an important bearing upon the merits of this controversy. But the plaintiff knew that the defendant was seeking a divorce from her. She was informed by his counsel that they were instructed by him to obtain a divorce, and that the papers had all been prepared for the purpose; and whilst they do not inform her what were the allegations of the bill, they say that they were sufficient to entitle him to a divorce. It was after this procedure by the defendant, that the conversation detailed by Dr. Owen occurred. She had then, after a long course of mal-treatment, disclosed by the evidence, been cast off by her husband, and was not recognized by him as his wife. Could she have consented to be the expectant mother of other children by him, to have them torn from her in tender infancy, as he had torn from her the child she had borne him, to be deprived of a mother's care and training? Could she consent to be the mother of his children, when they were to be taken from her as soon as they were old enough to receive instruction, and she would not be

allowed the office of a mother in inculcating in their tender minds the duties which they owe to God and man? Could she have consorted with him as his wife, whilst he held a bill of divorce over her, indicting charges against her, it may be, as infamous as
 376 those *he made against her in his answer to her bill, which he might file in court any day, and which she was instructed by his counsel was only held up to see if they could not get for him a permanent separation by private agreement? She could not then regard him as her husband, and she might well have considered that to yield to him would be to take the place of his legalized mistress, and not of a wife. To have given him the privileges of a husband under such conditions would have been to yield her body to him for prostitution. No honorable, conscientious, virtuous and high-principled woman could ever submit to occupy such a position. This view of the case, I think, satisfactorily explains her reply to Dr. Owen, and is a complete justification of her course.

The doctor mentions also a remark she made to him long anterior to his having any knowledge of a disagreement between her and her husband. "Although," he says, "her air was serious, I did not think the expression was one of any importance." That is the best interpretation of the character of her remark.

Old Mrs. Latham is also introduced by her son to testify that she declared to her just before the birth of her first child that she would never have another. From the strength of her expressions on that occasion, as detailed by the old lady, which probably have lost nothing clothed in her language, she must have felt deeply. It was the language of passionate grief and suffering. I do not know that it is unnatural that a lady of great refinement and delicacy of feeling and innate modesty, and under great suffering, should have the feelings this lady expressed to her mother-in-law just before her accouchement with her first child. I have heard of a gentleman saying that his wife had had twelve children, and he was under the impression that she never failed to declare before the birth of each one that she never would have another.

377 *That no inference can be drawn from the passionate declarations made to old Mrs. Latham, that the plaintiff had any fixed or false notions on this subject, or any belief that such indulgence was immoral and irreligious, is evident from the fact that after those declarations were made, and after her accouchement, she and her husband lived a happy married life together at Danville, which the proof clearly establishes, and with regard to which there seems to be a concurrence of opinion between my brethren and myself; and in fact it is admitted by the allegation itself that even after they left Danville for short intervals the defendant was not excluded from the privileges of a husband. There is no complaint of this nature which extends back of the period of her becoming diseased, except that she would not allow the consummation of the

marriage until several weeks after its solemnization—until after their arrival in Maryland, which is indelicately exposed in his answer. If it is true, it only shows that his wife was not sensual, and it is not inconsistent with the modesty and refinement attributed to her by her friends. But that she yielded we must conclude, from the fact of the birth of their child in less than eleven months after their marriage.

After her visit to Kentucky, and probably before they left there, under the advice of her physician, their intercourse was more restricted, and then the ill temper and dissatisfaction of her husband began to show itself. From these facts I think it may be fairly inferred, first, that the strong and passionate expressions made to her mother-in-law just before the birth of her child, as detailed in her deposition, were the result of her suffering and distress at the time, and cannot be construed as indicating any fixed morbid religious scruples on the subject of cohabitation between husband and wife; and, secondly, a confirmation of the opinion

378 before expressed, *that the ill temper of the husband and his ill treatment of his wife has been primarily and mainly caused, not excluding the influence which questions of property have had, by her restricting him in his otherwise lawful gratification; whilst there is a strong presumption from the discourteous and inhospitable treatment which his wife's mother and sister and other friends received from members of his family, and from other circumstances disclosed by the record, that in his maltreatment of his wife he acted not without prompting and encouragement from them.

As to defendant's social position, I know nothing more than the record shows; but I should suppose that in Virginia society, or well-regulated society anywhere, a man could hardly occupy a high social position who would treat the mother or sister of his wife, or other ladies of refinement visiting at his house, with rudeness and insult, or who would deny the mother and sister of his wife, or his son's wife, by an insulting letter, the privilege of visiting her at his house. Any one wishing to know more of this can read the depositions of Mrs. Tyree, Mrs. Ford, Mrs. Manson and Miss Lou. Graves, and the note of W. Latham, Sr., to Mrs. A. C. Graves, which was introduced in evidence by the defendant, remembering that the imputations he makes against Mrs. Graves and her daughter are not supported by a particle of testimony, and in the absence of such testimony, by the known character of those ladies they are repelled, and must be taken as an intentional insult.

This conduct towards the mother and sister and the lady friends of the plaintiff was with the concurrence of the defendant. They would hardly have been so treated if it was displeasing to him; in fact, in much of it he was himself an actor. I am not oblivious to the fact that several respectable witnesses of Culpeper have testified most favorably to the impressions he made on
379 them *in his boyhood and early youth,

and of the terms of eulogy in which they speak of him, and I wish there was nothing in this record to mar and deface that picture. I have felt it my duty in the course of this opinion to exhibit the facts. I forbear further comment.

I think the inference is plain, from all that has been said, that the defendant in arraigning his wife upon all the various charges which we have been patiently and laboriously investigating, has shown that he is utterly estranged and alienated from her; that he has no regard or love for her as his wife, but that he hates her, and would ruin her if he could; and that in the publication of her strictly confidential letters, written to him in relations of confidence of the most delicate and most sacred character, and the private confidential letters written by her to his mother with perfect freedom from restraint, in the confidence that she was writing to one who would not abuse her confidence and use it to her prejudice; and in the betrayal of the confidence reposed in him by his wife's mother, by publication of letters which she addressed to him expressly under the seal of confidence, there is no justification for defendant. He can find neither justification nor apology on the ground that his wife had unjustly charged him with the crime of adultery, and employed detectives to hunt up evidence to establish the charge. There is no evidence that she employed detectives. It was not improper for her or her friends to employ any lawful means to discover testimony to support the charge. There is no evidence that they employed unfair means. But the charge had not been made when the defendant's answer was filed, nor when he broke the seal of confidence in publishing the letters. It was not made in her original bill. She had then not a thought or suspicion that her husband had ever been guilty of such unfaithfulness to his marriage vow.

as she avers in her amended bill. And
380 it appears *from the testimony of Eliza Patterson that she did not communicate it to the plaintiff until after she went to live with Mrs. Dawson, when the plaintiff remarked that she had never thought of such a thing; and she says she went to live with Mrs. Dawson on the 7th of March, which is the day the defendant's answer was filed. The charge was made in the amended bill which was filed the 4th of July, 1877, and not before. And no testimony was given tending to implicate him until the 4th of June, 1877—long after the defendant had made his unfounded charges against his wife in his answer, and long after the publication of the aforesaid letters. It was nearly three months after his answer was filed before the depositions were given which implicated him in the offence, and nearly four months before the charge was made by plaintiff's amended bill. And I think her counsel would have been derelict in duty if they had not advised it after what had been disclosed by the testimony of Eliza Patterson and Maurice Dawson.

A most unwarrantable attempt was made by introducing testimony of alleged decla-

rations made by the witness, Eliza Patterson, to the mother, brothers and sisters of the defendant, of base and profligate attempts made by the plaintiff to influence and suborn the witness in her testimony, under the specious pretext of invalidating the witness. But all such testimony was mere hearsay, and was not entitled to the weight of a feather against the plaintiff. And the most of it was inadmissible for the purpose of invalidation, and the court below erred in not sustaining the exceptions taken to it by the plaintiff's counsel, and in not excluding it from the record.

This brings us to the consideration of the issue made by the amended bill. I think the testimony of Eliza Patterson and Maurice Dawson, if believed and unexplained, were sufficient to sustain the charge of adultery in a bill *for a divorce. The credibility of the former is fiercely assailed. She is a colored girl, and at the time of the alleged overtures and solicitations of the defendant she was a servant in his employment, but at the time her deposition was given was not in the employment of either of the parties to this suit. I think the testimony of a witness in her position ought to be received by the courts with great caution, because, in their ignorance and weakness, they are liable to be influenced improperly. The court should look to the capacity of the witness, the intrinsic character of the testimony, its reasonableness and consistency with itself and the established facts of the case, and the influences which may have been actually exerted, or which would likely have operated on the witness.

In this case the witness does not appear to be deficient in capacity, and her testimony is not unreasonable or inconsistent with itself or the established facts of the record. Old Mrs. Latham, years before, seemed to have apprehended danger, and says she warned the plaintiff against it. And about the time the witness testifies these overtures were made, with the solicitude of a mother, she felt uneasiness. She knew that her son and his wife were occupying different chambers, he having given up his place in his wife's chamber to her sister, and this mulatto girl was attending to his chamber, and she may have noticed something specially which excited her fears, and she takes the girl to task, and charges her with pregnancy when there could have been nothing visible to indicate it, as she was not. The reason she assigns—that if it were so, she did not wish the girl to be a burden on her hands—would seem to be insufficient. It would be time enough, if she were in that condition, to relieve herself of the burden after it became manifest. She most probably wished to find out the character of the girl and to ascertain whether her son was not in *danger. And afterwards, when her son deserted his wife's chamber, she had a bed for him in her chamber, instead of the one he had occupied before alone. And when, after the plaintiff had been informed that the defendant had caused a bill to be prepared for a divorce, which he had presented

to the judge, who had granted him an injunction, which was only held in abeyance pending negotiations for a permanent separation by agreement, in preparing for her defence in said suit, a sister of defendant ascertained from Eliza Patterson that she was sent by the plaintiff to her counsel, Mr. Williams, to make a statement of what she knew and could testify in said suit in her behalf, it was soon made known to the family of the defendant, his mother, two of his brothers, Woodville and Charles, and his sisters, and it seems to have caused quite a sensation and stir amongst them; their sympathies were very much excited for the girl, who they represent to have been in great distress, and in the kindness of their hearts they catechised the plaintiff's witness as to what she knew, and advised her as to how she might relieve herself from the difficulty; for it seems she did not wish to be a witness. Woodville says he had two interviews with her; the first some days before she went to see Mr. Williams. This was of his seeking. He says that he was at his father's house in the evening, when some member of the family remarked that Eliza Patterson was in great distress on account of an interview she had had with Mrs. Latham in regard to her giving testimony for her, and he sent for her to come in the parlor. And the next interview he had with her was some days after she had been to see Mr. Williams. His brother Charles had come down from Danville, and he, and one of his sisters also, had an interview with her before she went to see Mr. Williams, and he one after. The witness and Charles Latham differ as to what they advised her. She testifies that they told her to tell Mr. Williams that what she had to say would not do Miss Fannie any good, and that it wouldn't be worth while in him questioning her. Whether she, or he, is mistaken as to the advice given her, she seems so to have understood it, for that is the course she pursued; for she says: "After I told him that, he did not ask me but two questions, that I can remember." I infer from the solicitude and anxiety manifested by the mother, brothers and sisters of the defendant, that they must have apprehended that she would testify to something that would be very damaging to the defendant. They probably had some intimation before that of her having said that solicitations had been made to her by the defendant, for in answer to the twenty-second question of the cross-examination, she says the first morning he said anything to her she went straight down into the kitchen and told the cook, "Aunt Lizzie Adams;" and the second time he said anything to her she told her again, and told no one else but her at that time. About a month or two afterwards they got another cook, and she says she was talking with her about it in the kitchen, and the little boy was up stairs over the kitchen and heard her; who, she says, always said he would tell it.

If these statements were not true, it was in the power of the defendant to have shown it by introducing the persons named by the wit-

ness to contradict her. It was not competent for the plaintiff to introduce them to support the witness, and the presumption is, that the defendant did not, because they would, if introduced, have sustained the witness. But the plaintiff had then never heard of it; she did not communicate it to her until after she had left the Lathams' house and was boarding at Mrs. Jordan's, and of course was seeking her testimony for no such purpose, but only to prove the treatment she had received from her husband in presence of the witness.

384 *But the weeping and great distress of the witness, as represented by them! Why should it have caused her so much distress to give a statement to the plaintiff's counsel of all that the plaintiff was aware at that time that she knew, and which is contained in her deposition? It must have been caused by the dread of displeasing the defendant, in whose employment she was, and his family, that caused her such great distress, and the idea that if she gave testimony at all that she would have to expose the conduct of the defendant, of which at that time the plaintiff had not been informed, and of which she had not even a suspicion. It was very natural that it would be repulsive to her to make a public exposure of those matters, and more especially if she had reason to believe it would make a breach between her and Mr. Latham and his mother and sisters and brothers, as it would most likely do. It seems to me that it is only in this way that the distress which she manifested, as is represented, can be accounted for. It could not be from a dread of displeasing the plaintiff if she did not testify to it; for she was aware that the plaintiff was then wholly ignorant that such interviews had occurred between her and her husband, and consequently if she had suppressed it in her testimony it could have given her no displeasure, for she was not expecting her to give such testimony. In answer to the defendant's forty-first question, she says: "She (Mrs. Latham) only told me to go and see Mr. Williams, and I hesitated to go, but she talked with me a while, and I consented to go. She said she thought it was very unkind in me not to go; that is all I remember." She testifies that she did not tell Mrs. Latham until after she left her and went to live at Mrs. Dawson's. She told her in her room at Mrs. Jordan's. This was long after the plaintiff had left the house of her husband's father, and after she had requested the witness to go to Mr. Williams, and in fact

385 after the *defendant had filed his answer to her bill. And she testifies in answer to defendant's twenty-eighth question that she told the plaintiff without her asking her anything about it—"she told her of her own accord," and the plaintiff remarked "she never had thought of such a thing." I am perfectly satisfied from the evidence that no improper influence was exerted by the plaintiff to induce her to give the testimony she gave, or to give any testimony, and that her testimony was given against strong influences that were brought to bear upon her from

the other side. I think that the testimony of the defendant's witnesses as to declarations made by the witness to them, as to the influence the plaintiff exerted over her to induce her to testify, is no evidence against the plaintiff, being mere hearsay, and is incredible in itself, and is contradicted by the witness when on oath, and that it was, at least nearly all of it, inadmissible even for the purpose of invalidating the witness, no proper foundation having been laid for its introduction; and that if it were admissible it would not show, under the circumstances, that the witness had not told the truth when she testified on oath. I am of opinion that her testimony is not inconsistent with other facts in the record, that it is consistent with itself, and seems to have been given without prejudice or partiality, and I do not feel at liberty to disregard it.

No attempt has been made to discredit Maurice Dawson, but the plaintiff has introduced a witness, J. H. Ballard, then a United States officer, by whom he proves they went together to the house of ill-fame innocently, and from no improper purpose, mistaking it for a respectable boarding house, and left it as soon as they discovered their mistake. He says he and the defendant went to this house "just before night" on a Sunday evening, "only a short while; don't remem-

386 ber whether the sun was down *or not; it was not getting dark though. Dawson says it was on Sunday night between seven (then after dark) and eleven o'clock when he saw defendant with his friend, who was a stranger to him, at that house. He thinks it was nearer seven than eleven. He was, after he gave his deposition, introduced to Mr. Ballard, and afterwards testified that he did not think he was the man he saw with defendant, but was not certain, because he couldn't see the gentleman plainly that night, had never seen him before, and did not notice him as particularly as he did the defendant. Assuming that it was, when J. H. Ballard was with him that the witness Dawson saw the defendant at the house of ill-fame, no presumption of guilt from the fact of his being seen at that house can be raised against the defendant if Ballard is credited, and so much doubt is thrown upon the other testimony offered in support of the charge by the defendant's testimony that I think the evidence, taken altogether in support of it, is insufficient in law to establish the charge. Having disposed of these matters, and endeavored to clear the case of what has been improperly thrown into it to prejudice the plaintiff, we are prepared to consider the grounds upon which she seeks a divorce from bed and board and the custody and nurture of her infant child by her original bill. They are the statutory grounds of cruelty, a reasonable apprehension of bodily hurt or abandonment or desertion. The evidence is entirely satisfactory to my mind that the plaintiff is entitled to a divorce upon each and all of them.

I think the evidence shows that she has been treated with cruelty—yea, the refinement of cruelty. Her husband seems to have

taken a mistaken view of the marital rights of himself and wife, and has failed to appreciate the conduct of his wife in its true light; and this has led him to a course of conduct towards her that is cruel and inhuman.

387 *It is true that it is the husband's God-given prerogative to be the head of his family, and to be the ultimate authority in his domestic circle, and a good wife will respect his authority when exercised within proper bounds; but a woman when she marries does not surrender all her rights. It is an old common-law doctrine, that her legal rights are merged in her husband; but courts of equity and modern legislation have greatly modified the old common-law doctrine and enlarged the legal rights and equities of the wife. The wife does not lose her individuality, morally or socially. She retains her moral and human rights—her moral and religious responsibilities—her natural and moral sensibilities—her liberty of thought and freedom of speech. She is not the slave of her husband (though she is too often made such); she is morally and socially his equal. She has her rights and privileges within her sphere, which the husband cannot withhold from her except by an act of oppression. And the care and nurture and training of her children in the nursery is within her sphere, and properly belong to her peculiar province. The husband should give such assistance as he can to his wife in raising their children, and especially in supporting her authority. But surely it is not his duty or his privilege to go into the nursery and take charge of them and supersede their mother in her position of authority there. The children, and especially such as are of the tender years of this plaintiff's child, need the constant care and watchful superintendence of the mother. This cannot be rendered by the father, who has out-door duties to perform, and hence must devolve on the mother. And there are duties which must be performed by the tender female hand; and if not performed by the mother, must be by some other female. I deny the right of the father to take the child from the mother against her consent, and to place it under the care of another woman in opposition to her wishes.

388 *The training and instruction of the children in early life, and during the period when their characters are being formed, properly devolves on the mother. The responsibility rests on her more than on the father, for the reason that she can be always with them, whilst the father, who has his out-door duties, cannot; and the mother is usually better qualified to train and instruct her children. The maternal influence is proverbial. No man, perhaps, ever excelled in life who could not ascribe the qualities he possessed which gave him success to maternal influence. I say, then, this is the peculiar province of the mother; it is the position God placed her, and she is responsible to Him for the manner in which she discharges the duty. And the husband who interferes with her, takes her child from her, and prohibits her from having the care and training of it, if she is capable, prevents her

from meeting the responsibilities which she is under to her Maker, inflicts upon her unmitigated cruelty, and incurs guilt in the sight of Heaven. Such acts are an abuse of his authority and a flagrant violation of his marital obligations.

But the wife is entitled to have her child with her for her happiness, solace and comfort. It is generally believed, I think, that the affections of a mother are stronger than those of a father; and I believe it. What affection is stronger than a mother's love? Whilst a father may exercise an advisory influence with the mother in the management, control and training of her children, I deny emphatically his right to take away the care and custody of the child from the mother, as in this case, and give it to his mother or sisters, or anybody, against her consent and wishes. It is an enormous wrong and cruel outrage upon the rights of the mother. Even brute beasts are allowed in general to have their young offspring with them. It is painful to separate the tender offspring of a brute beast from its mother.

389 *The moral sentiment of the world looked with abhorrence on the separation of a female slave who was a mother from her offspring of tender years. It was not often done when slavery was sanctioned by law, though the master had the power; and when it was done, the mind of every man and woman of moral sensibility in the community where it occurred revolted and condemned it. But to tear from the bosom of a young, ardent, refined, highly cultivated, amiable, devoted mother, eminently qualified, morally and mentally, for rearing it, in defiance of her cries and entreaties, the infant child that she has borne, and to consign it to the rearing and training of the mother or sisters of the father, or any other person, is a barbarity and refinement of cruelty which no man has a right to inflict on his wife. I care not what precedents may be hunted up to support it—and none, I believe, can be found—I hold that it is opposed to all righteous law, human and divine; and I will never sanction it. It is cruelty when inflicted, which entitles a wife to be released from her obligations to her husband and to the protection of the law in her custody of her child.

That these cruelties, besides various other methods of showing his ill-will to her, have been inflicted by the defendant upon his wife, beyond all question or controversy, and I think, under circumstances of great aggravation, is abundantly shown by the testimony in this record. I regret that the limits of this opinion will not allow the recital of it. I must content myself with a reference to the depositions of Miss Lou. A. Graves, Charles A. Graves, Dr. Dulaney, Eliza Patterson, Mrs. Ford, Mrs. Tyree and Mrs. Boyd. He first takes her child from her most of the day and places it in charge of his mother and sisters, or takes it to his brother Woodville's, but usually returns it to her in the evening, though sometimes she is not allowed to see it until the next morning. He prohibits

390 *her from taking it with her in her walks for recreation, or in making calls on her friends. Soon her privileges are further restricted, and the child is taken from her also for the night, and she is denied the privilege of folding him in her arms to sleep. Finally, her child, the pride and joy of her heart, is torn from her embraces and her sight, clandestinely and secretly, and carried to Danville, under circumstances indicating that the separation was designed to be final; and thus abandoned by her husband and bereft of her child, she is at last driven, as her last hope, to appeal to the laws of her country for protection. If the statute is to be construed as using the term, cruelty, in a sense different from its use in common parlance, and implies injury to the body only (which includes the life or health), I agree with Bishop, that the more rational application of the doctrine of cruelty is to consider a course of marital unkindness with reference to the effect it must necessarily produce on the life or health of the wife; and if it has been such as to injure either, to regard it as true legal cruelty. To hold absolutely that if a husband avoids positive or threatened personal violence, the wife has no protection against any means short of these, to which he may resort, and which may destroy her life or health, is to invite such an infliction by the indemnity to the wrong-doer. 1 Bish. M. & D. edition, § 732. Again: "Suppose the body is the only thing to be considered in these cases, yet if we find various avenues to it, through any one of which may run the waters to drown its life or health, surely we cannot say that the approaches through one avenue should be left open by the law, while the others are closed." *Ib.* § 733. This I hold to be sound doctrine, and it applies to the case in hand, for such cruelties as this record exhibits, must prey upon the sensitive and refined nature of the plaintiff, and undermine and destroy her health and imperil her

391 life. *And it has been shown that her health has already been injured, by the testimony of Dr. Owen, defendant's own witness, Dr. Dulaney, and especially Mrs. Owen. The ground of divorce for cruelty, I think, is fully established.

I am also of opinion that the plaintiff has "reasonable apprehension of bodily hurt." She says in her bill, so bitter and relentless is the treatment she has received, that she does not feel safe in the house, and is afraid to remain there. She has continued to remain there for the child's sake and the fear she had of impairing her claim to him if she withdrew without the defendant's consent. He did presume to lay violent hands upon her, and bruised her hands and arms. The bruises could be seen four days afterwards, as proved by Mrs. Boyd. On another occasion he admits that he threatened to punish her, thereby asserting a right to punish her. The husband has no right to punish his wife. No language with which a wife might reproach her husband could justify him in inflicting punishment on her. He acknowledges without shame or apology, in his address to the court, that he did threaten to

punish her, as if it were his right to do so, which he evidently claims. Before God he promised "to love and cherish her, to honor and keep her in sickness and in health, as long as they both lived;" and yet he dares now threaten to punish her.

From this threat, acknowledged before the court in a way implying a claim of right to punish his wife, in connection with the fact of his once laying violent hands upon her, and with the temper and spirit he manifested towards her by his studied indifference, neglect, harshness, bitterness and cruelty which the evidence unfolds, I am forced to the conclusion that she had cause for her sense of insecurity, "and reasonable apprehension of bodily hurt," if she remained with him.

But he abandoned her. In *Bailey v. Bailey*, 21 Gratt. *43, we held that "desertion is a breach of matrimonial duty, and is composed, first, of the actual breaking off of the matrimonial cohabitation; and, secondly, an intent to desert in the mind of the offender. Both must combine to make the desertion complete." In this case it is proved that there was an actual breaking off of the matrimonial cohabitation. It is proved that some time before he went off to Danville and carried her child with him, he had not only deserted his wife's chamber and slept in another room, but took the child from its mother and carried it into his mother's room to sleep with him. Here was a breaking off of matrimonial cohabitation.

The defendant, it is true, alleges that he deserted his wife's room because she demanded it; but, as we have seen, there is no proof to sustain the allegation, or that it was at her request, or with her consent. The fact of the breaking off the matrimonial cohabitation is established; was it done by the husband with intent to abandon her? I think the fact that he wanted a perpetual separation, and had employed counsel to procure it, and had a bill and the papers necessary to procure a divorce prepared, and had declared to her brother that there never could be a reconciliation between them, and that they never could live together again as man and wife, and a few days afterwards, without any notice to his wife, moving off to Danville, and clandestinely, as shown by the deposition of Richard Jackson, the hackman, carrying her child of such a tender age with him, selling the chamber furniture used by his wife, including the bed upon which she slept, and dismissing her maid-servant, and causing his other effects, in two trunks heavily packed, to be sent after him the next day, is as conclusive as evidence could well be of his intent to abandon her; and that the note he left, to be handed to her after he was gone, and which was not delivered to her until the night after he left, and when

393 he was in Danville, and *delivered by a stranger who refused to give his name, does not alter this conclusion.

That note is dated Lynchburg, Virginia, February 21, 1877, and is in these words: "Dr. Fannie—The condition of my business makes it necessary for me to go to Danville

to-day. For obvious reasons I take Roy with me. I will go to my brother's house; you may follow us to-morrow." This was the first intimation she had of his purpose to go to Danville, as the note itself implies. He was going that day, and would take her baby with him, but four days over two and a half years old. His business requires him to go there. No intimation when, or that he ever will return to Lynchburg. He had discontinued his residence at his father's, in the way he had been residing there, by selling out his chamber furniture to his mother, without consulting his wife, and dismissing her servant maid, and does not inform her that he had made any other agreement with his father or mother to return and resume his residence there upon a new arrangement, nor is there any evidence that he had; nor does he inform her that he had made any agreement with either of them to continue her board there, nor is there any evidence that he had; or that after breaking up the former arrangement, he had made any new provision for her to remain there; or that he had provided any place as a home for her in Lynchburg. He tells her I am going to my brother's. The same brother who had come from Danville to Lynchburg and held a parley with her witness, to advise her what to do; and such a parley as this record shows! He says I am going there—I have a place provided for myself—you may follow. But does not request her to do so; does not say I have provided a place there for you too, or my brother invites you to come—but you may follow to-morrow, and

can look out for yourself; I have provided no place for you. *He knew when

he penned that note that his wife could not follow him; that it was morally impossible that she could, under the circumstances. And he didn't want her to follow him. If he had, he would have told her before he left that he was going to Danville, and would have requested her to go with him. He had deserted her chamber and taken her child from her before he left his father's, and declared that there never could be a reconciliation between them, and that they never could live together again as man and wife; and had employed counsel to procure a divorce for him, or a permanent separation, and it is evident he did not wish her to follow him to Danville, and he had made no provision for her there, and had provided no home for her where she was. And so he left his wife, whom he was bound by the most sacred obligations to provide for and protect, a deserted waif upon the sea of life. There she stood alone, without a home, bereft of her darling child, deserted by her husband, surrounded by his friends—her enemies. It is, in my opinion, clearly a case of desertion and abandonment—of cruel desertion; and the note which was delivered to her the night after he left, was an aggravation of its cruelty. This case is much stronger than that put by Bishop, when he says: "If the husband causes to be prepared the necessary papers for a divorce, and so informs his wife, his departure in a secret and clandestine manner establishes at once a desertion." 1 Bishop, 5th edition, § 783.

In case of a decree of divorce the court is invested with plenary power by section 12 of the statute, to determine with which of the parents the child should remain. The statute makes no provision for its care and custody in a case where there is no decree of divorce. The statute does not in that case vest the court with authority, nor does it take it away. It is silent on that subject, and *therefore, I maintain, leaves the court to its general jurisdiction.

But I am so firmly convinced that the plaintiff here is entitled to a divorce from bed and board that I will not stop to debate that question now, especially as this opinion has unavoidably been extended to an unusual length.

It cannot be questioned that this lady has been subject to cruel treatment (at least as that word is understood in common parlance), humiliation and oppression. I think I have shown by a review of the testimony that the main cause of it was no fault of hers, but her misfortune. She rests now under the frown and bitter reproaches of her husband and all his family. He has made no overtures to her for reconciliation or of affection, as the husband did in the case of *Kerr v. Kerr*. He gives no indication of relenting, or assurance that if she returned to him she would be treated as a wife should be, as was given by the husband in that case, but exhibits unabated indifference toward her, alienation, and positive hatred. She has been abandoned by him, and left to drift on the stormy ocean of life without a home, and bereft of her child, who has been ruthlessly torn from her bosom. If her bill should be dismissed it would be to say to her: The courts can give you no relief; you belong to your husband; you must submit to his exactions, however cruel and injurious to your health. You have no civil rights; you are his slave, and, he willing it, you must be subordinate in rank and station to his mother and sisters. Or you must surrender the child you have borne, though you feel it is a part of yourself; though you brought it into life and being in anguish and travail, and nurtured it from your own breasts, and nursed it in sickness and in health, through day and through sleepless nights, and have raised it to its present stature and taught its little feet to walk and its tongue to *prattle—your sweetest music—though God has thrown on you the responsibility of training it, not only for this life, but for a better life to come. That duty must be discharged by others who do not love it as you do, and cannot discharge the duty as a mother can.

Such is the cruel alternative that would be presented to this "amiable, well-principled and high-bred lady" by a dismissal of her bill. What will be her decision I will not conjecture. I have ever been in favor of maintaining the marital relation on just principles, and have been opposed to granting divorces upon slight grounds; but in this case, if the plaintiff should be influenced by mother and sisters. Or you must surrender

think she should be subjected to such a sacrifice. Better that they should never be reunited. A reunion thus coerced, I cannot see that it could ever result in a happy reconciliation and a happy married life. In this case the husband was the first to move for a divorce, and his conduct towards her has been such as was evidently calculated and designed to drive her from him, with the feeling, as he declared, that there could be no reconciliation, and that they never could live together again as man and wife. And under these circumstances, should she be constrained by torturing her maternal feelings to throw herself at his feet and implore his mercy to be treated by him as he lists, and to be subordinated to his coterie of friends and relatives? If it is done, I can have no hand in it. I cannot sanction it.

But if this court could recognize her strong claims to its interposition for her protection and legalize a separation from her husband, who claims the right to punish her, and has threatened her, and has abandoned her, and allow her to have the society of her child, at least for a time, during its pupillage, when it needs a mother's watchful care and training; and she could return to her widowed mother and friends in her native state and
 397 *enjoy a little peace and quiet and the treatment of her physician, feeling once more freed from the shackles which have oppressed and crushed her, there would be a good prospect for the restoration of her health; and her husband, seeing that she was no longer in his power, might relent and repent of his ill-advised course towards his wife, and be prepared to sue for reconciliation; it is not impossible, if he has not utterly forfeited her respect and confidence, and a reunion could ever be desirable, that it might be successful upon terms that would secure to her the rank and position which a wife and mother is entitled to in the family; and on no other terms ought they ever to be reunited.

But if such should not be the result, it would be far better for the child. The evidence in the cause abundantly shows that the mother is eminently qualified, morally and mentally, to have the custody and training and education of her child, and no one can fill the place of a mother; and the child would be constantly under her care and supervision. But the father, circumstanced as he is, is not a fit person to have the care and training of this child. I think it was Lord Brougham's opinion that the character of the man is formed before the child attains the age of seven years. The defendant holds a public office, which requires him to be absent from home much of his time, and often attending the courts. If he carried his child with him he could not be under his supervision. Until he is several years older, he would have to take his nurse with him, or employ one where he took him. And when he is old enough to dispense with a nurse he could not be with his father and under his superintendence, and would have to be let run at large if he took him with him, which would soon be his ruin.

But if his father does not take him with him he could not be in his custody; he would have to place him in the
 398 *care and custody of some woman. I conclude, therefore, that the father is not a fit person to have the custody of the child; in fact, it would be impossible that he could personally take the custody of him. He would have to place him in the custody of some woman; and I unqualifiedly assert that there is no woman on this earth who is as well qualified to have the rearing and custody of that child as his own mother. It is reduced then to a question, not between the child's father and his mother which should have his custody, but whether his mother or some other woman should have the custody of him. If it were a question between the mother and the father, it is palpable that it would be for the good of the child that the mother should have him. And all the authorities hold that the good of the child is the turning point. I do not understand that there could be any question as to the right of its custody between its own mother and the mother or sisters of its father, or any other woman. I must say that there is a conviction of my mind that if this dear child should be placed in the custody of his mother, and God spares his life, he will be raised up to be a useful and respectable member of society; but if taken from her, and placed in the custody of his father, there is a fearful probability that his ruin will be the consequence.

I am of opinion, therefore, to reverse the decree of the hustings court, to decree a divorce a mensa et thoro in favor of the plaintiff, to settle her entire estate which she derived from her father upon her, and to give to her the custody of her child, and to remand the cause for an account, to ascertain what sum would be a proper charge against the defendant, considering his circumstances, as alimony to his wife, and for the support and maintenance of the child. I therefore dissent from the opinion of the court, but am not opposed to the provision
 399 in the decree, as the bill of the plaintiff is dismissed, that the *dismissal shall be without prejudice to any right she may have to institute a suit in her own behalf, or on behalf of the child, for its custody.

MONCURE, P., and CHRISTIAN and BURKS, J's, concurred in the opinion of STAPLES, J.

Decree affirmed.

400 *McAden & als. v. Keen & als.

July Term, 1878, Wytheville.

1. Bankruptcy—Rights of Bona Fide Purchasers—Estate Vesting in Assignee.*—

Only the estate of a bankrupt, whatever it may be, at the time of his becoming such, including any estate he may have aliened by an act fraudulent and

*Bankruptcy—Rights of Bona Fide Purchasers.—The principal case is cited and the holding set out in its first headnote is sustained in *Parker v. Dillard*, 75 Va. 422. See also *Barr v. White*, 30 Gratt. 531.

void as to his creditors, is vested in his assignee in bankruptcy for the benefit of his creditors. And, therefore, no estate which may have been sold by him to a *bona fide* purchaser for valuable consideration fully paid prior to the act of bankruptcy, becomes so vested in said assignee.

2. Same—Bona Fide Sale of Portion of Estate—Judgment Liens—Credits.—A judgment creditor of a bankrupt whose judgment is a lien upon any estate *bona fide* sold and conveyed by the bankrupt, before his bankruptcy, may claim and secure in the proceeding in bankruptcy, his portion of the estate of the bankrupt, in virtue of his said judgment, without accounting or giving credit for anything on account of the lien of his judgment upon the estate so sold and conveyed.

3. Same—Same—Same—Recovery of Balance of Judgment.—Though such creditor may have so claimed and received in the proceeding in bankruptcy, his portion of the estate of the bankrupt, such judgment creditor may, by a suit in equity, enforce the lien of his said judgment upon the estate *bona fide* sold and conveyed before the act of bankruptcy, for the recovery of any balance of said judgment which may remain unsecured in the proceeding in bankruptcy; and that, though he may not, in the said proceeding, have asserted or given any notice of the lien of his said judgment upon the estate so sold and conveyed.

This case was heard at Richmond, but was decided at Wytheville. It was a creditor's bill in the circuit court of Pittsylvania county, brought in 1870 by James McAden and others against W. W. Keen and Robert A. Walters and others, purchasers of real estate from

Keen, to subject the said real estate to satisfy the judgments * of the plaintiffs. There were two amendments of the bill bringing in other parties. It appears that in 1867 Keen filed his petition in bankruptcy, and in September, 1869, received his discharge; that these plaintiffs were creditors who proved their debts; that the lands they seek to subject in this suit to the payment of their judgments were sold and conveyed by Keen before he filed his petition in bankruptcy, and were not mentioned by him in his schedules; nor did the plaintiffs in proving their debts refer to their judgment liens upon these lands. The real estate surrounded by Keen seems to have been absorbed by judgment debts having priority to those of the plaintiffs. The cause came on to be heard on the 9th of September, 1875, when the court expressed the opinion that the plaintiffs, having been parties to the suit in the bankrupt court, and claiming their debts therein, enforcing liens on property surrendered by the bankrupt, and failing to make known to the court other liens held by them upon other property, were estopped from maintaining a suit in any court to enforce their liens claimed in this suit; and without deciding any other question in the cause, dismissed the bills with costs. And thereupon the plaintiffs obtained an appeal from the decree.

E. E. Bouldin, for the appellants.

Thomas S. Flournoy and William J. Robertson, for the appellees.

MONCURE, P., delivered the opinion of the court.

This cause, which is pending in this court at Richmond, having been there fully heard but not determined, this day came here the parties, by their counsel, and the *court having maturely considered the transcript of the record of the degree aforesaid and the argument of counsel, is of opinion that only the estate of a bankrupt, whatever it may be at the time of his becoming such, including of course any estate he may have aliened, by an act fraudulent and void as to his creditors, is vested in his assignees, in bankruptcy for the benefit of his creditors; and, therefore, that no estate which may have been sold and conveyed by him, by deed duly recorded, to a *bona fide* purchaser for valuable consideration fully paid prior to the act of bankruptcy, becomes so vested in said assignees.

The court is further of opinion, that a judgment creditor of the bankrupt, whose judgment is a lien upon any estate so sold and conveyed by the bankrupt, may claim and secure in the proceeding in bankruptcy his portion of the estate of the bankrupt, in virtue of his said judgment, without accounting or giving credit for anything on account of the lien of his judgment upon the estate so sold and conveyed as aforesaid.

The court is further of opinion, that notwithstanding such creditor may have so claimed and received in the proceeding in bankruptcy his portion of the estate of the bankrupt as aforesaid, such judgment creditor may, by a suit in equity, enforce the lien of his said judgment upon the estate so sold and conveyed as aforesaid, for the recovery of any balance of said judgment which may remain unrecovered in the said proceeding in bankruptcy; and that notwithstanding he may not, in the said proceeding, have asserted or given any notice of the lien of his said judgment upon the estate so sold and conveyed as aforesaid.

The court is therefore of opinion, that the circuit court erred in dismissing the original and amended bills of the complainants; and that instead of doing so, the said court ought to have proceeded to adjudicate the rights of the *parties involved in the case, in regard to which rights it is not deemed proper by this court, as it would be premature, to express any further opinion than as aforesaid until the said circuit court shall have adjudicated upon them, and it may become the duty of this court to supervise the judgment of that court on appeal.

Therefore, it is decreed and ordered that the said decree appealed from be reversed and annulled; that the appellee, Robert A. Walters, pay to the appellants their costs by them expended in the prosecution of their appeal aforesaid here; and that the cause be remanded to the said circuit court for further proceedings to be had therein to a final decree, in accordance with the principles hereinbefore declared; which is ordered to be entered on the order-book here and forthwith certified to the clerk of this court at Richmond

aforesaid, who shall enter the same on his order-book and certify it to the said circuit court of Pittsylvania county.

Decree reversed.

404 *Helm v. Helm's Adm'r & als.

July Term, 1878, Wytheville.

1. Homestead—Rights of Widow.*—A widow whose husband has died leaving no children and no debts, and has not claimed the homestead in his lifetime, is not entitled to a homestead in his estate as against his heirs.

2. Setting Apart Homestead.†—An order of the county court setting apart a homestead, made upon the *ex parte* application of the widow, is of no effect as against the heirs.

John Helm, of the county of Floyd, died intestate in August, 1874, leaving a widow, but no children; and his mother, brothers and sisters, and the children of some who were dead, were his heirs and distributees. He left several small tracts of land, of the value of between \$2,500 and \$3,000, and personal property appraised at \$1,533. Joseph Helm, his brother, qualified as administrator on his estate.

In October, 1874, Joseph Helm, the administrator, and five of the other heirs and distributees, instituted a suit in equity in the circuit court of Floyd county, against Lavinia Helm, the widow, and the other heirs and distributees of John Helm, some of whom were infants. The bill was filed on the first Monday in November, and after setting out the different tracts of land of which John Helm died seized, and stating that the personal estate would be more than sufficient to discharge all the liabilities of John Helm, the plaintiffs prayed that Mrs. Helm might be assigned her dower, that the lands might be sold and the proceeds divided, or if the court should think that partition in kind could be made, that this might be done.

405 *Mrs. Helm answered the bill. She set out what interest she claimed in the estate of her husband. As to the real estate, she claimed one-third in value for her

***Homestead—Rights of Widow.**—In *Barker v. Jenkins*, 84 Va. 895, which expressly affirms the principal case, it held that a widow, where the husband was not in debt at his decease, cannot claim, against his heirs, a continuance of the homestead which he, in his lifetime, had set apart under Code of 1873, ch. 183. See also 2 Min. Inst. (4th Ed.) 910. See *Hatorff v. Wellford*, 27 Gratt. 356, where it was held that the widow has the right to claim homestead against creditors of her husband though the latter had not set it apart in his lifetime. See 15 Am. & Eng. Enc. Law (2nd Ed.) 696, for general discussion of the subject.

†Setting Apart Homestead at Instance of Widow.—The holding of the principal case on this subject is supported in 2 Min. Inst. (4th Ed.) 162. Now, under Va. Code of 1887, sec. 3636, homestead is assigned on petition to the circuit, county or corporation court, wherein the greater part of the real estate is, by the widow or minor heirs, or all of such persons living.

dower; and that she was entitled during her widowhood to a homestead out of the real and personal estate, not exceeding \$2,000. And she states that she had applied to the county court of Floyd to have her dower assigned to her; which had been done. And that she had applied to the said county court to have a homestead assigned her, which had been done in the manner provided by law; and she files copies of the proceedings in the county court.

Further answering, she says that the whole real estate of John Helm had been assigned to her as dower or homestead; and she insisted that it was not competent for the circuit court to interfere with either except by way of appeal, and especially it was not competent for this court to decree a sale or partition of said real estate.

It appears that John Helm had not set apart a homestead in his lifetime, and that on the 10th of November, 1874, on the motion of Mrs. Helm, the county court of Floyd appointed commissioners to assign to her her dower in the real estate of her husband, and also to set apart her homestead in the estate of her late husband. These commissioners made their reports. In the first they set out her dower by metes and bounds; and in the second, they gave her the remainder of the real estate, and \$321 of the personal estate in the hands of the administrator.

In December, 1874, the court made a decree appointing commissioners to assign Mrs. Helm's dower, and that they do assign to Lavinia Helm, in real and personal estate of John Helm, not exceeding \$2,000 in value, and report, &c.

These commissioners made their report; and after assigning Mrs. Helm's dower, 406 they valued the remainder *of the real estate at \$2,000, and assigned it to her as her homestead.

To this report the plaintiffs filed four exceptions; but it is only necessary to refer to the third, which was as follows: "And complainants further except to the assignment of homestead for the following reason: That the widow is not entitled to homestead in addition to her dower and year's support."

The cause came on to be heard in August, 1875, when the court confirmed the report as to the assignment of dower, but sustained the third exception to the report. The decree on this point is set out in the opinion of Christian, J. And thereupon Mrs. Helm applied to a judge of this court for an appeal; which was allowed.

J. L. Tompkins, for the appellant.

There was no counsel for the appellees.

CHRISTIAN, J., delivered the opinion of the court.

The main question we have to determine in this case is, whether the widow of a decedent who, in his lifetime, has failed to claim and set apart a homestead, and who dies leaving no children, and there being no creditors,

can claim a homestead in the estate of her husband?

In the case before us, commissioners appointed for that purpose, after laying off and assigning to her one-third of the real estate of her husband as her dower, also set apart to her the remaining two-thirds, that being valued at the sum of \$2,000, the amount of homestead exemption in this state. So that, according to the report of the commissioners, the whole real estate of the decedent was transferred to the widow for life, to the exclusion of the heirs. Exceptions, however, were taken to *the report of the commissioners by the heirs of decedent, one of which (the third exception) was as follows:

"3d. And complainants further except to the assignment of homestead for the following reason: That the widow is not entitled to homestead in addition to her dower and year's support."

The court sustained this exception by the following decree:

"And the court sustains the third exception to the report of commissioners of assignment of homestead, the court being of opinion that the widow of a decedent who died since the present constitution of Virginia went into effect is not entitled to a homestead in the estate of her husband; whereas in this instance the decedent died owing no debts, and that while said homestead may be claimed and held as against creditors whose claims were contracted since the present constitution went into effect, in case there is no waiver of homestead in favor of said creditors, that said homestead cannot be claimed and held against heirs at law and distributees of the decedent's estate."

From this decree an appeal was allowed by one of the judges of this court.

The question we have to determine is one purely of construction, and must be determined alone upon the true interpretation to be given to the provisions of the constitution in relation to the homestead exemption, and the statute law passed in pursuance thereof.

Section 1, article 11, of the constitution, provides that "every householder or head of a family shall be entitled, in addition to the articles now exempt from levy or distress for rent, to hold exempt from levy, seizure, garnisheing or sale, under any execution, order or other process, issued on any demand for any debt * * * hereafter contracted, his real and personal property, or either, including money or debts due him, whether heretofore *or hereafter acquired or contracted, to the value of not exceeding two thousand dollars, to be selected by him: provided." &c., (and then follow certain specified exceptions to which such exemption shall not apply, not necessary to be noticed here).

The fifth section of said article contains the following provision: "The general assembly shall, at its first session under this constitution, prescribe in what manner and on what conditions the said householder or head of a family shall thereafter set apart

and hold for himself and family a homestead out of any property hereby exempted, and may, in its discretion, determine in what manner and on what condition he may thereafter hold for the benefit of himself and family such personal property as he may have, and coming within the exemption hereby made. But this section shall not be construed as authorizing the general assembly to defeat or impair the benefits intended to be conferred by the provisions of this article."

Section 7 declares that "the provisions of this article shall be construed liberally, to the end that all the intents thereof may be fully and perfectly carried out."

I have thus quoted in full all the provisions of the constitution having reference to the subject under enquiry.

In accordance with the requirements of the fifth section above quoted, the general assembly duly proceeded, at its first session after the adoption of the constitution, to prescribe "in what manner and on what conditions the householder or head of a family should set apart and hold for the benefit of himself and family a homestead out of any property exempted."

In doing this they went a step beyond the specific requirements of the constitutional provisions above quoted, and provided for the case of a party dying without claiming a homestead, making provision for the widow and infant children of such decedent.

409 It is noticeable *that the constitution, by its terms, makes no provision for the widow or infant children of a decedent who dies without having claimed a homestead. The provisions of the constitution are confined to the party himself, declaring that he "shall be entitled to hold and set apart for the benefit of himself and family" the exempted property. And it has been earnestly contended, and with much force, that it was not contemplated by the framers of the constitution that any provision should be made further than for the benefit of the party who, in his lifetime, claims and sets apart his homestead—the constitution itself making no mention of the widow and children of a decedent who, in his lifetime, has failed to claim his homestead. But I think it is clear, that while the legislature cannot impair or abridge the rights of homestead secured by the constitution, it may enlarge such rights and confer them upon a class of persons not specifically mentioned in the constitution. Indeed, this question has already been definitely settled by this court. In *Hatorf v. Wellford*, Judge. 27 Gratt. 356, the precise question as to constitutionality of the act which confers the right to claim a homestead upon the widow or minor children of a decedent, who had not claimed and set apart his homestead, in his lifetime, was raised and argued in that case, and this court decided in favor of the constitutionality of the act, and of the right of the widow to claim a homestead in the estate of her deceased husband. In that case, however, the claim was asserted and upheld against the claim of creditors. The question, whether

the widow could, under the statute, claim a homestead against the heirs, where there were no creditors, did not arise, and was not decided. On the contrary, Judge Staples, delivering the opinion of the court, said:

"It has been held in Georgia and North Carolina certainly, and probably

410 *in other states, that the object of the

homestead laws is the security of the debtor and his family against the demands of the creditor, and where there are no debts the homestead cannot be held against the adult children, and the assignment does not preclude them from asserting their title to a share of the estate, citing *Kemp v. Kemp*, 42 Geo. 523; *Hager v. Nixon*, 69 N. C. 108. Upon these questions this court is not now called upon to express any opinion. It is sufficient to say that the petitioner and her children are entitled to have assigned them, and to hold exempt from levy, seizure or sale, so much of the personal estate of the father or head of the family as he himself would be entitled to select or set apart were he now living and asserting his claim to the homestead." The only question, therefore, decided in *Hatorf v. Wellford*, Judge, (supra), was that the widow has the right to claim homestead for herself and minor children in the estate of her deceased husband, where he has not claimed it and set it apart in his lifetime as against the creditors of her husband. So that we have now before us, for the first time, the question, whether under the constitution and statute law of this state a widow can claim a homestead where there are no creditors against the heirs. This question, as was said in the beginning, must be determined alone upon the true construction to be given to the act of assembly and the provisions of the constitution upon which it is founded. It is to be premised that while in the petition of appeal it is assigned as one ground of error, that the court did not direct its commissioners to enquire whether there were debts due for which the real estate was liable, it was regarded as a concession in the case, in the court below, that the decedent died owing no debts. The bill asserts that the personal estate was more than sufficient to pay any debts for which decedent was liable. This is nowhere denied, and indeed, the court,

by its decree, declares that the

411 *"decedent died owing no debts."

This will be taken as a concession in this court, as it was in the court below.

The decedent in this case left no children. His heirs-at-law were his mother, brothers and sisters, and their descendants. Under the statute of descents and distributions, the real estate descended to these heirs, subject to the widow's dower in one-third thereof, which was duly assigned to her. Upon the death of John Helm, his real estate immediately descended, and the title thereto became at once vested in these heirs. Was it divested and transferred for her life to the widow by virtue of the act of assembly above referred to? Section 10 of that act provides that "if any such householder or head of a family shall have departed this life since the adoption of the present constitution, leaving a

widow or infant children, and such homestead shall not have been selected or assigned in the lifetime of said householder, she, if remaining unmarried, or they, if she marry or die before such selection, shall be entitled to claim the same; and the court shall appoint commissioners to assign the same, in the same manner that commissioners are appointed to assign dower; and the homestead so assigned shall be held by the widow and children to the extent and on the same conditions prescribed in section 8 of this act." Section 8 herein referred to, declares that the homestead provided in this act shall continue after his death (i. e., after the death of a decedent who has claimed and set apart the homestead during his lifetime), for the benefit of the widow and children of the deceased, until her death or marriage, and after her death or marriage for the exclusive benefit of his minor children until the youngest child becomes twenty-one years of age.

Under these provisions it is plain, when construed, as they must be, with reference to the provisions of the constitution, that the

homestead which the widow may

412 *claim after the death of her husband

(who dies without having selected and set apart a homestead) is of the same character as that which the husband may have been "entitled to hold" in his lifetime; that is, a homestead held "exempt from levy, seizure, garnisheing or sale under any execution, order or other process issued on any demand for any debt," &c. The claim of homestead to be asserted by the widow, under statute and the constitution, is a claim which she can only assert against the creditors of her husband, and not against his heirs. If there be no creditors, she is not entitled to claim homestead in her husband's estate. The question, whether a widow without minor children, can claim for herself a homestead against creditors, does not arise in this case, and upon this question I express no opinion. The homestead, when claimed by her in a proper case, as when there are creditors, must be held by her "to the extent and upon the same conditions prescribed in section 8 of the act"—that is, "for the benefit of the widow and minor children." If there be no minor children, she cannot hold a homestead against the adult children, nor can she hold it, if there be no children, as in this case, against the heirs of her husband. In such case she is only entitled to her dower, but not to a homestead in her husband's estate. Any other construction of the statute would be to declare that the statute of descents and distributions had been repealed or modified by the homestead laws. Surely the legislature never intended, by the enactment of a homestead law, to repeal or modify the statute of descents in this state, which has become sacred by its antiquity, and one of the most important and valuable enactments, affecting the rights of property in the jurisprudence of this state. We cannot give such a construction to these laws as will repeal or modify to any extent this useful and venerable statute, unless

such intention plainly and unmistakably appears *by a direct repealing

clause or the most necessary implication.

If we give to the homestead law the construction contended for in this case, we would give to the widow not only her dower, but the whole of the real estate of her husband, to the exclusion of his heirs. We would, in effect, declare that a law, the sole object of which is the security of the debtor and his family against the demands of the creditor, should have the effect of taking away, in many instances, the whole property of a decedent from his children and heirs, and giving the whole to his widow during her life, and of changing the whole course of descents and distribution of property which has flowed in one channel for more than a century. Such a construction can never have the assent of my judgment, or the sanction of my judicial action. I am of opinion that the claim of homestead can only be asserted by a widow against the creditors of her husband, and never against his heirs; and in the case before us that the widow is only entitled to dower and not to a homestead.

There is only one other question raised in the record necessary to be noticed. The widow had, upon her motion in the county court of Floyd county, procured the appointment of commissioners to assign her dower, and also a homestead in the real estate of her husband, and upon the report of these commissioners, the county court had transferred to her the whole real estate of her husband—one-third as dower and two-thirds as homestead. It was insisted that this was a decree of a court of competent jurisdiction, and that the circuit court could take no cognizance of the case, except by appeal from the county court.

It is sufficient to say that all the proceedings in the county court were mere nullities, and were properly so treated by the circuit court. The homestead act provides that the

414 homestead shall be assigned to the widow in the *same manner as dower is assigned—that is, on motion of the heirs or devisees. In this case, after a bill was filed by the heirs in the circuit court, the widow went into the county court, and, upon her motion alone, all the proceedings in the county court were had, and to these proceedings the heirs were not even made parties, and, of course, were not bound by them. Such proceedings could not in any manner affect the rights of the heirs to have the whole question adjudicated in the circuit court.

Upon the whole case, I am of opinion there is no error in the decree of the circuit court, and that the same should be affirmed.

Decree affirmed.

415 *Page v. Clopton, Judge.

July Term, 1878, Wytheville.

I. On the 22d March, 1878, C, a judge in court, imposed a fine on P, an attorney, for alleged contemptuous behavior in the presence of the court, and at the same time, a motion was made by another at-

torney, to remit the fine, which motion was continued until a further day. On the 25th of the same month, the court overruled the motion to remit the fine, and ordered the sergeant to take P in custody and detain him until the fine was paid. P was in court on both of these days, and no exception was taken to the action of the court. On the 27th of the same month, and during the same term, P, who had paid the fine under protest, appeared in court and offered to except to the judgment imposing the fine, and moved the court to certify the facts on which the judgment was ordered, and that witnesses be called to testify to these facts, which, for reasons stated by the court, was refused. No bills of exceptions appear to have been tendered on this day, but on the 30th day of the same month, the last day of the term, P tendered three bills of exceptions to the judgment and rulings of the court, which the judge refused to sign, and P applied for a *mandamus* to compel him to sign the same—Held:

1. *Mandamus—Refusal to Sign Bill of Exceptions.**—The writ of *mandamus* will lie to compel the judge to sign bills of exceptions in this case, if "the truth of the case be fairly stated therein."

2. *Same—Same.*—When a bill of exceptions is tendered which does not fairly state the truth of the case, it is the duty of the judge, with the aid of the counsel, to settle the bill, and when settled to sign it, and if he refuses to do this, *mandamus* will lie to compel him.

416 II. *Exceptions, Time of Taking—Signing Bill.*†—The usual practice is to give notice of the exception at the time the decision is made, and reserve liberty to draw up and present the bill for settlement and signing, either during the trial *or after the trial, and during the term, as may be allowed by the court, but it must be

**Mandamus to Compel Signing of Bill of Exceptions.*—See 4 Min. Inst. (2nd Ed.) 391; Dilard v. Dunlop, 83 Va. 755; Collins v. Christian, 92 Va. 731; Porter v. Harris, 4 Call 485; Powell v. Tarry, 77 Va. 250. See Poteet v. Commissions, 30 W. Va. 89, discussing and approving principal case; Douglass v. Loomis, 5 W. Va. 542; Dryden v. Swineburne, 20 W. Va. 89; Morgan v. Fleming, 24 W. Va. 186; State v. Cunningham, 33 W. Va. 607; Cummings v. Armstrong, (W. Va.) 11 S. E. 742. See for general discussion, 13 Enc. Pl. & Pr. 576.

†*Exceptions, Time of Taking.*—In Powell v. Tarry, 77 Va. 250, it was held that points decided in the lower court, cannot be reviewed on appeal, unless it appears from the record that they were saved before the jury retired. See also 4 Min. Inst. (2nd Ed.) 826. Telegraph Co. v. Hobson, 15 Gratt. 122; Bull v. Com., 14 Gratt. 613; Stoneman v. Com., 25 Gratt. 887; Stevenson v. Wallace, 27 Gratt. 77; Martz v. Martz, 25 Gratt. 361; Peery v. Peery, 26 Gratt. 320; Winston v. Giles, 27 Gratt. 530; Suffolk v. Parker, 79 Va. 660.

Bill of Exceptions, Time of Signing.—See also Danville Bank v. Waddill, 31 Gratt. 477; Jones v. Com., 87 Va. 63; 4 Min. Inst. (2nd Ed.) 980; Moses v. Cromwell, 78 Va. 671.

When Mandamus Should Be Granted.—The principal case is cited and its general rules on this subject are sustained in Milliner v. Harrison, 32 Gratt. 426. (See also note to this case.) See 13 Enc. Pl. & Pr. 496 for general discussion of the subject.

Mandamus to Inferior Courts—Authority of Court of Appeals.—See also 4 Min. Inst. 357; Va. Code 1887, sec. 3086-88.

signed during the term at which final judgment is rendered; and it will be disregarded in the appellate court, if signed after the end of such term, although signed pursuant to a previous order allowing it, unless, perhaps, such order be made by consent of parties.

III. **Same.**—The rule as to notice of intention to take an exception, or of taking it at the time of the ruling, does not apply to a case like the present, in which the exceptant and the judge are the only parties concerned.

IV. **Mandamus—Right to Remedy.**—The office of the writ of *mandamus* is to compel corporations, inferior courts and officers, to perform some particular duty incumbent upon them, and which is imperative in its nature, and to the performance of which the relator has a clear legal right, without any other adequate, specific legal remedy to enforce it; and even though he may have another specific legal remedy, if such remedy be obsolete or inoperative, *mandamus* will lie. The remedy is extraordinary, and if the right is doubtful, or the duty discretionary, or there be any other adequate specific remedy in use, the writ will not be allowed.

This case was heard at Richmond, but was decided at Wytheville. It was a petition presented to this court by Samuel M. Page, asking the court for a writ of *mandamus* to William J. Clopton, judge of the hustings court of the city of Manchester, to sign three bills of exceptions to the judgment of the judge imposing a fine upon the petitioner for a contempt of court. A *mandamus nisi* was issued; to which the judge made a return; and the case came on to be heard upon the petition and return and the exhibits filed with them. The facts are sufficiently stated in the opinion of Burks, J.

S. B. Witt and E. C. Cabell, for the relator.

D. L. Pulliam and B. A. Hancock, for the respondent.

BURKS, J., delivered the opinion of the court.

417 *This is an application to this court to issue a writ of *mandamus* to compel the Honorable William I. Clopton, judge of the hustings court of the city of Manchester, to sign several bills of exceptions tendered by the relator, Samuel M. Page, to a judgment for a fine imposed on him for an alleged contempt by misbehavior in the presence of the said court.

Original jurisdiction to issue writs of *mandamus* and prohibition to the circuit and corporation courts, and the hustings court and chancery court of the city of Richmond, and in all other causes in which it may be necessary to prevent a failure of justice, in which a *mandamus* may issue according to the principles of the common law, is conferred upon this court by statute enacted pursuant to the constitution of the state; and it is provided that "the practice and proceedings upon such writs shall be governed and regulated in all cases by the principles and practice now prevailing in respect to writs of *mandamus* and prohibition, respectively."

Code of 1873, ch. 156, § 4; Con. of Virginia, art. 6, § 2.

For the pleadings and practice in writs of *mandamus* as regulated by statute, see Code of 1873, ch. 151.

This court refused to award the *mandamus* applied for in *Barnett v. Meredith*, 10 Gratt. 650, because neither the constitution of 1850 nor the statute then in force conferred the jurisdiction to award the writ. The provisions of the present constitution in relation to the awarding of such writs are substantially the same as those contained in the constitution of 1850, but the present statute expressly confers the jurisdiction which the former statute did not confer.

The office of the writ of *mandamus* is to compel corporations, inferior courts and officers to perform some particular duty incumbent upon them, and which is imperative in its nature, and to the performance 418 of which *the relator has a clear legal right, without any other adequate specific legal remedy, to enforce it; and even though he may have another specific legal remedy, if such remedy be obsolete or inoperative, the *mandamus* will be granted. 6 Bac. Abr. (Bourrier's ed.) 418; Broom's Leg. Max. 192, note; Carr, J., in *King William Justices v. Munday*, 2 Leigh, 168-9. The remedy is extraordinary, and if the right is doubtful, or the duty discretionary, or there be any other adequate specific legal remedy in use, this writ will not be allowed.

Lord Mansfield is authority for saying that "it was introduced to prevent a failure of justice and defect of police; therefore," said he, "it ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one." *Rex v. Barker*, 3 Burr. R. 126.

In relation to courts and judicial officers, it cannot be made to perform the functions of a writ of error or appeal, or other legal proceeding to review or correct errors, or to anticipate and forestall judicial action. It may be appropriately used and is often used to compel courts to act where they refuse to act and ought to act, but not to direct and control the judicial discretion to be exercised in the performance of the act to be done; to compel courts to hear and decide where they have jurisdiction, but not to pre-determine the decision to be made; to require them to proceed to judgment, but not to fix and prescribe the judgment to be rendered.

These principles are recognized and illustrated by multitudes of decisions, English and American. Some made by this court and the general court of this state, and by the supreme court of the United States, are here cited: *Com. v. Justices of Fairfax Co.*, Ct. 2 Va. Cas. 9; *Dawson v. Thurston & others*, 2 Hen. & Mun. 132; *Brown v. Crippen & Wise*, 4 Hen. & Mun. 173; *King William Justices v. Munday*, 2 Leigh, 165; *Harrison v. Emmerson*

419 *& others, Id. 764; *Mann v. Givens & others*, 7 Leigh, 689; *Morris, ex parte*, 11 Gratt. 292, 297; *Yeager, ex parte*, Id. 655; *Randolph Justices v. Stalnaker*, 13 Gratt. 523;

Comon. v. Fulton, judge, 23 Gratt. 579; Kent, Paine & Co. v. Dickinson, judge, 25 Gratt. 817; United States v. Lawrence, 3 Dall. R. 42; Ex parte Crane, 5 Pet. R. 190; Ex parte Roberts, 6 Pet. R. 216; Ex parte Bradstreet, 7 Pet. R. 634; Ex parte William Hany, 14 How. U. S. R. 24; Life & Fire Ins. Co. v. Wilson's Heirs, 8 Pet. R. 291; Life & Fire Ins. Co. v. Adams, 9 Pet. R. 571, 592; Ex parte Hoyt, 13 Pet. R. 279; Ex parte Cutting, 94 U. S. (4 Otto), 14.

Our statutes provide that "a party in a criminal case, or proceeding for contempt, for whom a writ of error lies to a higher court, may except to an opinion of the court and tender a bill of exceptions, which (if the truth of the case be fairly stated therein), the judge, judges or justices, or the greater part of those present, shall sign; and it shall be a part of the record of the case;" and that a writ of error shall lie "to a judgment for a contempt of court, other than for the non-performance of or disobedience to a judgment, decree or order." A similar provision is made for allowing bills of exceptions in the trial of civil cases "in which an appeal, writ of error or supersedeas lies to a higher court." Code of 1873, ch. 203, §§ 1. 4; ch. 173, § 8.

In either of the cases in which bills of exceptions are allowed, that is, in the trial of a case at law, or in a criminal case or proceeding for contempt in which a writ of error lies to a higher court, if a party excepts, as he may, to an opinion of judgment of the court in due time, and tenders in due time his bill of exceptions, the judge is required to sign the bill, "if the truth of the case be fairly stated therein." If the conditions of the statute are satisfied, the right of the party is clear and the duty of the judge equally clear, and it is imperative. *He has no discretion in the matter.

The language of the law is, he "shall sign." If, in the case supposed, the judge refused to sign the bill, then, "according to the principles of the common law," the party has the indubitable right to the writ of mandamus to compel him to sign, unless the law has provided some other adequate, specific remedy for the particular grievance—otherwise, there would be a palpable and essential failure of justice—for, a writ of error allowed would be futile and wholly inoperative quoad matters alleged in exceptions which are no part of the record. The enquiry then is, does the law provide any other specific remedy in such a case?

At common law, as we know, a writ of error lay for an error in law apparent in the record, and not for error in law not appearing in the record; and therefore, where the parties, plaintiffs or defendants, alleged anything ore tenus, which was overruled by the judge, it could not be assigned as error in law, because it did not appear in the record; and so the party grieved was without remedy. 2 Bac. Abr. (Bourrier's ed. 1843), 112; 2 Inst. 426.

This was a grave defect in the common law, for remedy whereof the English parliament passed the act of Westminster 2, 13,

Edw. 1, ch. 31, whereby bills of exceptions were allowed, by means whereof matters occurring in the trial of cases were made a part of the record, and were thus reached by writ of error. This act, the body of which may be found in Bac. Abr. ubi supra, is the model of the various statutes on the same subject in the United States. It was adopted in Virginia, with slight modifications affecting the matter of jurisdiction (1 R. Code, ch. 133, § 1, p. 523), and was cut down to its present dimensions at the revisions of the laws in 1849.

The English act was construed as not extending to criminal cases, at least to 421 cases of treason and felony *(2 Bac.

Abr. 114), and hence the second section of our act in the Revised Code supra, which provides for bills of exceptions in criminal cases also. The bill of exceptions under the English statute formed no part of the record of the case until made so by proceedings had in conformity to the statute. As soon as the bill was signed, a writ was issued to the judge who signed the bill, framed upon the statute, called scire facias ad cognoscendum scriptum, summoning him, as the terms imply, to appear and confess the writing or deny it. If he appeared and confessed his seal, or denied it, and proof of it was made, the bill was entered on the issue roll and thus made a part of the record. This writ was never used in Virginia, because, in practice, the judge who signed the bill at the same time ordered it to be enrolled and made a part of the record. By the statute as it now stands, the bill when signed becomes by express provision "a part of the record."

Such was the permission under the statute to make a bill of exceptions, which had been duly sealed, a part of the record. But while the act in terms provided, that if the party impleaded (cum aliquis implacitatur, &c.) "doth allege an exception, praying that the justices will allow it if they will not allow it, and he that allegeth the exception do write the same exception, and require that the justices will put their seals in testimony thereof, the justices, or the greater part of them present, shall do so." Yet it did not expressly provide for any writ or process to compel them to seal the bill. The act, however, being mandatory, it was considered that a writ grounded on the statute might be framed to compel the performance of this duty. Such peculiar writ, nameless it would seem, was accordingly devised, and the form of it, we are told, may be seen in the Registrum Brevium, 182, pronounced by Lord Coke to be the oldest book in the law. We have not access to 422

"that most ancient and *highly venerable collection of legal forms (3 Bl. Com. 183). but in the case of Conrow v. Stroud, decided by the supreme court of Pennsylvania in 1867, cited in argument, we find in the report of the case in 6 Amer. Law Reg. (U. S.). 298, the form of a writ used in that case, "which was adopted," it is said by the editor, "from the ancient writ found in the Registrum Brevium." See

form also in Robinson's Forms, ed. 1841, p. 345.

This ancient writ, according to Buller's *Nisi Prius*, 5th Eng. ed. 316, recites the form of an exception taken and overruled, and it follows, "vobis præcipimus, quod si ita est, tunc sigilla vestra apponatis;" and if it be returned "quod non ita est," an action will lie for a false return, and thereupon the surmise will be tried, and if found to be so (si ita est), damages will be given, and upon such a recovery, a peremptory writ commanding the same.

This writ, it is said, has occasionally issued out of the English chancery, and was never known to issue from the king's bench, though there is no case denying to that court the power to award it. In *Sikes v. Ransom*, 6 Johns. R. 279, the supreme court of New York speaks of it as, "in effect, a writ of mandamus," and so treated it in that case. In *Exparte Crane*, 5 Pet. R. 190, 218, Mr. Justice Baldwin, who dissented from the other judges in the case, speaks of it as "a special writ from chancery, returnable before the king in chancery, reciting the mandatory parts of the statute of Westminster," and he insisted that there was "a specific and legal remedy by action on the statute, for a false return, and a special action on the case, if the judges refuse to seal the bill of exceptions when duly taken and tendered," and, therefore, that mandamus would not lie to compel a judge to sign and seal a bill of exceptions. In the same case, however (p. 194), Chief Justice Marshall, in whose opinion all the associate justices concurred

423 except Justices Baldwin *and Johnson, said, "that a mandamus to sign a bill of exceptions is warranted by the principles and usages of the common law, is, we think, satisfactorily proved by the fact that it is given in England by statute; for the writ given by the statute of Westminster the Second, is so in fact, and is so termed in the books." In repeated decisions afterwards, the supreme court of the United States followed this decision, and the appellate courts of the several states (unless, perhaps, Pennsylvania may be an exception), where this or similar statutes are in force, seem to pursue the same course of decision. We have seen no case where the statutory writ in forma is adopted, except the case before cited from Pennsylvania, and the writ used in that case seems to be in substance a mandamus nisi.

This court has never been called upon until now to determine the proper remedy to compel a judge to sign a bill of exceptions when tendered. The question was discussed by Judge Baldwin in *Taliaferro v. Franklin*, 1 Gratt. 332, and he there expressed the opinion that the proper remedy was by special writ grounded on the statute, and that this court might frame the writ under power conferred by the Code. 1 Rev. Code. ch. 64, § 23, p. 123. (See corresponding provision in Code of 1873, ch. 157, § 4. p. 1054.) The other judges (Allen and Cabell) who sat with him, declined to express any opinion on the question, Judge Allen saying, "it is

not necessary to decide it here, and as the question is one of great interest in practice, I should prefer postponing it until we can have the aid of a full court and the benefit of an argument on the very point;" Judge Cabell using substantially the same language. See suggestions of Mr. Leigh, arguing, *Vaughn v. Green*, 1 Leigh, 287, 292; *Tucker, P., Jackson's adm'x v. Henderson*, 3 Leigh, 196, 215, 216.

If the writ framed under the statute 424 of Westminster *2 be the technical legal remedy to compel a judge to sign a proper bill of exceptions duly tendered, and such remedy may be resorted to under our statutes in their present form, applying as well to criminal as civil cases, still it is obsolete, and if put in force, we are of opinion, for the reasons already assigned, it would be, at least in effect, if not in fact, a writ of mandamus as used and applied at common law.

This case is heard on the petition of the relator and exhibits filed therewith, the rule awarded on the petition against the respondent, and the return of the respondent to the rule and the exhibits filed with the return. There is no plea or demurrer to the return, and no exception filed by either party. In this condition of the case, "according to the principles and practice now prevailing in respect to writs of mandamus," and our statutory regulations on the subject, there being no traverse of the return, it must be taken as true.

In *Exparte Newman*, 14 Wall. U. S. R. 152, 166, Mr. Justice Clifford thus states the rules and principles of pleading in such cases: "Due service of the rule being made, the judge is required to make return to the charge contained in the rule, which he may do by denying the matters charged, or by setting up new matter as an answer to the accusations of the relator, or he may elect to submit a motion to quash the rule, or to demur to the accusative allegations. Matters charged in the rule and denied by the respondent must be proved by the relator, and matters alleged in avoidance of the charge made, if denied by the relator, must be proved by the respondent. Angell & Ames on Cor. 9th ed. § 727; *Cagger v. Supervisors of Schuylkill*, 2 Abbott's Prac. N. S. 78. Motions to quash in such cases are addressed to the discretion of the court, but if the respondent demurs to the rule, or if the relator demurs to the return, the party demurring admits everything in the rule

425 or the return, as the *case may be, which is well pleaded, and if the relator elects to proceed to hearing on the return, without pleading to the same in any way, the matters alleged in the return must be taken to be true to the same extent as if the relator had demurred to the return. *Tapping on Mandamus*, 347; *Moses on Mandamus*, 210; *Commercial Bank v. Commissioners*, 10 Wend. R. 25; *The People ex rel. Ryan v. Russell*, 1 Abbott's Prac. N. S. 230; *Hannahan v. Board of Police*, 26 N. Y. R. 316; *Commonwealth ex rel. Middleton v. Commissioners*, 37 Penn. St. R. 245; 3

Stephen's Nisi Prius, 2326; 6 Bac. Abr. ed. 1856, 447."

From the return and from such charges in the rule as are not controverted by the return, it appears, in substance, that during the session of the hustings court of the city of Manchester, held by the respondent as the judge of the said court on the 22d day of March, 1878, the respondent imposed a fine of fifteen dollars on the relator, who was engaged as counsel in the trial of a cause, for alleged contemptuous misbehavior in the presence of the court, and at the same time a motion was made by a member of the bar—not as counsel, however, it would seem—to remit the fine, which motion was continued generally to a further day of the term, without specifying any particular day; and on the 25th day of the same month the court overruled the motion and ordered the sergeant to take the relator into custody and so detain him until the fine be paid. The relator was present in court when the orders of the 22d and 25th of March were made, and no objection or exception was made or taken to the judgment or action of the court on either day. On the 27th day of the same month, and during the same term of the court, the relator, who had been taken into custody by the sergeant under the order of the 25th, and, to release himself from custody, had under

protest paid the fine, appeared in court 426 and offered *to except to the judgment imposing the fine, and moved the court to certify the facts on which the judgment was rendered, and that witnesses be called to testify as to those facts. In the language of the return, "the court was inclined and did offer, as a matter of favor, to certify the facts, which offer was rejected by the petitioner, and the motion to call witnesses to testify as to the facts was conducted in a manner so impertinent and unpleasant that the court was compelled, for the preservation of order, decorum, and the due administration of affairs in court, to decline to listen further, and to put the petitioner upon such recourse, if any he had, as the law gave him; and thereupon the petitioner, of his own motion, desired that the facts be certified by the court, which motion was then overruled." It does not appear that any bill or bills of exceptions were tendered on the said 27th day of March, but it does appear by the return that on the 30th day of March, the last day of the term of the court, the relator tendered three several bills of exceptions to the judgment, action and rulings of the court, which bills the court refused to sign. These three bills (and a fourth, which need not be noticed further, as the return denies that it was ever tendered and that its statements are true) are filed with the petition, and the prayer is that the respondent be required by mandamus to sign them. The respondent, in his return, avers that these bills do not state truly the facts of the case, and he specifies wherein the statements are not true, but he does not say that when tendered he made known these objections, and offered, if the bills were corrected so as to remove the objections, to sign them as amended. On the contrary, as has

been seen, when the relator on a previous day, the 27th of the month, made his exception and prayed the court to certify the facts, the respondent, for the reasons stated in his return and hereinbefore recited, refused to certify the facts, and determined to 427 *"put the petitioner upon such recourse, if any he had, as the law gave him;" and he claims and urges in his return that the law gives the relator no recourse, because he did not except to the judgment of the court in due time; that he should have excepted on the 22d of the month, when the judgment for the fine was rendered, or at least on the 25th of the month, when the motion to remit the fine was overruled; and not having then excepted, he must be taken to have acquiesced in the judgment and to have waived all objection or exception thereto, and therefore he could not be heard to object or except at a later day of the term.

As to the particular bills of exceptions filed with the petition, it is too clear to admit of doubt that the writ of mandamus cannot be used to compel the respondent to sign said bills. Ex parte Martha Bradstreet, 4 Peters' R. 102. A judge is required by the statute to sign a bill of exceptions only on condition that "the truth of the case be fairly stated therein." The statement in the return not traversed, that these bills do not contain the truth of the case, must be taken as conclusively true in this proceeding. But the duty of a judge is not ended and fully discharged when he merely refuses to sign a particular bill tendered, on the ground that the truth of the case is not fairly stated therein. He should go further. He should proceed, with the aid of counsel, to settle the bill, and when settled, to sign it. Originally it was supposed that the judge was only bound to sign the bill when a true one was presented to him, and where there was any objection to it that he was not required to aid in its correction, and might, therefore, refuse to sign it. But the practice has for a long time been otherwise. Powell on Appellate Proceedings, ch. 5, § 20, p. 224.

If the bill presented is not truthful or fair, the judge should alter it and make it such, or suggest what alteration should be made.

Where such alteration can be made in 428 *the draft, or when necessary, he may require it to be redrafted in accordance with such suggestions; for he is not bound to sign a bill that is not true. Id. ch. 5, § 34, p. 235.

If a judge, therefore, refuses to sign a proper bill, or to proceed to settle the matter of a bill objected to, he may, in either case, be compelled by mandamus to act; but if he states in his return to the rule or mandamus nisi, that the particular bill presented does not contain the truth of the case, and therefore he refused to sign it, whether such statement must be taken as conclusive in the proceeding by mandamus, or whether it may be traversed and the truth of the bill enquired into and settled one way or the other, are questions which do not necessarily arise in the case before us, as there is no plea to or traverse of the return by the relator. The

questions suggested are of great importance in practice. They have not been argued in this case, and as it is not necessary to decide them now, we express no opinion upon them. See what is said in Powell on Appellate Proceedings, ch. 5, § 62, p. 256, and High on Extraor. Leg. Rem. part 1, ch. 3, § 202, p. 159, and cases there cited by these authors.

When the relator in this case tendered the bills of exceptions filed with his petition, if the only objection to them had been that they did not state fairly the truth of the case, it would have been the duty of the respondent to specify the objections, and, in conjunction with the relator or his counsel, to amend the bills so as to present the case fairly, and when settled to sign them, and he may now be compelled by mandamus to proceed to do so, unless the relator has waived or lost his right to except by not exercising it at an earlier day.

Much depends on the practice of the court in the taking and noting exceptions, and drawing, presenting, settling and signing the bills, but the general rule seems
429 *to be that, if intended to be relied on, exceptions should be taken and notice thereof given at the time the decision to which they apply is made, and in jury trials they should be taken at least before verdict. Wash. & New Orl. Teleg. Co. v. Hobson, 15 Gratt. 122, 138; Matz's ex'or v. Matz's heirs, 25 Gratt. 361; Peery's adm'r v. Perry, 26 Gratt. 320, 324.

The usual practice is to give notice of the exception at the time the decision is made, and reserve liberty, with the permission of the judge, to draw up and present the bill for settlement and signature either during the trial or after trial and during the term, as may be allowed or directed by the judge. The bill should be presented and signed at least during the term at which final judgment is entered in the suit or other proceeding in which the exception is taken, and it will be disregarded in the appellate court, if signed after the end of such term, although signed pursuant to a previous order allowing it, unless perhaps such order be made by consent of parties entered of record. Winston v. Giles, 27 Gratt. 530, 535.

One reason for the rule requiring this promptness in taking the exception and giving notice thereof is, that an exception taken and made known for the first time at a subsequent period might affect very injuriously the rights of the opposing party, for if he have seasonable notice of the exception, he may perhaps have it in his power at the time or during the trial to obviate or counteract it, and it would be unjust to allow his adversary to insist on the exception and have the benefit of it, after, by his own negligence, or it may be by his contrivance, he has made it impossible to meet it. Wash.

New Orl. Teleg. Co. v. Hobson (supra), 2 Tidd's Prac. (9th ed.) 863. Another reason for the rule is, that the judge may note the matter of the exception while it is
430 fresh in his mind, and *thus be enabled the better to settle the bill when it is presented for his signature.

The rule in its general operation is a wise one, but we do not think this case comes within the reason of the rule, and cessante *ratione legis cessat ipsa lex*.

This is not the case of a suit *inter partes*. It was a summary judgment for contempt without the formality of a trial. It was wholly *ex parte*. The exception, of necessity, was to the judgment after it was rendered. There was no opposing party to be affected by it, who might have insisted on earlier notice of the exception and claimed that he was or might have been injured for want of it. The matter was wholly between the relator and the judge. The judgment for the fine was entered on the 22d day of the month, and the execution of it was, on motion, at once suspended. The motion was overruled on the 25th of the month, and the judgment then put into execution. On the second day thereafter, the 27th of the month, the relator asked to except. It is conceded that an exception on the 25th would have been in due time. It cannot be said that the judge needed any earlier notice of the exception to enable him to bear in mind the facts he was called upon to certify. He makes no such pretension in his return. The whole matter was of recent occurrence, and the facts were no doubt firmly impressed on his mind and fresh in his recollection. The motion to remit the fine, which he took time to consider, made it necessary for him to recall, revolve and retain in mind all the facts and circumstances. He must have been as well prepared, as to knowledge, to certify the facts on the 27th as he could have been on the 25th, and he actually files with his return such certificate in a bill of exceptions made out by himself after service of the rule in this case.

To deny to the relator the right to
431 except at the time *he desired and offered to do so, and have his exceptions embodied in a bill and made a part of the record, so as to enable him to have the judgment reviewed on a writ of error, if applied for and allowed, would, we think, be a harsh and rigorous application of the rule as to the time of tendering exceptions, not warranted by the circumstances of this case. The respondent is mistaken in supposing, as by the return he seems to have supposed, that it was "a matter of favor" to the relator to allow him to except to the judgment of the court when he offered to do so on the 27th of the month. It was the relator's absolute right then to except, and as clearly the duty of the respondent to sign a proper bill of exceptions, with a certificate of the facts.

The bill filed with the return was not a bill tendered by the relator, nor was he heard, or allowed the opportunity of being heard, in its preparation and settlement. He has the right of being heard in the settling of any bill which may be proper in the case.

We are therefore of opinion, that the rule against the respondent should be made absolute, and that a peremptory writ of mandamus should be issued, directed to the respondent, commanding him, on the tender by the relator of a bill of exceptions to the judgment rendered against him, if the truth

of the case be fairly stated in said bill, to sign it; and if the truth of the case be not fairly stated therein, to proceed to settle the same, and when settled, to sign it; and in either case to order the bill so signed to be made a part of the record in the proceeding in which said judgment was rendered, and such will be the order of this court.

The judgment of the court was as follows:

This cause, which is pending in this court at its place of session at Richmond, having been fully heard, but not determined at said place of session, this day came here

432 *the parties by their counsel, and the

court having maturely considered the petition of the relator and exhibits filed with said petition, the rule awarded against the respondent, the return of the respondent to the said rule and the exhibits filed with the said return, and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the relator had the right to take exceptions to the judgment in the said petition and proceedings mentioned, rendered against him by the hustings court of the city of Manchester, and to tender a bill of exceptions to be signed by respondent as judge of the said hustings court, and that the exceptions taken by the relator to the said judgment were taken in due time; and although the respondent, as judge of said hustings court, cannot be required to sign the particular bills of exceptions filed with said petition, because it is shown by said return, which is not traversed, that the truth of the case is not fairly stated therein; yet, as when said bills were tendered the respondent did not suggest any alterations to be made therein, or then offer or proceed to settle the truth of the same, he should now be required to proceed with the aid of the relator, or his counsel, to settle the matter of a bill to be signed, and when settled to sign the same; and the writ of mandamus is the proper remedy to compel him so to proceed. It is therefore adjudged and ordered that the said rule be made absolute, and that a peremptory writ of mandamus be issued directed to the respondent, the Honorable William I. Clopton, judge of the hustings court of the city of Manchester, commanding him, on tender by the relator of a bill of exceptions to the judgment aforesaid rendered against him by the said hustings court, if the truth of the case be fairly stated therein, to sign the same, and if the truth of the case be not fairly stated therein, to proceed with the aid of the relator, or his counsel, to settle

433 the same, and when settled *to sign it, and in either case to cause said bill when so signed to be made a part of the record of the proceedings in which said judgment was rendered.

And it is further ordered that a copy of this order be duly served on the said respondent, and that such service shall have the same force and effect as the execution upon him of a peremptory writ of mandamus issued in pursuance thereof.

And it is ordered that this order be entered on the order-book here, and forthwith

certified to the clerk of this court at its place of session aforesaid, who shall enter the same on his order-book.

Peremptory mandamus issued.

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*Coltrane v. Worrell.

July Term, 1878, Wytheville.

1. **Liability of Trustee Receiving Confederate Currency.**—C, living in Virginia, trustee of D, a married woman separated from her husband, and residing in Missouri, holds bonds on a solvent debtor, well secured on real estate, which were executed before the war; and in 1863 receives payment in part of said bonds in Confederate money, and invests it for D in a Confederate bond. The receipt of Confederate money at that time was a breach of trust, and C will not be allowed a credit for the amount of the bond.
2. **Same—Interest during Civil War.**—C, holding bonds bearing interest, will be charged with the interest falling due during the war, the debtors living in Virginia, and therefore bound to pay the interest to him.
3. **Same—Interest—Credits.**—By the terms of the trust, C was to pay the interest of the trust fund and as much of the principal as might be necessary for the support of D. Before the war he paid her some interest, and also since the war. In settling his accounts, whilst he will not be charged interest upon interest, his payments will not be credited upon the principal of the fund.
4. **Widows—Removal of Trust Fund to Sister State.**—The trust deed provides that D shall have the interest and so much of the principal of the trust fund as shall be necessary for her support. If she dies in the lifetime of her husband she may dispose of the whole of the trust fund by her will, and if she survives him it shall be hers absolutely. She may have the trust fund removed to Missouri, and vested in a trustee appointed in that state to receive and hold it on the same trusts.
5. **Duties of Trustees.**—A trustee cannot derive profit from the trust fund without rendering an equivalent therefor. He is bound to execute the trust for the benefit of the *cestui que trust*, whether the latter live at home or abroad, or the trust is to be executed in peace or in war. If the trust fund be perfectly secure, bearing interest at the beginning of the war, he cannot voluntarily change it so as to make it insecure and bear no interest.

435

*On the 30th day of March, 1857, Amos Worrell and Darthula, his wife, then of the county of Carroll, between whom there was then pending a suit for a divorce from bed and board, brought by him, compromised the matter, and in pursuance of the compromise he settled on her a portion of his estate, to be "secure from his control and disposition and free from all liability for his debts and obligations." Accordingly, by deed dated on that day and duly recorded, they conveyed to William Kyle, in fee simple with general warranty, a tract of land in the said county, and also certain slaves and

***Liability of Trustee Receiving Confederate Currency.**—See also *Carter v. Dulaney et al.*, ante 192, and note.

other personal property, all of which is described in the deed, in trust to sell said real and personal estate as therein mentioned, and to divide the moneys arising from such sale and the bonds taken for property sold, into two equal parts, first deducting his commissions and all other expenses properly incurred in the execution of the trust, and to pay, assign and transfer one of said parts to said Amos Worrell, or such person or persons as he might direct, and the other part or half to Ira B. Coltrane, to be held by him in trust for said Darthula Worrell, "for her sole use and benefit." And it is declared in the deed that "it shall be the duty of said Coltrane to invest all such moneys as shall be so paid to him, or shall come into his hands from said bonds, in such stock and security, or to loan out the same on such security as he may deem best calculated to produce the largest amount of interest and profit, and to pay all such interest and profit as may come into his hands unto the said Darthula Worrell for her sole and separate use, or to such person or persons as she may from time to time order and direct by writing under her hand; and if such interest and profits should not be sufficient for the comfortable maintenance of said Darthula, the said Coltrane shall be at liberty to apply so much of the principal of the funds for that purpose as may be necessary; and full power is given to said

436 *Darthula, if she shall die before her husband, to dispose of said trust fund by any last will and testament by her to be made and executed as the laws of Virginia direct wills of personal estate to be executed; and in case she should survive her husband, then the funds of said trust are to be paid over to said Darthula, to be disposed of and used by her as her absolute property." And the said Amos Worrell, by the said deed, relinquished and released all claim to the said fund for himself and all persons claiming under him, and agreed that the full control and use thereof should be in the said Darthula as therein provided for; and a provision was therein made for the appointment of another trustee if said Coltrane should decline to act as such.

The said Kyle seems to have sold the property conveyed by the deed on the 30th day of April, 1857, the real estate on a credit of three, four and five years, and the personal property on a credit of six months, and to have taken separate bonds from the purchasers for the portions due to the husband and wife respectively. The said Coltrane accepted the appointment of trustee for said Darthula, with all the duties required to be performed by him in said deed; and on the 27th of June, 1857, received from said Kyle \$705.39 in cash and interest, and \$2,211.81 in bonds, amounting together to \$2,917.20, which appears to have been her portion of said proceeds of sale, for which he executed his receipt as trustee to the said Kyle. Three of the said bonds were for real estate, amounting, the first to \$309.76, due 30th April, 1860, the second, to \$619.52, due the 30th April, 1861, and the third to \$619.52, due 30th April, 1862, and all three to \$1,548.80. The rest of

the said bonds, twenty-five in number, were for personal estate, some of them being small in amount, and all of them were due 30th October, 1857.

Coltrane, the trustee, seems to have **437** paid to Mrs. Worrell, *the beneficiary, on the 30th of April in each of the years 1858, 1859, 1860, and 1861, a sum about equal to or little more or less than the annual interest of the trust fund in his hands. But before the late war commenced, in 1861, she removed to the state of Missouri, where she has ever since resided and yet resides, and intends hereafter to reside. In consequence of such removal he paid her no money out of the trust fund, principal or interest, during the war; and since the war he has made her payments at different times, in the years 1868, 1869, 1873 and 1874, leaving still a large amount of the trust fund remaining in his hands.

As she intends permanently to reside in Missouri, and as it has been and must continue to be inconvenient for her to receive the trust fund from a trustee in Virginia, she desires to have it placed in the hands of a trustee residing at or near the place of her residence. She accordingly applied on the 14th of August, 1874, to the circuit court of Clinton County, Missouri, in which she resides, to appoint a trustee there to act for her in the place of the said Coltrane; and on the next day Granville M. Hiatt was appointed as trustee by the said court, and executed a bond with security as such trustee accordingly.

On the 7th day of September, 1874, Mrs. Worrell brought her suit in the circuit court of Carroll county to obtain a settlement of the account of her said trustee, Coltrane, and a decree for a transfer of the trust fund remaining in his hands to the place of her residence in Missouri. In her bill, to which she made the said Coltrane, Kyle, and Amos Worrell, her husband, defendants, among other things, she charges that she removed to the state of Missouri before the war, of which state she is now a resident and citizen, and not of the state of Virginia, in which latter state she has not resided for twelve or fifteen years; that the state of Missou-

438 ri is her *permanent home, and she intends to reside there as long as she lives; that she desires to remove the fund and money due her under said trust deed to the state of Missouri, and has caused one Granville M. Hiatt, a citizen of that state, to be appointed a trustee to execute the trusts created for her in said deed. She filed with her bill documentary evidence of his appointment and qualification as such in the circuit court of Clinton county, Missouri. She states that he has accepted the trust, and executed bond with good security conditioned according to law, a copy of which she also filed with her bill. "She states that she has given compelled to make two or three trips to this state to get funds, as all appeals by letter proved unsuccessful, and that the trouble and expense of the trips is very considerable and largely exhausts the funds, and unless she can get her money transmitted to Missouri she will soon have spent it all in traveling

from the latter-named state here and back again. She states that the trustee, Coltrane, has never made any settlement of the trust estate in his hands, or rendered accounts according to the terms of the deed," &c. After making defendants to the bill as aforesaid, and praying a settlement of the trust account, she further prays that a decree may be made for the removal and transmission of the trust fund to Missouri; that the same be paid over to said Hiatt for the purpose of being so removed and transmitted, and that she may have such further general and special relief as the nature of her case may require and equity can give.

On the 13th day of October, 1874, said Coltrane filed his answer to said bill in which, among other things, he says, "that a considerable portion of the fund placed in his hands consisted of bonds and notes, and he believing those amounts as secure as he could make them, deemed it unnecessary to collect and loan the same to others perhaps not so responsible. Of the remainder, respondent

439 ent *admits that he invested but little, and for the reason that he met with no opportunity he considered perfectly safe." He further says "that in the spring of 1863 he had on hand one thousand dollars of Confederate money belonging to said fund, and which sum he invested in Confederate states bonds, believing that to be the best manner in which he could invest the same at that time, as complainant had absented herself from the state, and he could not pay her anything, and which he has now on hand, and thinks should be allowed him in settlement." He denies the allegation of the bill, "that complainant has repeatedly tried to get money from him for her actual wants, and has at all times been unsuccessful." He further "denies that the terms of the deed required him to make any settlement, but states that he always has been and now is ready and willing to have a settlement." He further states that he "believes that the interest has always been more than sufficient for her wants, as she has never called upon him for the whole of the interest, and of the part received by her she has now, your respondent believes, some \$400 loaned out." He asks "that under the provisions of the act of the general assembly in such cases provided, he may have an abatement of four years' interest in the settlement of his accounts as said trustee." He insists "that in equity he is entitled to so much at least, the complainant having absented herself from this state during the time of the late war, and thereby prevented him from having any opportunity to pay her any portion of the interest due her, which he would have done had she been here, and which amounts were therefore lost to him without any fault of his, having saved and kept secure the fund placed in his hands during the time of the late war and financial troubles, when so many estates were lost, and when respondent lost of his own means, and unavoidably, a much

440 *larger amount than the amount of the trust funds in his hands."

He further states that he "is advised and

so answers that of the fund placed in his hands the complainant is only entitled to receive, and he authorized to pay to her, the interest and so much of the principal as may be necessary for her comfortable support, and that a court of equity will not cause a trust fund to be removed to a foreign state upon such a state of facts as are presented in this case; that he insists that he has faithfully performed his duty as trustee, and that if the provisions of the deed really entered into between the complainant and Amos Worrell should, on investigation, prove to be what he really thinks they are, he would not be authorized to pay any portion of said fund more than accrued interest and so much of the principal as might be necessary for her support, and that if he did so pay over the same the said Amos Worrell might hereafter be entitled to recover the same of him."

It appears that answers were filed by the two other defendants, Kyle and Amos Worrell. Kyle's is not material, and need not be further noticed here. Amos Worrell's is not in the copy of the record before this court, no doubt because not considered material.

On the 20th of October, 1874, there was a decree for the settlement of the accounts of said Coltrane before one of the commissioners of the court, who was directed to state and adjust the same, and make report to the court.

On the 9th of April, 1875, the report of the settlement made by Commissioner Brown in pursuance of said decree was filed in the cause. The commissioner submitted four statements of the settlement of said Coltrane's account as trustee. "In the first statement he is charged with interest during the war, and is not allowed a credit for the

Confederate money received and bonded 441 as stated in *his deposition. This statement shows a balance of \$2,557.54 principal, and \$495.28 interest due from said trustee on the 20th day of April, 1875. In Statement No. 2 no interest is charged from April 30, 1861, to April 23, 1865, which, in this account, is the same as striking off the interest from April 17, 1861, to April 10, 1865, but said trustee is not allowed a credit for the money bonded as aforesaid. This statement shows a balance of \$2,459.25 principal due from said trustee April 20, 1875. In Statement No. 3 interest is charged during the war, but the said trustee is allowed a credit for the money bonded as aforesaid. This shows a balance of \$2,149.92 principal due from said trustee April 20, 1875. In Statement No. 4 no interest is charged during the period," &c., "and the said trustee is allowed a credit for money bonded as aforesaid. This statement shows a balance of \$1,267.52 principal due from said trustee April 20, 1875."

On the 2d of April, 1875, said Coltrane's deposition was taken by the commissioner, in which he states "that sometime in 1863 he invested in Confederate bonds the sum of \$810 of the funds in his hands as trustee for Darthula Worrell, which bonds are filed with the papers of the suit mentioned in the caption, and says also that he was not authorized

to do so by any order of court nor Mrs. Worrell either, and the main reason for investing in Confederate bonds was, that he could get a higher rate of interest, and Mrs. Worrell being absent from the state, he did not know what better he could do."

Afterwards, to-wit: on the 30th of July, 1875, said Coltrane's deposition was again taken in the case, and appears to have been taken by or in behalf of the complainant. The witness then proved that the largest part of the money invested by him, as trustee aforesaid, in Confederate bonds, was received by him from C. F. Worrell

442 *in the spring of 1863, out of money due for the purchase of a tract of land of the said trustee, Kyle, in 1857, and that so far as witness knew, said Worrell was then and has since continued solvent.

On the 16th of October, 1875, the cause came on to be heard upon the bill, exhibits, answers, depositions, orders and decrees entered therein, the report of Commissioner Brown, and argument of counsel. Whereupon the court being of opinion that the first statement of Commissioner Brown is the correct one in the case, with this exception, that the defendant, Coltrane, should receive credit for the amount of Confederate money paid in taxes in 1864 and 1865, at its par value, instead of its scaled value, he was allowed a further credit of \$23.75, of date March 12, 1864, and of \$147 of date February 11, 1865, being the difference between the par value of said amounts and the scaled value allowed by the commissioner; and the court adopted and confirmed the first statement of said report, with the amendment aforesaid. It was therefore decreed that the complainant, Darthula Worrell, recover against the defendant, Coltrane, the sum of \$2,557.54, principal, with legal interest thereon from the 20th day of April, 1875, and \$495.28, interest, subject to a credit of \$23.75, of date March 12, 1864, and \$147 of date February 11, 1865, to be applied as a credit on the last mentioned amount, to-wit: the \$495.28 interest. And it was further decreed that unless the defendant, Coltrane, shall pay over to Granville M. Hiatt, the trustee appointed by the circuit court of Clinton county, Missouri, appointed as such in this behalf, his agent or attorney-in-fact, within sixty days, all moneys in his hands belonging to the trust funds, and all notes, stocks and securities of every description, of the trust fund, execution shall issue in the name of said Granville M. Hiatt, for the amount herein-before

443 decreed against said Coltrane, or for such *amount or part of said trust funds which he, the said Coltrane, shall fail to account for and pay or turn over to said Hiatt within the time aforesaid. And it appearing that the complainant has complied with the provisions of the statute in such case made and provided, it was further decreed that the trust funds be removed to the state of Missouri, to be held by said Hiatt, as trustee, according to the terms of the deed of trust and separation aforesaid, and the statute in such case made and provided. And there was a

decree for costs in favor of the complainant against said Coltrane; and the cause was continued with leave to the complainant to apply for any further relief necessary to carry into effect this decree.

From the said decree of the 16th day of October, 1875, the said Ira B. Coltrane applied to a judge of this court for an appeal; which was accordingly awarded.

J. A. Walker, for the appellant.

Tipton & Brown, for the appellee.

MONCURE, P., after stating the case, proceeded:

The first and principal assignment of error in the decree appealed from in this case is, that credit was not therein given to the trustee, Coltrane, in the settlement of his account as trustee, for eight hundred and ten dollars, claimed by him as having been invested in 1863 or 1864 in Confederate bonds on account of the trust. This is indeed the only assignment of error on account of which, it seems, that an appeal in this case was allowed, though all the assignments of error made in the petition, or ore tenus or in writing, in the argument, will be noticed in this opinion.

444 I do not think there is any error in the decree in *respect to the said first and principal assignment of error. The investment of \$810 therein mentioned was made out of money the largest part of which the trustee, Coltrane, admits he collected in Confederate money, in the spring of 1863, from C. F. Worrell. He says there were some small amounts collected from other parties, but he cannot state from whom.

Now, was he warranted by law in making such collection when and under the circumstances he did?

I say no, according to well-settled principles of law. In the spring of 1863 Confederate money was very greatly depreciated, and a fiduciary had not then a right to receive Confederate money at par in discharge of a well-secured specie debt, except under peculiar and extraordinary circumstances. The debt on account of which the said collection was made was certainly a well-secured specie debt when such collection was made, and was most likely so to continue. Coltrane himself proves that C. W. Worrell, the debtor from whom the collection was made, "was and has been solvent." But the debt due by Worrell was also secured by a lien on real estate, which was duly recorded. It was a part of the purchase money of land sold and conveyed by William Kyle, trustee for Amos and Darthula Worrell, by deed dated the 23d of February, 1858, and duly recorded on the same day in the clerk's office of the county court of Carroll, in which county the said land was situate. In the said deed a lien was expressly reserved on the said land for the purchase money. It is not pretended that the land was not ample security for the purchase money. Here, then, was a double security of this debt, the

solvency of the debtor personally, and the specific lien reserved upon the land. Were there any peculiar and extraordinary circumstances in existence which warranted the collection of the said debt or any part of it in

Confederate money at par, depreciated 445 in value as it was *in the spring of 1863? Certainly not. What occasion had the trustee, in the execution of his trust, for the money, or any part of it, at that time? None whatever. The only person in the world who had any interest in it was the beneficiary in the trust, who had removed to the state of Missouri before the war, and continued since to reside there. No payment had been made to her by the trustee since the war commenced, and there would be no power to make such payment until the war was ended, Virginia and Missouri being on opposite sides of the belligerent line. No one could tell in the spring of 1863 when the war would be at an end. That was about the middle of the war. It was the plain duty of this trustee to continue to hold, as he had a right to do and easily might have done, this well and permanently secured specie debt until the end of the war, instead of collecting it or any part of it in the spring of 1863 in greatly depreciated Confederate currency at par, only to invest the same in Confederate bonds, no less depreciated in value below their nominal amount. In regard to the small amounts said by Coltrane to have been collected from other parties, he could not state from whom, the matter is altogether too vague to be of any account. Most, if not all, of the bonds and notes placed in his hands as trustee were doubtless good debts. He says in his answer, that "believing those amounts as secure as he could make them, he deemed it unnecessary to collect and loan the same to others, perhaps not as responsible."

These bonds and notes were placed in his hands as trustee on the 27th of June, 1857. They were all due except the three bonds of C. F. Worrell, on the 30th of October, 1857, three and a half years before the war. The trustee had ample time to have collected them before the war, if such collection had been necessary or proper. If he did 446 not do so, it was no doubt because *he considered them perfectly good. The bonds of Worrell, we have seen, were not only good by reason of the general solvency of the debtor, but also because they were secured by a lien on real estate; and they amounted to more than double the amount of all the other bonds put together. It may well be assumed in this controversy, therefore, that all of these bonds were good and solvent and well secured, and that the trustee had no power, in the spring of 1863, to receive payment of any of them in depreciated Confederate currency at par.

I am, therefore, clearly of opinion, that there is no error in the decree in respect to the matter of the first assignment of error, and that this position is fully sustained by the cases cited on the subject by the counsel for the appellee. The following are the cases, or some of them, which were so cited:

Williams' adm'r v. Skinker, 25 Gratt. 507, 518, 519 and 524; Crickard's ex'or v. Crickard's legatees, Id. 410, 418, 419, 424 and 425; Moss v. Moorman, 24 Id. 97; Hannah v. Boyd, 25 Gratt. 692, 701; Ammon's adm'r v. Wolfe, &c., 26 Id. 621; Walker v. Beauchler, 27 Id. 511.

The second assignment of error in the decree (which, however, is not made in the petition for an appeal in the case), is that the appellant is charged with interest during the war.

In the ordinary case of debtor and creditor, where they reside on the same side of a belligerent line, the debt bears interest during the war, which is recoverable, notwithstanding the act of assembly on the subject. But where they reside on different sides of the belligerent line, interest on the debt during the war is not recoverable; and this is not the effect of the said act of assembly, but of principles of law which have been long since recognized and established. This, however, is not an ordinary case of debtor and

447 creditor, but a case in which a trustee holds bonds and notes in his hands for *the benefit of a cestui que trust. Can such a trustee avoid liability to his cestui que trust for interest on the trust fund during the war, when he has already collected such interest or may collect it hereafter?

It does not appear that the debtors to the trustee for the trust fund, or any part of it, ever have refused or will refuse to pay such interest to the trustee. The fact is, those debtors and the trustee always, during the war, lived on the same side of the belligerent line, and there was always on that side a hand to receive payment of interest from them. A trustee cannot derive a profit from the trust fund without rendering any equivalent therefor. He is bound to execute the trust for the benefit of the cestui que trust, whether the latter live at home or abroad, or the trust is to be executed in peace or in war. If the trust fund be perfectly secure, and bearing interest at the beginning of the war, he cannot voluntarily change it so as to make it insecure and bear no interest. I am therefore of opinion that there is no error in the decree in respect to the matter of the second assignment of error.

The third assignment of error in the decree is that the accounts should have been stated on the principle of the cases of Granberry v. Granberry, 1 Wash. 246, and Burwell's ex'or v. Anderson, adm'r 3 Leigh, 348. (And this assignment of error was made for the first time in the argument.)

Without stating what the principle of those cases is, I think it very clear that the account stated by the commissioner in this case is stated on a principle which can do no injustice to the trustee who was bound by the express terms of the trust to apply the interest and so much as might be sufficient of the principal of the trust fund in his hands or under his control, to the sole and separate use of the said Darthula Worrell. She has not received from the trustee, as he admits, 448 the whole amount of the *interest on the trust fund, which she was certainly

entitled to receive, and he has not been charged with any interest upon interest in the mode of stating the account.

The fourth and last assignment of error in the decree is, that "the direction for the removal of the fund to Missouri was erroneous. The trustee appointed in Missouri was not legally appointed, and is not entitled to receive the fund."

I think the decree is not erroneous in this respect. The law under which this proceeding for the appointment of a trustee in and the transfer of a trust fund to another state, is in the Code, ch. 125, §§ 6 and 7, p. 936, and is in these words:

"6. When any personal estate in this state is vested in a trustee resident therein, and those having the beneficial interest in the said estate are non-residents of this state, the circuit court of the county or corporation in which the said trustee may reside may, on a petition or a bill in equity, filed for that purpose, order him or his personal representative to pay, transfer and deliver the said estate, or any part of it, to a non-resident trustee appointed by some court of record in the state in which the said beneficiaries reside.

"7. No such order shall be made in the case of a petition until notice of the application shall have been given to all persons interested in the trust estate, nor until the court shall be satisfied, by authentic documentary evidence, that the non-resident trustee appointed as aforesaid has given bond, with sufficient security, for the faithful execution of the trust, nor until it is satisfied that the payment and removal of such estate out of the state will not prejudice the right of any person interested or to become interested therein."

The proceedings in this case for the appointment of a trustee in the state of Missouri are very formal, and there seems to be no defect therein, except that there
449 is *no certificate of "the judge of the circuit court of Clinton county, Missouri," added to the record of that court, attested by the clerk thereof, with the seal of the court annexed, which record is filed as an exhibit in this case. See Code, ch. 172, § 15, p. 1108. But there was no exception or objection to the said exhibit on that ground or any other, either in any of the answers or other proceedings in the case in the court below, nor until the said fifth assignment of error was made to the said decree. I think it was then too late to make the objection for the first time, and that the trustee in Missouri must be considered, as no doubt he was in fact, duly appointed.

The case comes within the category of cases to which the statute applies, authorizing a transfer of property of a cestui que trust to another state. "When any personal estate in this state is vested in a trustee resident therein, and those having the beneficial interest in the said estate are non-residents of this state," is the language of the statute.

Now, Mrs. Worrell is the only person who can be said to have any beneficial in-

terest in the said estate, in the meaning of the statute. During her life she is certainly entitled to the interest on the subject, and so much of the principal as may be necessary for her comfortable maintenance; "and full power is given to her, if she should die before her husband, to dispose of the trust fund by any last will and testament by her to be made and executed as the laws of Virginia direct wills of personal estate to be executed; and in case she should survive her husband, then the funds of said trustee are to be paid over to said Darthula, to be disposed of and used by her as her absolute property." After this full conveyance of the subject to her or for her use, the deed

thus proceeds: "And the said Amos
450 Worrell doth hereby relinquish *and release all claims to the said fund for himself and all persons claiming under him, and doth agree that the full control and use thereof shall be in the said Darthula, as herein provided for." She is certainly entitled to the fund absolutely, subject only, if to anything, to one possible contingency, to-wit: the contingency of her dying before her husband without having disposed of the trust fund by last will and testament as aforesaid. What would become of the fund in that single contingency it is unnecessary here to decide. But it is a contingency entirely within her power and control, which may at any time easily be exercised by her, and has no doubt already been so exercised. It cannot be regarded by the husband as of any value, and he has interposed no objection, on that or any other ground, to the removal of the trust fund to the state wherein the beneficiary resides. Can the trustee in Virginia interpose any such objection? The only substantial beneficiary having been for many years a resident of the state of Missouri, and intending permanently to reside there, ought not the trust fund be there also? The record shows how inconvenient has been her distant separation from the fund heretofore, how seldom and at what expense she has received any benefit from it, and how beneficial it would be to her to have it near at hand, while no person would be thereby injured.

Upon the whole, I am of opinion that there is no error in the decree, at least in substance, and that it ought to be affirmed, after being amended in the form of a draft which I have prepared, as a part of the foregoing opinion.

The other judges concurred in the opinion of MONCURE, P.

451 *The decree was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the said decree and the arguments of counsel, is of the opinion, for reasons stated in writing and filed with the record, that the decree appealed from instead of being as it is, should, and it is accordingly adjudged, ordered and decreed, that it be so amended as to be in words and figures following, to-wit: The cause came on this day to be heard upon

the bill of complaint, the exhibits filed, the several answers, the depositions of witnesses, the order and decree heretofore entered therein, the report of Commissioner Brown, and argument of counsel. And the court being of the opinion that the first statement of Commissioner Brown is the correct one in this case, with this exception, that the defendant, Ira B. Coltrane, should receive a credit for the amount of Confederate money paid in taxes in 1864 and 1865, at its par value instead of its scaled value, a further credit of \$23.75, of date March 12, 1864, and \$147 of date February 1st, 1865, being the difference between the par value of said amount and the scaled value allowed by the commissioner. And the court doth receive, adopt and confirm the first statement of said report with the amendment aforesaid. It is therefore adjudged, ordered and decreed that the complainant, Darthula Worrell, recover against the defendant, Ira B. Coltrane, the sum of \$2,557.54, principal, with legal interest thereon from the 20th day of April, 1875, and \$495.28, interest, subject to a credit of \$23.75, of date March 12th, 1864, and \$147, of date February 11th, 1865, to be applied as a credit on the last mentioned amount, to-wit: the \$495.28, interest.

And the court being satisfied by authentic documentary evidence in the cause that
452 Granville M. Hiatt, of the *county of Clinton, in the state of Missouri, in which the said Darthula Worrell resides, has been duly appointed by the circuit court of said county to receive and hold as trustee the fund now held by the said Ira B. Coltrane, as trustee, for the benefit of the said Darthula Worrell, under the deed of trust in the proceedings mentioned, and also that the said Granville M. Hiatt, the now non-resident trustee appointed as aforesaid, has given bond with sufficient security for the faithful execution of the trust, and that the payment and removal of the said fund out of the state will not prejudice the right of any person interested or to become interested therein, it is therefore adjudged, ordered and decreed that the said trust fund now held by the said Coltrane as aforesaid, being the sums of money and interest hereinbefore recovered against him by the said Darthula Worrell as aforesaid, be paid, transferred and delivered to the said Hiatt, the non-resident trustee aforesaid, to be held and disposed of by him as such according to the terms of the deed of trust and the condition of the bond aforesaid. And to enforce the payment of the said sums of money and interest to him, he may sue out executions for the same on this decree and in the name of the said Darthula Worrell for his use as such trustee. And it is further adjudged, ordered and decreed that the said Darthula Worrell recover against the said Ira B. Coltrane her costs by her expended in the prosecution of this suit; and liberty is reserved to her, or her non-resident trustee for her benefit, to apply to this court in this clause hereafter, by motion or petition, for any further order or decree which may be necessary to carry into effect the decree.

And it is further adjudged, ordered and decreed that the said decree appealed from, as hereinbefore amended, be affirmed, and that the appellee, Darthula Worrell, recover against the appellant damages according to law *and her costs by her about
453 her decree in the appeal expended; which is ordered to be certified to the circuit court of Carroll county.

Decree amended and affirmed.

454

*Wampler v. Wampler.

July Term, 1878, Wytheville.

Bill by W charges that W and wife had conveyed to his son E, a tract of land on the consideration that E should provide for and take good care of W and his wife so long as they may live, in a comfortable manner, both in sickness and health, and should build a comfortable dwelling-house for them on the land, and that he utterly failed and refused to comply with his agreement. And that these promises were fraudulently made by E for the fraudulent purpose of obtaining said deed, and that plaintiff relied on said promises and would not have executed said deed if they had not been made; and that said deed was obtained by means of said fraud so practiced upon him by E upon demurrer to the bill—Held:

1. Deeds—Fraud—Equity Jurisdiction.—

W did not have an adequate remedy at law for the failure to perform either of the considerations stated in the bill, and equity has jurisdiction to relieve him.

2. Same—Same—Same.*—The bill charging a fraud by E in procuring the deed, on that ground equity has jurisdiction to give relief.

3. Same—Same—Same.—The court of equity may, upon these facts, if sustained, rescind the contract, set aside the deed, and put the parties in the same position they were in before the contract was made and the deed executed.

This was an appeal from the decree of the circuit court of Bland county dismissing a bill filed by Abraham Wampler against his son, Ephraim Wampler, to set aside a deed which the plaintiff and his wife has executed, conveying a tract of land to the said Ephraim Wampler. The defendant demurred to the bill.

The cause came on to be heard at the May term, 1878, of the court, when the
455 court sustained the demurrer and *dismissed the bill; and thereupon Abraham Wampler applied to a judge of this court for an appeal, which was allowed. The case is fully stated by Judge Christian in his opinion.

Williams, for the appellant.

Crockett & Blair, for the appellee.

CHRISTIAN, J., delivered the opinion of the court.

*Deeds—Fraud—Equity Jurisdiction.—The principal case is expressly affirmed in *McMullin v. Sanders*, 79 Va. 356, and in *Miller v. Miller*, 25 W. Va. 503.

The single question we have to determine in this case is, whether the circuit court erred in sustaining the demurrer to the plaintiff's bill. The bill charges that the plaintiff and his wife on the 27th November, 1872, executed a deed conveying to his son a certain tract of land therein mentioned, in consideration (as expressed in the deed) that his son "should provide for and take good care of him and his wife so long as they may live, in a comfortable manner, both in sickness and in health;" and for the further consideration (not expressed in the deed) that his said son should build on the land conveyed a good and comfortable dwelling-house.

The bill contains further allegations, as follows: "The said Ephraim Wampler fraudulently induced your orator to believe, by his repeated promises and assurances, that if your orator would convey him the said 170 acres of land, that he would take care of and comfortably support your orator and his wife during their entire life, and would build them a comfortable dwelling-house; and, with a view to make himself and wife comfortable in their declining years, they were induced to execute said deed, the said Ephraim not only promising to take care of your orator and wife comfortably, but promised and agreed to build your orator a good,

456 comfortable dwelling-house on your orator's land for his residence. *Your orator avers that the said Ephraim has utterly failed and refused to comply in any respect with his part of said agreement—has utterly failed and refuses to furnish one iota of the consideration promised, and that said promises so made by said Ephraim Wampler were resorted to by him fraudulently for the fraudulent purpose of obtaining said deed, and that your orator relied on said promises, and would not have executed said deed if they had not been made; and your orator charges that said deed was obtained by means of said fraud, so practiced on him by said Ephraim Wampler; that he took possession of said 170 acres of land immediately after said deed was executed, and is still in possession thereof and residing thereon with his family, and has not furnished to your orator and his wife or to either of them anything whatever toward their maintenance or support, but on the contrary has obtained property from your orator to a considerable amount and has not paid him therefor, nor has he built your orator the dwelling-house promised; on the contrary has contented himself with simply putting in a window of four panes of glass in your orator's own old house in which he now lives, and which is but a miserable cabin, almost entirely unfit for human habitation. Though the said Ephraim has had five years in which to do something toward complying with his said contract, he has done literally nothing towards it, although your orator has frequently urged him to do so, but he has uniformly failed to do so, and leaves your orator, in his old age, to take care of himself and his wife as best he can, without the benefit or income which your orator could derive from said land. Your orator charges that the said contract of his said son amounts to

a fraudulent acquisition and inequitable holding of said land, which a court of conscience will not tolerate or permit, but will hold, as your orator avers, that said fraud so practiced by said Ephraim Wampler, 457 upon your orator, *constitutes said Ephraim, an implied trustee, holding said land for your orator's benefit, and that a court of equity for said fraud will set aside and annul said deed, rescind said contract and remit your orator to his rights in said land."

The bill then prays that the deed be set aside and annulled, and the land be reconveyed to the plaintiff, and for general relief.

To this bill the defendant demurred; and the circuit court sustained the demurrer, and rendered the following decree: "The court is of opinion that the plaintiff has ample relief at law, and that the demurrer be sustained and the bill dismissed, and that defendant recover of complainant the costs of this suit."

To this decree an appeal and supersedeas was awarded by one of the judges of this court.

The court is of opinion that this decree of the circuit court is erroneous.

Upon the demurrer, of course, all the allegations of the bill must be taken as true. It is plain that the plaintiff did not have a complete and adequate remedy at law. The consideration for the deed of conveyance for the land, as alleged in the bill, was the comfortable support of the grantor and his wife during their lives, and the erection on the land conveyed of a good and comfortable house. This was a continuing obligation on the part of the grantee. It was to continue during the lives of the grantors and each of them. At the end of the first year, or sooner, the grantors had the right of action, if the covenant for support was not complied with, for a breach of the covenant. In such action damages could be recovered only for the refusal of the grantee to perform his covenant up to the time of the commencement of the suit.

But the obligation for support and 458 maintenance continued *for an indefinite time, during the lives of the grantors and each of them; it may be for ten or twenty years. Must the grantors bring their suit every six months or twelve months for damages for a failure upon the part of the grantee to supply them with food and clothing? And in the meantime, having conveyed their all to the grantee, having deprived themselves of the means of support, must they suffer and starve until by suits at law and executions they could compel the grantee to supply them with the means of support?

But beside the consideration of support and maintenance, another consideration alleged in the conveyance (and this upon demurrer must be taken to be true) was that the grantee should erect upon the land a comfortable dwelling. How could this covenant, so important to the comfort of the grantees, be enforced in a suit at law?

We think it is clear that the grantors in his case did not have a complete and ade-

quate remedy at law, and that upon the facts stated in the record, admitted by the demurrer to be true, a court of equity had the undoubted jurisdiction, there being no complete and adequate remedy at law, if not to compel a specific performance of the contract on the part of the grantee, certainly to rescind the contract, annul and set aside the deed, and put the parties in the same position they were in before the contract was made and deed delivered.

But there is another ground of equity jurisdiction in this case. There is a positive and distinct allegation of fraud in the bill. The following allegation is contained in the bill: "The said promises (i. e. for support and maintenance and the building of a comfortable dwelling), so made by said Ephraim Wampler, was resorted to by him fraudulently for the fraudulent purpose of obtaining said deed, and that your orator relied on said promises, and would not
459 have executed said deed if *they had not been made. And your orator charges that said deed was obtained by means of said fraud so perpetrated on him by said Ephraim Wampler." Here, then, we have a distinct and specific charge of fraud, to-wit: that the promises which induced the grantor to part with his land were resorted to by the grantee with a fraudulent purpose and intent to obtain a deed for the land conveyed.

Now, fraud is universally conceded to be a ground of equitable jurisdiction. The first province of a court of equity being to enforce truth and fairness in the dealings of men, the prevention and correction of fraud is part of the original and proper office of the court.

Courts of equity have an original, independent and inherent jurisdiction to relieve against every species of fraud. Every transfer or conveyance of property, by what means soever it be done, is in equity vitiated by fraud. Deeds, obligations, contracts, awards, judgments, or decrees may be the instruments to which parties may resort to cover fraud, and through which they may obtain the most unrighteous advantages, but none of such devices or instruments will be permitted by a court of equity to obstruct the requisition of justice. If a case of fraud be established a court of equity will set aside all transactions founded upon it by whatever machinery they may have been effected, and notwithstanding any contrivance by which it may have been attempted to protect them. These principles have now become axioms of equity jurisprudence.

Applying these principles to the case before us, we are of opinion that the decree of the circuit court sustaining the demurrer to the plaintiff's bill was plainly erroneous. The plaintiff ought to have been permitted to establish by proof the fraud alleged in his bill instead of being dismissed by that court and sent to a court of law to lit. ate his
rights, when it is plain, from the very
460 *nature of his demand and the continuing obligation of the defendant, the plaintiff could not have a complete and adequate remedy.

For these reasons the court is of opinion that the decree of the circuit court sustaining the demurrer and dismissing the plaintiff's bill be reversed and the cause remanded to said circuit court with instructions to overrule the demurrer and require the defendant to file his answer to said bill, that the case may be heard and determined upon bill and answer, and such evidence as either party may lawfully produce.

The decree was as follows:

This day came again the parties by their council, and the court having maturely considered the transcript of the record of the decree, and the arguments of counsel, is of the opinion, for reasons stated in writing and filed with the record, that the decree of said circuit court sustaining the defendant's demurrer to the plaintiff's bill is erroneous. It is therefore decreed and ordered that the said decree be reversed and annulled, and that the appellant recover of the appellee his costs by him expended in the prosecution of his appeal and writ of supersedeas here. And this court, proceeding to render such decree as the said circuit court ought to have rendered, it is further decreed and ordered that the said demurrer be overruled; and the cause is remanded to the said circuit court for further proceedings to be had therein. All of which is ordered to be certified to that court.

Decree reversed.

461 *Harman & als. v. Davis, Adm'r, & als.

July Term, 1878, Wytheville.

Upon a bill by the widow and the two distributees of H, the distributees being infants, against D, the administrator, and his sureties, for the settlement of his account and distribution, a commissioner reports D indebted in the sum of \$7,942.39; and D excepts to the report. Subsequently D withdraws his exceptions, and by consent of both plaintiffs and defendants a decree is made in which the defendants here in court admitting that D, as administrator, and his sureties, are responsible to the plaintiffs in the sum of \$5,000, which the defendants admit themselves as chargeable for distribution among the said widow and said children, with interest from February 1st, 1873, and the said widow and distributees being willing and consenting here in court to accept the said \$5,000 and interest in full satisfaction and discharge of their claim against said administrator and his sureties, it was decreed, with the consent and agreement of all the parties, that N, the widow, should recover of the defendants \$1,666.66, with interest, &c., and that C and K, infant children of H, should recover of said defendants \$3,333.33, with interest, &c. And by like agreement the defendants were allowed to make payment in three instalments of ten, twenty and thirty-six months. D and his sureties failed to make the first payment; and then filed a bill to review the decree, on the grounds: First. That the infant plaintiffs could not consent to the decree, and might, on coming of age, have it set aside. Second. Because the decree did not require the plaintiffs to execute refunding bonds—H&D:

1. Infants, When Bound by Decrees.*—It was not error to decree in the cause in favor of the plaintiffs because some of them were infants. They do not complain of the decree; and though the infants were incapable of consenting to the decree, it is binding upon them if for their benefit; and the court having the whole case before it, and being satisfied the decree is for *their benefit, there is no error on the face of the decree for which it could be reviewed and reversed.

2. Consent Decree against Administrator and Sureties—Bill of Review.—There was no error in the decree in not requiring refunding bonds to be given by the plaintiffs. This would have been incompatible with the evident intent and legal effect of the decree, which was that the sums decreed to be paid by D and his sureties was in his hands for distribution among the plaintiffs. And the acknowledgment and consent of D, stated in the decree, was a waiver of any right of his to require refunding bonds.

This was an appeal from a decree of the circuit court of Tazewell county, rendered on the 18th of November, 1875, in a cause in which Nancy Harman and her two children, who were infants, were plaintiffs, and J. Mosby Davis, administrator of E. H. Harman, deceased, and his sureties were defendants. The decree from which the appeal was taken, was rendered upon a bill of review by the defendants to review and reverse a previous decree in favor of the plaintiffs, rendered by consent of all the parties. The court reversed the first decree, and the plaintiffs obtained an appeal. The case is stated by Judge Anderson in his opinion.

Kent and Walker, for the appellants.

Richardson, for the appellees.

ANDERSON, J., delivered the opinion of the court.

A bill was filed at the June rules of the county court of Tazewell county by Mrs. Nancy Harman, widow of Edwin H. Harman, deceased, and her infant sons, Charles W. Harman and Davis K. Harman, heirs and distributees of the said decedent, against John Mosby Davis, the administrator of the said E. W. Harman, deceased, and Henry B. Harman and Reuben C. Fudge, his sureties in his administration bond, for their distributive shares in the estate of said decedent. The bill alleges that for a number of years previous to the death of E. H. Harman, he and the said J. M. Davis had been in partnership in the mercantile business on Bluestone, in the county of Tazewell, the profits of which were very handsome; and that in the year 1858 they formed a partnership in the mer-

***Infants, When Bound by Decrees.**—The principal case, as to its holding that such a decree is binding upon infants, if for their benefit, is expressly affirmed in *Morriss v. Va. Ins. Co.*, 85 Va. 595. And it is a general rule, that an infant defendant is bound by a decree unless when he arrives of age he can show error in it but when a decree is obviously for his benefit his rights may be absolutely bound by it.

cantile business with John L. Neel, which was carried on for upwards of a year, at the expiration of which time they bought out the said Neel and continued the business themselves, until the war put a stop to all transactions of the kind; and the said E. H. Harman entered the service of the Confederacy and was killed in battle. And the said J. M. Davis being the sole survivor of the firm, it devolved on him to settle up the partnership concerns, and to receive in his capacity as administrator of the said E. H. Harman, his share of the partnership fund and effects, and to account for and pay over the same to them, his distributees. And the prayer of the bill was that he should be compelled to settle the said partnership accounts, and his administration accounts, and account for and pay over to them their distributive shares in the estate of said decedent, and for general relief.

The defendant, J. M. Davis, answered the bill, to which the plaintiffs replied generally, and an account was ordered and taken and reported, showing a balance against the administrator, J. M. Davis, of \$7,942.39; to which the defendants filed exceptions, and depositions were taken. Said exceptions were afterwards withdrawn, and the following decree was entered: "This cause came on to be heard this the 2d of July, 1873, upon the papers heretofore read, and the report of Samuel C. Graham and the exceptions thereto; and the defendants withdrawing all exceptions to said report, admit here in court that the defendant, Davis, as administrator of E. H. Harman, H. B. Harman and R. C. Fudge, his securities in his administration bond, are responsible to the complainants, the

*widow and distributees of E. H. Harman, for the sum of \$5,000, the amount with which the said Davis and his sureties admit themselves to be chargeable for distribution among the said widow and said children, with interest from the 1st of February, 1873, and the complainants, the widow and heirs-at-law of said E. H. Harman, being willing and consenting here in court to accept the said \$5,000 and interest as aforesaid, in full satisfaction and discharge of their claim against the said administrator and his sureties," the court proceeded to decree, by and with the consent and agreement of all the parties, that the said complainant, Nancy Harman, recover of said defendants \$1,666.66 $\frac{2}{3}$, with legal interest thereon from February 1st, 1873, till paid, and that Charles W. Harman and Davis K. Harman, infant children of E. H. Harman, suing by Nancy Harman, their next friend, recover of said defendants \$3,333.33, with interest from February 1st, 1873, till paid. And the defendants, by like agreement of all said parties, were allowed to make payment in three equal installments, in ten, twenty and thirty-six months from the date of the decree, and if punctually paid no execution to issue; and it was decreed that the complainants recover their costs. And it was agreed that all the unpaid claims due the estate of E. H. Harman were the property of said Davis.

The first installments falling due and being unpaid, the plaintiffs caused executions of *fi. fa.* to be issued therefor, and thereupon the defendants brought their bill in the circuit court of Tazewell county against them, praying an injunction to said executions, which was granted, and upon the coming in of the answer of Nancy Harman, was, by a decree of the court of the 18th of May, 1875, dissolved. And on the 10th day of September, 1875, the said J. M. Davis, administrator of E. H. Harman, deceased, H. B. Harman and Reuben C. Fudge, sureties of

465 said Davis as administrator as afore-said, *by leave of the court, filed their bill of review and obtained an injunction to restrain the plaintiffs, Nancy Harman and others, from all further proceedings under the decree rendered in the case of Nancy Harman and others against J. Mosby Davis and others in the bill of review mentioned, to which bill the defendants filed their answers—the infant defendants by guardian ad litem; and the cause coming on to be heard on the 18th of November, 1875, the court was of opinion that there was error apparent on the face of the decree complained of, in that it was a decree by consent, and some of the complainants being infants could not be bound thereby, and because refunding bonds were not required to be executed by the complainants before payment by the administrator. And for these reasons and causes of error decreed that the decree of the 2d of July, 1873, be reversed and annulled, from which decree the defendants to the said bill of review appealed to this court, which is the case now to be decided.

The court is of opinion that it was not error to decree in that cause in favor of the plaintiffs because some of them were infants. The defendants were adults, and admitted that they were chargeable for distribution to the widow and children of E. H. Harman, deceased, with the sum of \$5,000, and interest thereon from the first day of February, 1873, till paid, for which the defendant, Davis, as administrator of E. H. Harman, and his securities in his administration bond, are responsible to the complainants, the widow and distributees of the said E. H. Harman, deceased. And the court says the complainants, the widow and heirs aforesaid, being willing and consenting here in court to accept the same in full satisfaction and discharge of their claim against the said administrator and his sureties, "it is therefore adjudged, 466 ordered and decreed, by and with the consent *and agreement of all the parties," as hereinbefore set out, a decree for the distribution of that sum admitted to be due for distribution, by the administrator and his sureties in full satisfaction and discharge of all that is due them from the administrator and his sureties.

There is no claim made by the widow and distributees for more, nor dissatisfaction expressed by them with the amount decreed in their favor, but the complaint comes from the administrator and his sureties, that they admitted their liability for more than they

ought, and they seek to be released from this acknowledgment on the ground that some of the parties to whom they acknowledged it to be due were infants. It is very clear that they being under no disability, their acknowledgment could not be impaired or affected by the fact that those to whom they acknowledge themselves indebted were infants. But they contend that their acknowledgment ought to be binding upon them because it was made as a concession to the complainants upon the consideration that it would be received in full satisfaction and discharge of all they owed them; that the complainants did agree to receive it as such, but that some of them are infants, and are not bound by that agreement, and may, after they attain majority, refuse to be bound by it and compel them to pay more.

If there is any ground for their complaint that they acknowledged a larger indebtedness than they were in fact owing, and they are prepared to show it, they surely can have no ground for the apprehension that after the infants attain majority they may be able to have the decree complained of set aside and annulled, and subject them to the payment of an additional sum. It is not a motion of the infants to be relieved from a consent decree, which allowed them less than they were entitled to, upon the ground that they were incapable of giving their consent by

467 reason of their infancy; but it is a motion *by the adult administrator and his sureties to be relieved from a decree for a sum which they acknowledged in open court was due from them to the complainants, and which decree was entered by their consent and the consent of the complainants, in full satisfaction of all their claim against the defendants, because two of the complainants were infants.

The administrator must be presumed to be well informed as to the condition of the estate and the state of the accounts between him and his intestate, and it is presumable that he would not have acknowledged a larger indebtedness to the distributees, or a larger sum in his hands for distribution than truth and justice required. The account taken by the commissioner showed a much larger amount due from the administrator to the estate; but there were still some outstanding debts of the decedent which had not been paid, and the administrator contended that some of his vouchers evidencing disbursements, had been erroneously rejected by the commissioner; but upon the whole, he was willing to acknowledge an indebtedness to the complainants—an amount in his hands, not for paying debts and distribution, but for distribution, of course after paying debts—an amount for which he and his sureties were responsible, not to creditors and distributees, but to the distributees, the complainants, of \$5,000, with interest thereon as specified; and was willing that the plaintiffs should take a decree therefor in full satisfaction and discharge of their whole claim. They agree to it, and the court entered such a decree, by consent and agree-

ment of all the parties. The plaintiffs are satisfied with it, and seek to enforce it, and do not ask to be released from it, on the ground of the disability of two of them by reason of infancy. But the defendants seek to be released from it on the ground that it is not binding on the infant plaintiffs, they being incapacitated to give their consent.

But that could be no ground for
 468 *relieving them from the decree in favor of the adult plaintiff.

And in this case the court is of opinion that it is no ground for releasing them from the decree in favor of the infant plaintiffs. Although the infants were incapable of consenting to the decree, it is binding upon them, if for their benefit—as binding as it would have been if no consent had been given. An infant plaintiff is as much bound by a decree as an adult. *Brown v. Armstead*, 6 Rand. 594. Unless the court was satisfied that this decree was for the benefit of the infants, it would have been error to have entered it as a consent decree. And this court, having the whole case before them, and being satisfied that the decree was for the benefit of the infants, and that they are therefore bound by it, there is no error upon the face of the decree on this account for which it could be reviewed or reversed.

The court is further of opinion that the decree of the 2d of July, 1873, sought to be reviewed is not erroneous, because it contains no provision requiring the plaintiffs to execute refunding bonds before enforcing payment. Such a provision would have been incompatible with the evident intent and legal effect of the decree, which was that the sum decreed to be paid by the administrator and his sureties was in his hands for distribution amongst them, which could not have been so if there were outstanding and unsatisfied debts of the estate for which it was liable; and that the defendants were responsible to them for that amount, which could not have been so if it were chargeable with the payment of debts due from the estate; and that the same was to be paid them in full of their entire interest in the estate, and that all debts due the estate or the different co-partners, of which the defendant, Davis, was the surviving partner, were to be his property, not liable for any further claim on their part for distribution, but liable, of

469 course, for any debts *of the estate which might be outstanding and unsatisfied. Consequently a provision in the decree requiring the plaintiffs to give obligations to refund any proportion of debts which might thereafter be recovered against the estate, would have been incompatible with the legal effect and intent of the decree. And furthermore, the defendants acknowledging that the amount specified was in the hands of the administrator for distribution, and consenting to a decree in favor of the plaintiffs against them for their respective proportions thereof, was a waiver of any right of the administrator to require refunding bonds.

The court is therefore of opinion to reverse the decree of the 18th of November, 1875, of

the circuit court of Tazewell county, to dissolve the injunction, and dismiss the plaintiffs' bill of review with costs.

The decree was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the said decree and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the decree of said circuit court rendered on the 2d day of July, 1873, and in the proceedings mentioned, for which the same ought to have been reviewed and opened; and hence that the decree of said court rendered on the 18th day of November, 1875, and which is the subject of this appeal, is erroneous. Therefore it is decreed and ordered, that said decree of 18th November, 1875, be reversed and annulled, and that the appellants recover of the appellees their costs by them in the prosecution of their said appeal here expended. And this court proceeding now to render such decree in the premises as the said circuit court of Tazewell county

ought to have rendered, it is further
 470 *decreed and ordered, that the injunction awarded in the cause depending on the bill of review in the proceedings mentioned be dissolved, and that said bill of review be dismissed, and that the defendants in said bill (who are the appellants here) recover of the plaintiffs in the same their costs by them about their defence to said bill expended; which is ordered to be certified to the said circuit court of Tazewell county.

Decree reversed.

471 *Va. & Tenn. R. R. Co. v. Washington County.

(Two Cases.)

July Term, 1878, Wytheville.

Absent, BURKS, J.

1. **Taxation by Counties—Constitutional Law.**—The constitution of the state does not authorize the county authorities to assess property for taxation and levy taxes upon it independent of the action of the legislature.

2. **Same—Same.**—Under the present legislation of the state the county authorities can only levy a tax upon such property as by law is assessed with state taxes in the county.

3. **Same—Railroads.**—Under the present legislation of the state, county authorities cannot levy a tax on the real estate of railroads in the county, either for county, township, school or road purposes.

***Counties—Taxation—Constitutional Law.**—Under the constitution of the state a county cannot exercise the powers of taxation, unless authorized to do so by the legislature. *S. V. R. R. Co. v. Supervisors of Clark County*, 78 Va. 269, expressly affirmed the principal case. For the present legislation on this subject, see Acts 1874-75, p. 355; Va. Code 1887, ch. 36, sec. 833, as amended by Acts 1895-96, p. 274.

These were applications by the Virginia and Tennessee Railroad Company to the county court of Washington County, to be exonerated from assessments of taxes for county, township, school and road purposes, upon their real estate in the county, consisting of that part of their road lying in said county. It appears that the several township assessors had placed the said land on their books, at a valuation fixed by them, and the tax-tickets had been issued. And thereupon the railroad company presented their petition to the court to be exonerated from the payment of these taxes. One of the cases refers to the taxes assessed in 1871, and only refers to the county and township taxes, which alone seem to have been assessed against the company in that year. The other refers to the taxes for the year 1873, and refers to the taxes for county, township, school and road purposes.

472 *The county court refused to exonerate the railroad company from the payment of the taxes, and these judgments were affirmed by the circuit court. And thereupon the railroad company applied to a judge of this court for a writ of error; which was awarded. The only question in the cases is the authority of the county officials to levy the tax.

J. Alfred Jones, York & Fulkerson, for the appellant.

White & Cummings and Campbell, for the appellee.

STAPLES, J., delivered the opinion of the court.

At the time of the commencement of this controversy, in the year 1871, the Virginia and Tennessee Railroad Company was required, by act of the legislature, to report annually to the auditor of public accounts the estimated value of all its real and personal estate of every description. It was also required to report quarterly the net earnings of the road for the three preceding months, and at the same time to pay into the treasury of the state the taxes imposed by law. So that the company, instead of being assessed in the different counties in which its road was located, was assessed as an entirety.

The assessment for state taxes was not made, as in ordinary cases, by the township assessors, but by the company itself to the auditor of public accounts, and the taxes were paid, not to the county treasurer, but directly into the state treasury.

The same provisions were applied to the other railroad companies and canal companies, and, with some modifications, to the insurance and telegraphic companies doing business in the state. This mode of assessment and taxation has been continued and is still pursued by the legislature. Acts of 1869-70, page 312; Acts of 1870-71, page 93.

473 *In the year 1871, the County of Washington claimed the right to impose the county levies upon the property of the Virginia and Tennessee Railroad Com-

pany in that county, and it caused to be assessed for that purpose the road-bed and other real estate within its limits. This claim was resisted by the company, but was sustained both by the county and circuit courts of that county. The case is brought here by writ of error to the judgment of the last-named court. The grounds upon which the parties respectively rest their pretensions will be considered in the course of this opinion.

An examination of the various acts of the legislature on the subject will show that for many years the county levies and poor rates were confined to the titheables within their limits. Real and personal property was not made the subject of county levy until long after the revisal of 1819. At what precise period this was done I have not been able to ascertain, as the acts of the general assembly showing the fact cannot be had in this place. It was probably as far back as the year 1824 or 1825. See 2 Rev. Code 1819, page 63; Code of 1849, page 277, sec. 4. But under all the acts subjecting property to county levies, the levy in every case was limited to those subjects assessed with state taxes within the county. Under former constitutions and laws the practice was for the justices of the county, a majority being present, to settle the accounts of the county, and to proceed to lay the levy upon property assessed with state taxes according to the land and property books as made out by the commissioner of the revenue for state purposes. The result was that under no circumstances could there be a county levy upon property unless it was assessed within the county for state taxation. This was the uniform rule, never departed from prior to the adoption of the present constitution.

474 It is claimed, however, *that that instrument has changed the law upon this subject, and that power is now conferred upon the county authorities respectively to lay the county levies upon all subjects of taxation not specially exempt under the constitution, independently of legislative sanction, and whether such subjects are or are not assessed for purposes of state taxation.

It will be admitted that when an enactment, constitutional or legislative, is relied on as effecting a radical change in the policy of the government, as pursued for forty years—a policy founded upon sound reason and common justice—the language of such enactment ought to be very explicit in its terms. More especially is this true when applied to the subject of taxation, a subject peculiarly within legislative discretion, involving the highest attributes of sovereignty and affecting all classes and conditions of society. The legislature is invested with complete power over the subject of taxation, except so far as may be otherwise provided in the constitution. On the other hand, the counties are mere auxiliaries of the government, established simply for the more effective administration of justice; and the power of taxation as confided to them is a delegated trust, and is to be strictly construed. They

act not by virtue of any inherent power, but as mere agencies of the state. *City of Richmond v. Daniel*, 14 Gratt. 385; 21 Gratt. 604, 617.

In this case it is claimed that an independent sovereign power not only of imposing taxes, but also of designating the subjects of taxation, is conferred upon each board of supervisors in every county and township of the state. It cannot be going too far to say that the men composing these boards are not generally elected with reference to such duties, nor are they qualified by their pursuits, information or position for the exercise of a trust so delicate and responsible. It is difficult to believe it was ever intended to confer

upon these boards a power which the
475 *state would never bestow upon her magistrates at a time when the county court was composed of some of the most intelligent and responsible citizens of the state.

The provision of the constitution relied on as conferring this power is found in section 2, article 7, of that instrument. That section, after providing that each county shall be divided into townships, in each of which there shall be annually elected one supervisor and certain other officers therein named, declares: "The supervisors of each township shall constitute the board of supervisors for that county, and shall assemble at the courthouse thereof on the first Monday of December in each year, and proceed to audit the accounts of said county, examine the books of the assessors, and regulate and equalize the valuation of property, fix the county levies for the ensuing year, apportion the same among the several townships, and perform such other duties as shall be prescribed by law."

The words relied on as conferring the power in question are, "to fix the county levies for the ensuing year, and apportion the same among the various townships." The learned counsel for the county of Washington, in commenting upon these words, insists they confer upon the supervisors authority to ascertain the levy, to establish a levy and to impose a levy, and to divide the same among the several townships; and that this is but an exercise of the taxing power under the constitution. All this may be conceded, and the question still arises, how are the supervisors to ascertain the subjects of taxation for the county levy? To what source are they to look for the necessary information to guide them with respect to the taxable property? The answer is found in the section already cited, which declares they shall "examine the assessors' books." And a subsequent section of the same article provides that the general assembly, at its first session after the adoption of the constitution, shall

476 *pass such laws as may be necessary to give effect to the provisions of this article. The legislature accordingly provided for the election of assessors; it prescribed that their duties and powers should be the same as those of the former commissioners of the revenue; it required them to assess the property of their respective townships; to make out the land and property books in

the manner required of the commissioners of the revenue—a copy of which was to be sent to the auditor of public accounts, another delivered to the county treasurer, and another to the clerk of the county for the use of the board of supervisors. Acts of 1869 and 1870, pages 80 and 282. These are the books to which the constitution refers, by which the state taxes are ascertained and collected, and by which the supervisors must be governed, as were the former justices of the peace, in laying the county and township levies. The conclusion is inevitable, therefore, that the board of supervisors in laying the county levies must look to the books provided for the state assessment, and to the subjects of taxation as contained in those books.

This must be so, unless we are to suppose that the framers of the constitution intended to inflict upon the state a complex and expensive system requiring two sets of assessors, one for the state and the other for the counties, with two sets of books containing different valuations of property and different subjects of taxation. The more reasonable presumption is, that they legislated with reference to the former system, simply substituting the supervisors in place of the justices, and confining the county levy to such property, real and personal, as was assessed with a state tax within the county. Acts of 1869 and 1870. § 74, p. 284; p. 306, § 47.

It is very true that the section already quoted also confers upon the board of supervisors the power to equalize and regulate the valuation of property. I am free to confess that, after the most careful examination
477 tion *and reflection, I am unable to say what these words precisely mean.

It is very probable they were taken from the constitution of some one of the northern states, where they have equalization boards, as they are called. These boards have a sort of appellate power for the purpose of an equalization, in case the assessment of one district is found to be relatively higher or lower than that of another, so that if the general taxes were to be assessed upon it, the district would pay more or less than its due proportion. This is not done by changing individual assessments, but by fixing the aggregate for the several districts at what in the opinion of the board they shall be, so that general taxes may be levied according to this determination, instead of on the assessors' footings. This is the construction generally given to the laws relating to the equalization boards in other states. *Cooley on Taxation*, p. 290.

But whatever may be the meaning of the words in our constitution just quoted, it is very clear the power to regulate and equalize the valuation of property cannot be construed as giving authority to change the assessors' books and to prescribe new subjects of taxation different from those assessed by the state.

The learned counsel for the County of Washington maintain that the legislature, in various acts passed from time to time since the adoption of the constitution, has recognized this power as vested in the board of

supervisors; and in support of this position he relies upon the fact that the legislature in prescribing the duties and powers of the supervisors, has used the same words contained in the constitution. I submit to the learned counsel, this is reasoning in a circle. If the words in question had a fixed, well-ascertained meaning, we might easily understand what the legislature intended in incorporating them in one of its statutes. Sometimes the legislative department, finding great difficulties in the construction
478 *of a constitutional provision, embodies it in a statute, leaving it to the courts to give to it the proper interpretation.

But in the present case we are left in no difficulty as to the meaning of the legislature. In the very first act on the subject, passed 9th of July, 1870, Acts of 1869 and '70, page 332, the supervisors of the respective counties are required to convene the 1st of July, 1870, and to lay the county levy for the year 1870, according to the provisions of sections 2, 3 and 4 of chapter 53. Code of 1860, so far as the same are applicable. One of the sections thus referred to limits the levy in express terms to property assessed with state taxes within the county. This act was followed by the act of March 19th, 1872 which confers upon the supervisors authority to "fix the amount of the county levies for the ensuing year, to order the levy on all male persons over twenty-one years of age, and on all property assessed with state taxes within the county;" or the order of levy may be a certain sum on all male persons over the age of twenty-one years, and for a certain per centum upon the amount of the state tax, and to apportion the same among the various townships of the county. Acts of 1871 and '72, page 291. The act of March 26th, 1875, contains substantially the same provisions. Acts of 1874 and '75, page 355. These enactments show that the legislature was of opinion that the supervisors are not clothed with the power of assessment and taxation under the constitution, without the aid of legislation. They further show that the design was to adhere to the policy pursued for forty years, and to confine the county levies to those subjects assessed with state taxes within the respective counties.

It is said, however, that the words "within the county," refer to the location of the property, and not to the place where the assessment may be made; and the statute
479 *ought to be construed as if it read: "the board of supervisors shall have power to order the levy on all property within the county assessed with state taxes." It is sufficient to say that the words used in the act of 1872 and in all the subsequent acts, are the same as those used in the Code of 1849, the Code of 1860, and indeed in all the acts prior to the adoption of the present constitution. Their meaning, as used in these prior enactments, was well understood, and that is, that the county levies were confined to property assessed with state taxes within the county by the commissioners of the revenue. It must be presumed that the legislature, in adopting the same words in the

more recent enactments, intended to give them the construction uniformly given to them.

There is but one act ever passed by the legislature which at all militates against this view, and that is the act of March 15th, 1872. It is there provided that "where a railroad or canal shall pass through more than one of the counties of the state, the report (of the company) shall show the estimated value of the property herein-above classified that may be within the limits of each of said counties; and it shall be the duty of the auditor of public accounts to furnish the board of supervisors of each of the counties of the state through which any railroad or canal passes, such estimated value of the property herein-above specified, as appears from such report to be within the limits of each of said counties." Now, it would seem to be very clear that the object of this enactment was to furnish a basis for the assessment and imposition of county levies upon the various railroads of the state, and thus to remove all the difficulties growing out of a want of legislation upon that subject; and yet we find at the next session of the legislature, April 5th, 1872, an act was passed in which it is expressly provided that section 91, just cited, shall not authorize the

supervisors in any county through
480 which said railroad or canal *may pass, to assess, levy or collect any tax for county or township purposes on the valuation of properties classified in the report required by the said 91st section of the assessment act.

The provisions of the act of March 15th, 1872, have been omitted in all the subsequent acts on the subject. If, therefore, the legislature at one time manifested a purpose to charge the various railroads of the state with county levies, that purpose was immediately abandoned and never again asserted.

The whole theory of our system of taxation is based upon the idea that it is prepared by the representatives of the people upon due deliberation and reflection, and when thus prepared for state purposes it may be safely applied to the counties and other local agencies of the commonwealth. And any rule of construction and doctrine which would give to these agencies a power of taxation under the constitution, independent of all legislative supervision and control, is in violation of the uniform policy of the state, and contrary to the true principles of the government. When, therefore, the constitution gives the supervisors authority "to fix the county levies," it only means they shall ascertain and fix the amount of such levies, and the amount thus ascertained is to be collected from such subjects of taxation as are prescribed by the legislature.

It has been argued, however, that under the present constitution taxation, whether imposed by the state, county or corporation bodies, shall be uniform; and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as prescribed by law. And in this respect the present constitution differs very materially

from that of 1851. And further, that the legislature has no power to exempt any property from county levy if it so desired. See § 1, art. 10 of the constitution. Let all this be conceded, and still it is not
 481 perceived in *what way it helps the County of Washington. If all property must be taxed as well by the county as by the state, it can be done only in the manner prescribed by law. As already stated, the constitution makes it the duty of the legislature to pass such laws as are necessary to carry its provisions, relating to taxation, into execution. The legislature has made no provision for imposing county levies upon the railroads of the state. So far from it, as has been seen, it has by inevitable implication exempted them from such levies.

If the commissioners of the revenue, or the assessors in the different counties, should make an assessment of the railroad track, or other property within their limits, such assessment would constitute no just basis of taxation. A part of a railroad running through one county may be of little value, but if taken in connection with the whole, it may be as valuable as any other part. As was said by the supreme court of Kentucky: "A railroad, from one end to the other, is an entirety. Fragmentary taxation or sales might be unjustly vexatious and injurious to the owners, prevent the destination of the road, and disturb the public use and interest. To avoid such evils and absurdities, the law treats a railroad and all its appurtenances as one entire thing, not legally subject to coercive severance or dislocation. In that consolidated character it must be taxed for state revenue, and cannot be a fit subject for local taxation by the separate counties through which it runs." *Applegate v. Ernst*, 3 Bush. R. 648.

And in *Gulph R. R. v. Moores*, 7 Kansas R. R. 210, it was said: "A railroad is an entire thing, and should be assessed as a whole. It would be almost as easy and reasonable to divide a house or a locomotive into portions and assess each portion separately as to divide a railroad into portions and assess each portion of it separately."

482 *The policy of Virginia has uniformly been in accordance with the views expressed in these cases. Prior to the war the assessment and taxation were based upon the dividends, or upon the receipts of the companies, ascertained by reference to the number of passengers or the amount of freight transported. Code of 1849, ch. 39, § 1 to 5; Code of 1860, p. 200. Since the war, as has been already seen, the tax has been upon the net earnings of the respective roads, paid quarterly into the treasury. The state has, therefore, never regarded any mere local assessment of a part of a railroad within a county as furnishing any reliable basis of taxation. At the very time the legislature was providing for the reassessment of lands throughout the commonwealth, in the year 1870, it required the railroads and canals to be assessed, not with reference to any valuation so made, but entirely upon dif-

ferent principles. These considerations plainly show that the assessment of lands made in the different counties by the assessors of the several townships, for purposes of state taxation and county levy, were never designed to include the property of the railroad and canal companies located in those counties. It would be most extraordinary indeed that the legislature should repudiate the whole system of local assessment and taxation as utterly unjust and impracticable when applied to railroads, and at the same time confer upon the supervisors of each county the power to apply that system to the same railroads in its most objectionable form, based upon crude and conjectural valuations by men without the necessary qualifications or means of information for such duties. It is impossible to foresee the mischiefs that would flow from such a policy, if every county from Norfolk to Bristol is to be invested with the power of assessing and taxing the railroad within its limits, and it is easy to see that this company, if
 483 not *taxed out of existence, would have to bear the most grievous burdens, far beyond its resources.

It is stated by counsel that the state tax on that portion of the road between Lynchburg and Bristol, is ten thousand dollars. It is conceded that if the other eight counties between those points impose a levy in proportion to that of Washington County, the amount will exceed fifteen thousand dollars, five thousand dollars more than the entire state tax.

One of the counsel of the appellant, upon a calculation made by him, estimates the county levies as three times the amount of the state tax. However all this may be, it is most obvious that the legislature, so far from making any provision for imposing the county levies upon the railroads of the state, has plainly evinced a purpose to prohibit the imposition of county levies in such cases.

And until the legislature makes the necessary provision for carrying the constitution into effect in this particular, neither the supervisors of the county nor the courts can furnish a remedy or supply the want of proper legislation. In this connection it may not be amiss to quote from the observations of a very eminent author upon what are termed self-executing provisions in a constitution. He says: "That although all the provisions of a constitution are to be regarded as mandatory, there are none which from the nature of the case are as incapable of compulsory enforcement as are directory provisions in general. The reason is, that while the purpose may be to establish rights, or to impose duties, they do not in and of themselves constitute a sufficient rule by means of which such right may be protected or such duty enforced. In such cases, before the constitutional provision can be made effectual, supplementary legislation must be had, and the provision is in its nature mandatory to the legislature to enact the needful legislation, though back of it there lies no authority to enforce the command."

484 *Sometimes the constitution, in terms,

requires the legislature to enact laws on a particular subject, and here it is obvious that the requirement has only a moral force. The legislature ought to obey it, but the right intended to be given is only assured when the legislation is voluntarily enacted. Illustrations may be found in constitutional provisions requiring the legislature to provide, by law, uniform and just rules for the assessment and collection of taxes. These must lie dormant until the legislation is had. They do not displace the law previously in force, though the purpose may be manifest to do away with it by the legislation required." Cooley's Constitutional Limitations, pp. 99, 100.

These observations of the learned author could hardly be more apposite if they had been made with direct reference to the provision of the constitution now under consideration. But in taking the view just now presented, it is by no means conceded that the constitutional provision requiring all property to be taxed according to its value, has any application to county levies. Under the constitution of 1851, taxation was required to be equal and uniform throughout the commonwealth, and all property was to be taxed according to its value. It was held by this court that these provisions did not apply to county levies, but solely to taxation for purposes of state revenue. So that while the state taxes were required to be equal and uniform, the county levies were not subject to any such condition. *Gilkeson v. The Frederick Justices*, 13 Gratt. 577. Under the present constitution the rule of uniformity and equality is applied to county taxation as well as to the state, but it does not therefore necessarily follow that the rule requiring all property to be taxed according to its value, is also to be applied to county taxation. Upon this point we do not desire to express any opinion. It is a very grave and important question, only to be decided upon

the fullest consideration. This case is readily disposed of upon other grounds already presented. I think that the supervisors of Washington County were not authorized to impose the county levies upon the property of the Virginia and Tennessee Railroad Company, not assessed with state taxes in that county. If the County of Washington and other counties of the state are improperly deprived of a source of revenue from property within their limits, it is for the legislature to apply the remedy. It is worthy of remark, however, that no such power has ever been asserted by any of the counties until the present claim was put forth by the County of Washington; nor, so far as our information extends, has there been any complaint of injustice done to the counties by the system of taxation adopted by the state with respect to her railroad companies. But without pursuing the topic further, I am of the opinion that the circuit court and county court of Washington County erred in refusing to exonerate the company from the payment of county levies and township taxes assessed against it by the County of Washington for the year 1870,

and for that error both of said judgments must be reversed and a judgment entered in conformity with the views herein expressed.

The judgment in each case is the same, except that the first only referred to county and township levies. The second was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid, and the argument of counsel, is of the opinion, for reasons stated in writing and filed with the record, that the county court and the circuit court of Washington County erred in refusing to exonerate the plaintiff in error, the Virginia and Tennessee Railroad Company, from the

county levy, township, school and road taxes for the year 1873. It is therefore considered by the court, that the said judgment of the said circuit court be reversed and annulled, and that the defendant in error pay to the plaintiff in error its cost by it expended in the prosecution of its writ of error and supersedeas here. And this court proceeding to render such judgment as the said circuit court ought to have rendered, it is further considered, that the judgment of the said county court be reversed and annulled, and that the defendant in error pay to the plaintiff in error its costs by it expended in the prosecution of its writ of error and supersedeas in the said circuit court. And it is further considered that the plaintiff in error be and it is hereby exonerated from the payment of the county levy and township, school and road taxes of the County of Washington for the year 1873, and recover of the county the costs of its motion in said county court. All of which is ordered to be certified to the said circuit court.

Judgment reversed.

487 *Snavely & als. v. Harkrader & als.

July Term, 1878, Wytheville.

In a suit by infants who have removed out of the state, by their next friend, against their Virginia guardian, they ask that their property may be transferred to their foreign guardian; and the court decrees that the amount ascertained to be due from the Virginia guardian to the several plaintiffs shall be paid to the foreign guardian, and that he may sue out execution upon the decree. Upon appeal, so much of the decree as directs the payment to the foreign guardian is reversed, and he is directed to proceed according to the statute to have the infants' estate removed, and when that is done the circuit court may decree that said several sums shall be paid over to him. Without any further proceeding, several executions are sued out in the name of the infants for the amounts due them respectively, the executions being made returnable in less than four weeks; and the Virginia guardian enjoins the executions—**Held:**

1. Executions—Conformity.*—Every execu-

*Executions—Conformity.—An execution should conform substantially to the judgment or decree which it is used to enforce. 4 Min. Inst. (2nd Ed.) 889.

tion should conform accurately to the judgment or decree which it is used to enforce; and as the decree directed the money to be paid to the foreign guardian, and authorized him to sue out execution, the executions were irregularly and unlawfully issued.

2. **Same.**—The court of appeals having reversed so much of the decree of the circuit court as directed the money to be paid to the foreign guardian, and authorized him to sue out execution, it was irregular and illegal to issue the executions until the circuit court had decreed the payment of the money.

3. **Same—Foreign Plaintiffs—Injunction.**

—Although under the statute, Code of 1873, ch. 183, § 40, the defendants in the executions might have moved the court or the judge in vacation to quash them, as this must be done upon notice to the plaintiffs, and could only be done by publication as to these foreign plaintiffs, under the circumstances the defendants were entitled to enjoin the executions.

488 *This is a sequel to the case of *Snaveley v. Harkrader & als.*, reported in 29 Gratt. 112. That case having been decided on the 25th of September, 1877, on the 10th of October, without any proceedings under the decree of this court, seven writs of fieri facias were issued from the clerk's office of the circuit court of Wythe county, one in the name of each of the six children of James H. Harkrader, deceased, for the amount reported to be due to him or her by Commissioner English, with interest, and the other in the name of all these children for the costs in that suit. These writs were dated the 10th of October, 1877, and were made returnable on the first Monday in December, which was the first day of the term of the circuit court of Wythe, and were to be levied on the property of Aaron Snaveley and his four sureties.

Upon the issue of these executions Snaveley and his sureties applied for, and obtained from the judge of said circuit court an injunction to restrain proceedings thereon until the further order of the court. In their bill they refer to the decree of the circuit court and the alteration made in that decree by the court of appeals. They say that this last decree does not direct that executions shall issue, but expressly provides that the foreign guardian must proceed by petition to obtain leave to remove his wards' estate, and then the court shall decree to be paid over to him the several amounts respectively due from the former guardian, Snaveley, as reported by the commissioner.

They refer also to the decree of the court of appeals as to the costs to be paid by the next friend of the plaintiffs in that suit, and which were to be ascertained by the report of a commissioner, which had not been done, but the execution had been issued for the whole amount of their costs, both in the

489 circuit court and the court of *appeals. And they say the plaintiffs in these executions all reside out of the state.

The defendants in the injunction, upon notice, moved the court at the term in December to dissolve the injunction; and the

court dissolved the injunction as to all the executions except that for the costs. And the plaintiff, Snaveley, stating that he wished to proceed in the proper quarter to petition for a supersedeas to this order, on his motion the execution of the same was suspended for sixty days, &c.

On the 5th of December, 1877, Henry E. Harkrader moved the circuit court by petition, after publication of notice, to order the moneys payable by Snaveley and the other defendants in the cause, under the decrees of the circuit court and court of appeals, and also under any further decree that may be made in said cause, to be paid by said defendants, or by the sheriff of Wythe county, to the petitioner as the Illinois guardian of said infant plaintiffs, &c. And on the 21st of December, 1877, the court made the decree accordingly, and referred the cause to Commissioner English, to take an account of the costs as directed by the court of appeals.

Upon the petition of Snaveley and his sureties, an appeal from the order dissolving the injunction was allowed by a judge of this court.

Crockett & Blair, for the appellants.

There was no counsel for the appellees.

BURKS, J., delivered the opinion of the court.

The court is of opinion, that the several writs of fieri facias, proceedings under which were enjoined by the judge of the circuit court of Wythe county, were irregularly and unlawfully issued.

490 *Every execution should conform accurately to the judgment or decree which it is used to enforce. There is a substantial reason for this requirement. Where the judgment or decree is satisfied by execution in the hands of an officer, the defendant is entitled, for his protection, to record evidence of the discharge. This evidence is not furnished by an execution, although duly returned satisfied by an officer, which does not correspond with the judgment or decree.

The decree of the said circuit court in the suit of *Harkrader & als. v. Snaveley & als.*, pronounced on the 21st day of December, 1876, confirmed the report of Commissioner English, which ascertained the several amounts due from the defendant, Snaveley, and his sureties (the present appellants), to the plaintiffs, respectively; but it did not order the defendants to pay those amounts to the several plaintiffs, or give the latter any recovery against the defendants. On the contrary, in express terms, it ordered payment to be made to H. E. Harkrader, attorney in fact of Robert C. Harkrader, and foreign guardian of the infant plaintiffs, and "conservator" (committee) of F. E. Harkrader.

It would seem clear that on this decree, as it originally stood, as to these several amounts, only one execution could have been issued, and that in the name and on behalf of H. E. Harkrader for the aggregate of the several sums ascertained by the commissioner's report. Indeed, the decree expressly provides that "the said H. E. Harkrader has

leave to sue out his fieri facias against the said defendants for the amounts decreed him." If there be any doubt as to whether only one execution could have been sued out for the aggregate of the sums fixed by the report, or separate executions for the several amounts, still, in either case, the execution

or executions must have been in the
491 name and on behalf of H. E. *Harkrader, to whom, and to none other, payment was ordered to be made.

On appeal, this decree was partially reversed by the decree of this court rendered on the 25th day of September, 1877. It was expressly reversed and annulled, so far as it directed the appellants (Snively and others) to pay over to the foreign guardian, H. E. Harkrader, the sums respectively found due to the appellees by the report of Commissioner English; and it was provided, that the said H. E. Harkrader, the foreign guardian, should have leave to file his petition in the said circuit court, after due advertisement as prescribed by the statutes, and upon such petition so filed, the said circuit court should decree to be paid over to him the several amounts respectively due from the former guardian, Snively, as already ascertained by said report of Commissioner English.

The decree of the circuit court gave costs jointly in favor of the plaintiffs against the defendants. As to these costs, the language of the decree aforesaid of this court is as follows: "And it is further decreed and ordered, that said circuit court shall, through one of its commissioners, ascertain what proportion of the costs were incurred in taking evidence in reference to the sale of said infants' real estate, and of the evidence certified from the state of Illinois as to the qualifications of said foreign guardian, and the costs of printing the same, and such costs so ascertained shall be, upon a final decree, decreed against the said H. E. Harkrader."

Now, under this decree, it is manifest that no execution could be properly sued out by any party without the further action of the circuit court. The infants, as already seen, could not rightfully sue out executions, because no money was decreed to be paid to them, and H. E. Harkrader, the foreign guardian, could sue out none, because the

decree, so far as it ordered payment to
492 be made to *him, was reversed and annulled, and a further decree by the circuit court was required before he could lawfully receive anything. And as to the costs, the decree of this court would seem to contemplate a postponement of payment until the enquiry directed by this court should be ordered and made.

The court is further of opinion, that although the appellants had their remedy by motion to quash the executions, which motion, under the statute (Code of 1873, ch. 183, § 40), might have been made, after reasonable notice, as well before the judge of the said circuit court in vacation as before said court in term; yet this remedy, under the circumstances of this case, was inadequate, and therefore the injunction was proper.

Every court has a perfect right to watch

over the execution of its judgments, and where its process has been irregularly or fraudulently used, to quash it, as being the best and speediest mode of doing justice. *Hendricks & Taylor v. Dundass*, 2 Wash. 50.

Of whatever form the writ of execution may be, it must conform to the judgment; and if it does not, it will be quashed on motion. *Herman on Executions*, § 403, pp. 619, 620, citing *Reese v. Burts*, 39 Geo. R. 565.

When the statute law authorized the issuing executions on decrees, it clothed the courts of chancery with the power of watching over such process and correcting any abuses arising under it, to the same extent and by the same means that courts of law use. *Carr, J., in Windrum v. Parker & als.*, 2 Leigh 361, 367. And in deciding upon all questions in respect to executions on decrees, the courts of chancery are bound to abide by the common law and statutes respecting executions at law. *Green, J., S. C.* 369.

The motion to quash, as provided by our Code, *ubi supra*, must be "after reasonable notice," and such notice, *what-
493 ever may be the grounds on which the motion is based, does not of itself suspend the execution of the writ. *Herman on Executions*, § 405, p. 621, citing cases from Alabama, Louisiana and Mississippi.

The executions in this case were issued on the 10th day of October, 1877, and were returnable on the 3d day of December following, which was the first day of the then next term of the circuit court of Wythe county. The bill of the appellants, charges that the Harkraders (the plaintiffs named in the executions), "are all non-residents." This allegation of the bill, on the motion to dissolve the injunction without answer, must be taken as true. Notice of the motion to quash could have been served only by publication thereof once a week for four successive weeks in a newspaper published in this state. Code of 1873, ch. 163, § 2. Before the motion, therefore, could have been regularly made, the apprehended mischief under the executions might have been accomplished; the property of the appellants might have been seized and sold under process irregular and illegal. It is no answer to this view to say that the indebtedness of the appellants was ascertained and fixed by the report of the commissioner which was confirmed by the decree, and that, therefore, the appellants could not be injured by executions compelling payment. Although the amounts due were definitely ascertained, there was no order in the decree, as modified by this court, for payment, and without such order, or what is equivalent thereto, there could be lawfully no execution to compel payment. An order to pay, or recovery in some form, is an essential prerequisite to an execution to compel payment.

In *Shackelford v. Apperson*, 6 Gratt. 451, it was held by this court, Judge Baldwin delivering the opinion, that the execution in that case having issued irregularly and unlawfully, it was competent for the court to quash it in term time, or for the judge in va-

494 cation to restrain proceedings *upon it by an injunction order. The remedy resorted to in that case was a bill with injunction. The court below, by its decree, had dissolved the injunction and dismissed the bill. The decree was reversed and the bill and injunction ordered to be reinstated.

At the date of that decision there was no statute authorizing a motion to quash an execution to be made before a judge in vacation, but if there had been such a statute, as there now is, the decision would doubtless have been the same, if it had appeared, as in this case, that notice of the motion could not have been given in time to make the remedy effectual.

In this case notice to the sheriff, as we have seen, would not of itself have suspended the execution of the writs in his hands, and hence the necessity of the injunction to restrain him.

The court is therefore of opinion, that the decree of the said circuit court, in so far as it adjudges and orders that the injunction theretofore awarded be dissolved as to all the executions in said decree mentioned, except the execution for costs, is erroneous, and should to that extent be reversed and annulled. The said circuit court should have wholly overruled the motion to dissolve said injunction as to all the executions mentioned in the decree. So much of said decree, therefore, as has been declared to be erroneous, must be reversed and annulled, and the residue thereof affirmed, the injunction, to the extent it was dissolved, be reinstated, and the cause remanded for further proceedings to final decree in conformity with this opinion.

The decree was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the decree aforesaid and the argument of counsel, is of 495 *the opinion, for reasons stated in writing and filed with the record, that the several writs of fieri facias in the said decree mentioned, proceedings whereon were restrained by the injunction order made by the judge of said circuit court, were irregularly and illegally issued. The court is further of the opinion that, although the appellants had a remedy by motion to quash the said executions, yet this remedy, under the circumstances of this case, was inadequate, and therefore they were entitled to file their bill, and to the injunction awarded thereon to enjoin, inhibit and restrain the appellees from all further proceedings on said executions.

The court is therefore of the opinion, that the said decree of the said circuit court, to the extent that it dissolves the said injunction, is erroneous. The said circuit court should have wholly overruled the motion to dissolve the said injunction, not only as to the execution for costs in said decree mentioned, but as to all the other executions therein mentioned; it is therefore decreed and ordered, that the said decree of the said circuit court, so far as the same is hereinbe-

fore declared to be erroneous, be reversed and annulled, and the residue thereof be affirmed; and that the appellees pay to the appellants their cost by them expended in the prosecution of the appeal aforesaid here. And the cause is remanded to the said circuit court, with directions to reinstate the said injunction so far as the same has been dissolved by the decree aforesaid, and for further proceedings in the cause to a final decree in conformity with the opinions and principles herein expressed and decreed; all of which is ordered to be certified to the said circuit court of Wythe.

Decree reversed.

496 *Preston v. Grayson County.

July Term, 1878, Wytheville.

1. **Bonds—Assignment without Notice—Payment.**—A bond which has been assigned by the obligee is paid to the obligee before it is due, without notice of the assignment. The payment is valid, and the assignee cannot recover upon the bond from the obligor.
2. **Parol Evidence.**—Parol evidence which is not inconsistent with a record to which it refers, is competent evidence.

This was a writ of error and supersedeas to a judgment rendered by the circuit court of Grayson County, upon an appeal from a decision of the board of supervisors of Grayson County, upon a claim against the county, presented to the said board of supervisors by James W. Preston. The board of supervisors rejected the claim, and upon appeal the circuit court affirmed the judgment. The facts of the case are very fully stated in the opinion of the court, delivered by Moncure, P.

Richardson, for the appellant.

Crockett & Blair and Hackler, for the appellee.

MONCURE, P., delivered the opinion of the court.

The claim in controversy in this case is a claim of the appellant, James W. Preston, under John M. Preston as assignee of a bond of the appellee, Grayson County, for the sum of twelve hundred dollars, dated on the 27th day of September, 1860, payable 497 on the 1st day of November, *1861, and given in pursuance of an order of the county court of said county, made on the 24th day of July, 1860; which said sum was a part of the sum subscribed by said county towards the construction of "The Wilson Creek and South Fork Turnpike Company," to which company, as obligee, the said bond was made payable. The main defence relied on in the court below was, that payment of the amount of the bond had been made by the obligor, the appellee, Grayson County, to the obligee, "The Wilson Creek and South Fork Turnpike Company"

aforesaid, without having received notice of the assignment of said bond either from the said assignee, John M. Preston, or from any other source.

The said defence was sustained by the judgment of the court below, and the question we now have to decide is, whether there be error in that judgment which requires its reversal, or whether it must not be affirmed.

The law involved in the case can admit of no controversy. It is too well settled, and has been too long established to require even the citation of authority to sustain it. That law is, that payment by an obligor to an obligee of the amount of a bond which has been assigned, the obligor having no notice of such assignment at the time of such payment, is a valid payment and discharge of the debt. This proposition of law was not, and could not be controverted in the argument.

The only controversy in the case, therefore, is one of fact, viz: Whether payment of the bond was in fact made by the obligor to the obligee; and if so, whether at the time of such payment the obligor had notice of the prior assignment of the bond to John M. Preston.

We think it clearly appears from the record that such payment was in fact made, and made without notice on the part of the obligor at the time of such payment that the bond had been assigned to John M. Preston.

498 *On the 7th day of April, 1875, the appellant presented his said claim for allowance to the board of supervisors of Grayson County, on consideration whereof the said board refused to allow said claim or any part thereof. From which decision of the board an appeal was taken by the appellant to the county court of said county. On the 23d of November, 1875, the judge of said court being so situated as to render it improper, in his opinion, for him to preside at the trial of said appeal, on motion of the appellant it was ordered that the cause be removed to the circuit court of Grayson County for trial, and the clerk of the county court was ordered to certify the same to the clerk of the circuit court, together with the papers in the cause. On the 7th of July, 1876, on the motion of the defendant, the appellee, Grayson County, it was ordered by the said circuit court that the issues in the cause be: First. Whether or not the bond has been paid by the defendant to the plaintiff or to any one under whom he claims. Second. Whether or not the plaintiff's right to recover the money mentioned in the bond has been barred by a former judgment. Third. Whether the said bond is the bond of the defendant. On the 2d of July, 1877, the parties by their attorneys, by consent, submitted all matters of law and fact to the judgment of the said circuit court, which, having fully heard the evidence and argument of counsel, took time to consider thereof. And on the 6th day of July, 1877, came again the parties by their attorneys, and the court having maturely considered the transcript of the record, the testimony of wit-

nesses and the argument of counsel, was of opinion that there was no error in the judgment and decision of the supervisors aforesaid, and affirmed the same with costs to the appellee. From that judgment of the said circuit court the appeal to this court, now under consideration, was obtained.

Upon the trial of the cause in the **499** said circuit court, two *bills of exceptions were taken by the appellant to opinions of the court given against him. On these two bills the only questions presented for our decision by the record arise. All the evidence introduced on the trial on either side is set out in these two bills, and the question arising on the second of them, is whether, according to the said evidence, regarding it all to be admissible, there is any error in the judgment. The question arising on the first is as to the admissibility of certain of the evidence. We will consider, in the first instance, the question arising on the second of these bills, to-wit: Whether, upon the whole evidence, regarding it all as admissible, there is any error in the judgment. In other words, whether, upon the whole evidence, so regarded, the said bond was paid by the appellee and obligor, Grayson County, to the obligee, The Wilson Creek and South Fork Turnpike Company, without notice of the prior assignment of the bond to John M. Preston, the circuit court having given judgment for the defendant on the issue joined on the plea of payment, though deciding for the plaintiff on the two other issues aforesaid.

Regarding all the evidence as admissible, we cannot see how there can be any doubt upon the question. The evidence shows conclusively that on the 24th day of July, 1860, an order was made by Grayson County court for the execution of the bond in question, which was accordingly thereafter executed. On the day after that order was made, to-wit: on the 25th day of July, 1860, there was a levy made by Grayson County court for twelve hundred dollars, for Wilson Creek and South Fork turnpike road, which was intended to be in payment of the bond for the sum directed by the said order made on the previous day, to be executed as aforesaid. The evidence shows why the levy was made on that day instead of being postponed for a year, as some of the justices seem to have preferred. It was competent for

500 *the county, of course, to anticipate the time of payment if the levy should be ready for payment before the bond should become payable. In that case the matter could be adjusted by a discount of interest. The money may have been due by the county when the bond was executed, and the time given on the bond may have been matter of accommodation to the county, as it doubtless was. But whether so or not, the county had a right to anticipate the day of payment of the bond. By making the levy a year later than it was made, the money might not be ready in time. The bond was executed on the 27th of September, 1860, and was passed by the obligee to John M. Preston on the second of October, 1860.

It is not pretended that John M. Preston ever gave any notice to the county of the assignment of the bond to him, as he certainly ought to have done if he desired to make the county liable to him. He knew very well that the mode of payment of the debt by the county would be by levy, and that without such notice the levy would be in favor of the obligee, and that payment of the money would necessarily be made by the sheriff of the county to the obligee unless notice of the assignment should be previously given to the sheriff. The assignee was therefore egregiously in fault in not having given such notice if he desired to hold the county liable to him. In fact he seems to have credited entirely the turnpike company aforesaid. He was deeply interested in that work and had contributed to its execution, and was willing further to contribute thereto by advancing the amount of this bond to the company, and holding the bond only as collateral security of a promise made him by the company, and assigned to him in its stead state bonds which it expected to receive. Therefore, at the time this bond was passed to him by the company an assignment was given to him in these words:

501

*“October 2, 1860.

“I have this day passed to John M. Preston a bond on the County of Grayson for twelve hundred dollars, in payment of a debt due to said Preston for money loaned to The Wilson Creek and South Fork turnpike road; the bond on Grayson County is due the 1st day of November, 1861. And I hereby agree and promise to lift said bond as soon as I receive some state bonds on the state of Virginia.

“(Signed) W. C. Parks, President.”

At the same time said Preston executed a receipt for the bond in these words:

“October 2, 1860.

“I have this day received from Colonel W. C. Parks, president of The Wilson Creek and South Fork Turnpike Company, a bond on the County of Grayson for \$1,200, due the 1st day of November, 1861, which I am to hold until said Parks, president, &c., receives some bonds from the state of Virginia to enable him to pay to me a debt due for money loaned said company, agreeable to a written agreement.

“(Signed) John M. Preston.”

It was upon this latter promise that Mr. Preston no doubt mainly relied, and not on the idea of getting the money from the county. Had he purchased a bond of the county and looked to it for payment, he would doubtless have forthwith notified the county of the assignment. But he confidently looked to the company to get the state bonds and pass a sufficient amount of them to him to cover the amount of the county bond. But he was disappointed in that expectation. No bonds seem to have been obtained from the state, no doubt because of the trouble in which the state soon thereafter was involved. At

all events, there is no proof of any notice to the county of assignment of its bond to Preston. And *on the 14th of January, 1861, the sheriff of the county, or his deputy, being ready to pay the levy, accordingly paid it to the said company, taking from its treasurer a receipt in these words:

“Received of William R. Baker, D. S., twelve hundred and twelve dollars, payment in full on the claim allowed by the county court to The Wilson Creek and South Fork Turnpike Company for the year 1860.

“(Signed) W. G. Young,
“Treasurer of the W. C. & S. F. T. P. Co.
“January the 14th, 1861.”

The record shows no trace of any claim against the county on account of the said assignment to Preston from the date thereof, to-wit: October 2, 1860, until July 2, 1869, nearly nine years, when the appellant presented the said bond to the county court of said county, and moved said court to make a levy for the same, with interest in his favor, which motion the said court overruled and refused to lay the said levy. To which opinion and judgment of the court the appellant excepted. And in the bill of exceptions it is expressly stated that “it appears to the court, that on the 25th day of July, 1860, a levy was made by the court for \$1,200, for the road mentioned in the bond, and which amount went into the hands of the sheriff of Grayson County, and which amount, the court is of opinion, was to pay said bond.” Notwithstanding the said bill of exceptions, no appeal appears to have been taken from the said judgment of the county court in July, 1869, and no further demand appears to have been made by the appellant against the said county on account of said bond until the 7th day of April, 1875, nearly six years after said judgment, and more than fourteen years after said assignment, when the *claim was presented to the board of supervisors as before stated.

We deem it unnecessary to set out the evidence in this case to show that the fact is as before stated in regard to the payment of the bond to the obligee without notice of the assignment. Such is the plain meaning of the evidence, construed in the ordinary way. But construed as it must be in an appellate court revising a judgment of an inferior court, on evidence which is certified in a bill of exceptions to the judgment, there can be no room for question.

We are therefore of opinion that the circuit court did not err in giving judgment for the defendant on the plea of payment. We do not admit that judgment ought not to have been given for the defendant on the plea of “former judgment;” but it is unnecessary to decide that question in this case.

The only remaining question is, whether the court below erred in not excluding the answer of G. W. Cornett as evidence in the case, as stated in the first bill of exceptions. It seems to be only necessary to state the case as presented by the record to show that there is no error in the judgment in

this respect. The witness, Cornett, stated that in 1860 he was commonwealth's attorney for Grayson County; that as such he was present in that year when the county levy was laid by the county court, on the 25th July, and also on the day before, when the order was made for the issue of the bond in controversy; that a majority of the justices were present on both days, but that most of them were assembled to lay the levy in an upstairs room, whilst the residue were sitting in court, and that the full court was only present in the court-room when the levy had been agreed on and was reported and finally voted; that whilst the consultation in the up-stairs room was in progress, witness was called in to advise the said justices, and did so, and then said Cornett was

504 asked *the following question: "Will you state what the levy of \$1,200 to The Wilson Creek and South Fork turnpike road laid by the county court of Grayson, on the 25th July, 1860, was made to pay; and if you know for what, please state your means of knowledge?" To which question the witness answered that he knew said levy had been laid to pay off the bond which the order of the day before had authorized to be issued, and that he knew this because one of the points of discussion in the consultation aforesaid had been whether a levy to pay said bond should be made in the year 1860, or be deferred till the year 1861, and that as to this point mainly, he had been called upon for his advice; that there were two parties, some for an immediate levy and some for deferring it, &c.; that he had advised an immediate levy, because the other expenditures to be levied for that year were less than they had been, and since the levy had to be made—since it was understood that no further call on the county would be made by the company—it was better to make it and be done; which advice prevailed. Whereupon the plaintiff excepted to said answer as an attempt to vary the effect of the record by inconsistent parol testimony, and moved the court to disregard said answer, but the court overruled said exception and received said answer as proper evidence; to which opinion and action of the court the plaintiff excepted.

We can see nothing in this answer which is at all inconsistent with the record, or which can properly be considered as an attempt to vary the effect of the same. Upon the whole we are of opinion that there is no error in the judgment, at least to the prejudice of the appellant, and that the said judgment ought to be affirmed.

Judgment affirmed.

505 *Moore & als. v. Sexton's Ex'x.

July Term, 1878, Wytheville.

Absent, MONCURE, P.

1. Deeds—Frauds of Previous Grantors.—

Upon the facts of this case—HELD: That no fraud or knowledge of fraud in a previous grantor of the land is brought home to the grantor in a deed of trust to secure a debt, or to the creditor.

2. Same—Same.—If B, a judgment debtor, purchases land and procures it to be conveyed to J as the purchaser, and J conveys it in trust to secure a *bona fide* debt, the creditor not being informed that it had been so purchased by B and conveyed to J, the judgment creditor has no lien upon the land for his debt as against the creditor under the deed of trust.

In May, 1872, the executrix of John Sexton instituted a suit in equity in the county court of Wythe county against Benjamin Beville, James A. Beville, Jane E. Moore and William T. Beville, in his own right and as trustee for Susan Beville and others. In her bill she set out a judgment which had been recovered in March, 1861, by the Farmers' Bank of Virginia against G. G. Thompson as maker, Benjamin Beville as first, and said John Sexton as second endorser; that an execution was issued on this judgment which was never returned; that in February, 1871, said judgment was revived against her as executrix of said John Sexton; and that in a creditor's suit in the same court a decree had been made for the sale of real estate of said Sexton for the payment of said debt.

506 The bill further states that in September, 1860, Benjamin *Beville made a deed by which he conveyed to his son-in-law, A. A. Moore, several lots of land in and near Wytheville, which she set out, and all his personal estate; that he caused a lot that he had purchased at the sale of T. J. Boyd's property by the commissioner, R. C. Kent, to be conveyed by said commissioner to James A. Beville, by deed of September 15th, 1863; and another lot purchased at the same sale to his son, William T. Beville.

And the bill further sets out several conveyances by Moore to the children of Benjamin Beville, and charges that all of said deeds were fraudulent and without valuable consideration; and Beville is stated to be a bankrupt, Thompson insolvent, and A. A. Moore to be dead. The prayer of the bill was that said deeds might be set aside as having been made with intent to hinder, delay and defraud the creditors of Benjamin Beville; that the said estate might be sold and the proceeds applied to the payment of the plaintiff's debt, and for general relief.

Benjamin Beville, James A. Beville and Mrs. Moore filed their answers denying the fraud, and Mrs. Moore denying all knowledge of such fraud, if there was fraud. David Sexton also filed his bill against the same parties, claiming that he had a lien of a judgment rendered and docketed in March, 1860, against Benjamin Beville, for \$350, with interest and cost, subject to a credit of \$300. It is only necessary to refer to one of the said deeds, viz: that from Kent, commissioner, to James A. Beville, of the 15th of September, 1863. It appears that this lot was unimproved at the time of this conveyance, and that Mrs. Moore having received the amount of an insurance on the life of her husband, which he had taken out for her benefit, she, in April, 1869, lent to James A. Beville \$1,000, to secure which he, by deed bearing date the 20th of

507 April, 1869, conveyed the lot *to a trustee to secure the debt. She also lent him \$800 on the security of his livery stock, which had been paid.

When the cause came on to be heard the county court held the deeds to be fraudulent, and decreed a sale of the property, but the sale of the lot on which Mrs. Moore held the deed for the security of her debt was postponed for the time. In a subsequent decree it was directed to be sold, and she obtained an injunction to the sale on the ground that she was not aware that the decree for the sale had been made.

The cause came on to be heard on the 30th day of March, 1877, when the court held that Jane E. Moore had knowledge of the fraud in the conveyance made to James A. Beville of the lot conveyed by him and wife to secure her at the time of the deed executed for her security, and the order suspending the decree for the sale of the lot was set aside, and the injunction was dissolved, and the commissioner was directed to proceed to sell the lot, and thereupon Mrs. Moore and the Bevilles obtained an appeal. The facts as viewed by the court are set out in the opinion of Judge Anderson.

Holbrook and English, for the appellants.

Kent, Pierce and Bolling, for the appellees.

ANDERSON, J., delivered the opinion of the court.

The court is of opinion that there is nothing in the record to show that the debt of James A. Beville to Mrs. Jane E. Moore, as evidence by his note, and secured by deed of trust on his house and lot, is not genuine and bona fide, and for the consideration appearing on the face of said papers. The proof is that Mrs. Moore after the death of her husband, which occurred in the fall or winter of 1877, received \$5,000 in **508** money, in payment of *his life policy, and that she loaned \$1,000 of it to her brother, the said James A. Beville, for which he executed to her the said note and deed of trust. She at another time loaned him \$800 or \$850, which was secured upon horses and other personal property, which they call "livery stock." That deed is absolute on its face, but was evidently intended only as security. She admits this debt was paid. And the bond for \$800, with credits endorsed upon it, showing its entire satisfaction, is exhibited by James A. Beville with his deposition.

It is alleged by the creditors of Benjamin Beville, father of said James A., that the said lot was purchased and paid for by the said Benjamin, who caused the same to be conveyed to his said son in fraud of his creditors, and that Mrs. Moore had notice of it when she loaned the money on said security, and thereby became a participant in the fraud. It is a well established principle, that fraud must be proved, and cannot be presumed. Both James A. Beville and Mrs. Moore deny the allegation of fraud, and the latter denies that she had any knowledge of it,

if there was fraud in the procurement of the title to the lot by the grantor. James A. Beville testifies that he never informed her or any one that the lot was acquired by him from his father. And Mrs. Moore, in answer to the question, if she ever had any intimation or knowledge of any kind that her father had advanced or paid the purchase money on this house of James A. Beville's at the time of or prior to her loan of \$1,000 to James A. Beville, swears that she never had. Her language is, "none in the world." And she declares, in answer to another question, that she loaned the money upon the faith of James Beville's deed to the land. There is proof positive that Benjamin Beville was indebted to his son, and that Colonel Boyd was indebted to him, and that he told his son Colonel Boyd wished to sell him a lot, and proposed to him that if **509** he *would take it in payment of what he owed him, that they would make the trade; which his son agreed to. And the next day they went to see Boyd, and met him near where his (witness) house is. They walked up to where Susan Bumgardner now lives, and Colonel Boyd gave him the option to take that lot or the one he now owns. He told him he would take the latter, and his father directed Colonel Boyd to have the deed made to him. Colonel Boyd does not remember the particulars, though he says they might have occurred as stated, and what he does remember is consistent with the foregoing statement. The foregoing is proved by James A. Beville, who does not appear to have any pecuniary interest in the question. He files with his deposition his account against his father, being for money loaned and work done; and swears to the correctness of it. Although he was under age, he had entered the army of the Confederacy, and having been wounded in the service in 1862, was at home for about eight months, when he made a large portion of the amount of his account by dealing in liquor. A portion of the money was made before he entered the army—his father giving him his time—and which, together with money he sent home to him from the army, and the money he had made by dealing in liquor, which he loaned his father, constitutes his account, of all which he says he kept memoranda in his memorandum book, from which the account exhibited was copied, and which book he exhibited when asked to do so by the adverse counsel. There is no evidence in the record contradicting the testimony of this witness, or to impeach his credit; nor is there any direct testimony to prove that Mrs. Moore had any knowledge or intimation of fraud, if there was fraud, in the transaction between Benjamin Beville and her grantor at the time she made him the loan and took the deed of trust as security, or prior thereto.

510 *But the plaintiffs in the original suit and defendants to Mrs. Moore's bill of injunction, rely on circumstances to establish the alleged fraud in this transaction, and Mrs. Moore's knowledge of it. They charged that Benjamin Beville was largely indebted, and had previously executed a

deed, to-wit: on the 28th of September, 1860, conveying to his son-in-law, A. A. Moore, all his property, real and personal, with the fraudulent intent of hindering and delaying his creditors in the recovery of their debts; and thence infer that he caused the deed to be made to his son with the same fraudulent intent. And Mrs. Moore having admitted that she had been informed by her father that said deed of September, 1860, had been made with such intent, they contend that it is thence inferable that she was aware that he caused the deed for the lot in question, of the 15th of September, 1863, to be made to his son James, with the same fraudulent intent, although she denies having had any such knowledge.

But the latter transaction seems to be distinct from and to have had no connection with the former, and to have occurred about three years thereafter. And the deed to secure her loan was made nearly nine years thereafter, six years after the deed conveying the lot to James A. Beville was made and recorded. And the adverse parties had acquiesced in his possession and ownership during that whole period without setting up any claim upon it to satisfy their debts, and for several years afterwards. But she testifies that she never had an intimation or knowledge of any kind that her father had advanced or paid the purchase money on this house and lot of James A. Beville. Again, she swears that she never heard from any one that her father paid the money for this house and lot and had the deed made to James. She also says she does not know when the lot in question was sold to James.

511 But if she had no knowledge *that her father had paid the purchase money for the lot and had the deed made to James, how can she be charged with notice of fraud in the conveyance of the title to James? We will attempt no further analysis of her testimony, but will only remark that, when fairly construed, we think there is no part of it inconsistent or in conflict with the citations we have made from it; and she manifests in no part of it a disposition to withhold anything she knows, but the whole is characterized with perfect frankness, when her answers are prejudicial to her interest as well as when they are in her favor. And the court is of opinion that the plaintiffs in the original bills and the defendants in the injunction bill, have wholly failed to invalidate the deed of trust executed by James A. Beville and wife on the house and lot in question, to secure the loan of \$1,000 from Mrs. Moore.

But the defendant, David Sexton, claims to be substituted to the rights and remedies of the Southwestern Bank, which, he alleges, has a judgment lien upon the said lot, which is prior to the lien of the plaintiff. It is the judgment of said bank against Benjamin Beville, who, he contends, had an equitable title to the lot in question. Commissioner English, in his report, says it seems to have been rendered and docketed in August, 1861—more than two years prior to the date of the deed from Robert C. Kent, commis-

sioner, to James A. Beville, and about eight years prior to the conveyance of the same lot, with the improvements he had put upon it, in trust, to secure the loan he had made from his sister, Mrs. Moore. We have seen that if said lot was purchased by Benjamin Beville, and paid for out of his own means, and that he caused the deed for it to be made to his son James, in fraud of his creditors, that Mrs. Moore had no knowledge of it when she lent her money to the said James, on the faith of said lot as a security, and he 512 conveyed *it in trust to secure her; and consequently that her deed was valid and unaffected by the fraud between Benjamin and James A. Beville, if any such existed. If the account given by James A. Beville of that transaction is true, and his father, Benjamin Beville, was indebted to him, and an agreement was made between them that if he would agree to take a lot from Colonel Boyd in satisfaction of what he owed him, he would purchase it from Colonel Boyd for him, and pay Boyd the price of the lot out of a debt Boyd was owing him, and that in pursuance of that agreement the lot was purchased from Boyd and conveyed to him, the said James, the said Benjamin did not thereby acquire any equitable title or interest in said lot which could subject it to the lien of the said judgment of the Southwestern Bank. But if this were not so—if the said Benjamin Beville had purchased the said lot and paid for it out of his own means, and had it conveyed to his said son in fraud of his creditors, of which the proof in the record is by no means full and satisfactory, we have seen that Mrs. Moore, being a purchaser of the legal title thereof six years afterwards, for value, without notice of the fraud, if there was fraud, or of any equity in Benjamin Beville, is unaffected by the fraud, and her title is good against any equity of Benjamin Beville—is it good against the equity of the creditor of Benjamin Beville by virtue of his judgment lien?

If the said Benjamin Beville ever held any interest in said lot there is nothing upon record to show it. There is a clear title conveyed by R. C. Kent, commissioner of the court, to James A. Beville for the lot in question. The said deed passes Col. Boyd's title directly to him, and it is made to him in pursuance of a decree of the county court of Wythe county of the 15th of September, 1863, to which David Sexton was a party, and which recites that it was thereto- 513 fore purchased by David F. *Boyd under a prior decree in said cause ordering the sale of Thomas J. Boyd's lands for the sum of seven hundred and fifty dollars, which has been paid to said Kent as receiver; and the deed proceeds, "therefore, in consideration of the premises aforesaid, and of a transfer from said David F. Boyd to said James A. Beville, the said Robert C. Kent, commissioner as aforesaid, doth hereby grant, with special warranty, unto the said James A. Beville and his heirs and assigns, a lot or parcel of land," therein described, which is the lot in question. And

the deed goes on further to state as follows:

"The above-named lot, purchased and paid for as aforesaid by said David F. Boyd, has been sold by him, by Thomas J. Boyd, his attorney-in-fact, in pursuance of a power of attorney executed by said David F. Boyd, and filed with the papers of said cause, for a valuable consideration, to the said James A. Beville, which consideration has been paid by said Beville to Thomas J. Boyd as attorney-in-fact of the said David F. Boyd," the receipt whereof is acknowledged. "Therefore the said Robert C. Kent, commissioner as aforesaid, is hereby authorized and directed to convey the said lot of land to the said James A. Beville in the stead of the said David F. Boyd." This deed was put upon record and was notice to the world, and instead of giving notice that Benjamin Beville was an intermediate purchaser, absolutely excludes the idea, because it represents that the sale was made by the commissioner to David F. Boyd, and by him, by his attorney, directly to James A. Beville, and the payment of the purchase money by said James A. Beville to the said attorney of David F. Boyd, and that the commissioner was authorized by him to make the conveyance directly to the said James A. Beville, and the name of the said Benjamin Beville is nowhere alluded to in the said deed. If it

were true that Benjamin Beville had a secret equitable interest in the said lot, which is contradicted by the recitals of the deed, could the creditor's judgment lien attach to that so as to over-reach the legal title of the purchaser from James A. Beville for value and without notice? The docketing of the judgment is required to give notice to subsequent purchasers. But the docketing of a judgment against Benjamin Beville could give no notice of a lien of the judgment upon the land of James A. Beville, the holder of the legal title, by virtue of a secret equitable title which Benjamin Beville once had to the land, of which the bona fide purchaser for value from James A. Beville of the legal title, had no notice.

The deed of trust from James A. Beville to R. C. Kent for the benefit of David Sexton, was made subsequent to the deed of trust given to secure the debt to Mrs. Moore, and any admissions made by him in that deed could not be binding on Mrs. Moore.

Upon the whole, the court is of opinion that there is error in the decrees of the circuit court so far as they invalidate said deed of 29th of April, 1869, or subject said lot to the lien of any judgment or judgments against Benjamin Beville as against the said security of Jane E. Moore, or give priority to the subsequent deed of trust executed by James A. Beville for the benefit of David Sexton, or which require the sale of said lot for any purpose inconsistent with priority of right in the said Jane E. Moore, and to this extent said decrees must be reversed with costs, and in all other respects the court is of opinion to affirm them.

BURKS, J., dissented

Decree reversed.

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*Price v. Thrash.

July Term, 1878, Wytheville.

I. Bill by T, a judgment creditor of P, against P and his alienees, to subject to the satisfaction of his judgment the land still held by P, and the lands in the hands of the alienees, charges that the deeds to these alienees were fraudulent and without consideration. The bill is taken for confessed as to all the parties but P, who answers denying the fraud, and saying they were on valuable consideration. The court below holds the deeds to have been fraudulent, and decrees a sale of the land, and P alone appeals—HELD:

1. **Deed—Fraud—Decree—Appeal—Right of Grantor to Question Fraud.**—The alienees are the parties interested in this question, and they not having appealed, P cannot question the fraud in this court.

2. **Same—Same—Judgment Creditors—Equity Jurisdiction.**—It is not necessary, since the revision of the law in 1849, that a judgment creditor shall exhaust his remedies at law before going into equity to subject the land of his debtor or his fraudulent alienees to satisfy his judgment. Code of 1873, ch. 182, §§ 6, 9.

3. **Same—Same—Same—Same.**—The remedy in equity against the real estate is not dependent upon inadequacy of the legal remedy to satisfy the judgment out of the personal estate, or the insufficiency of such estate for that purpose, but it may always be resorted to whether there be or not personal estate of the debtor sufficient to satisfy the judgment.

II. In this case P says he was the surety of W in the bond on which plaintiff's judgment was founded, and that W had conveyed to J a large tract of land, among other things, to secure P in his suretyships for him, and this trust fund was ample to satisfy the debt; and he insists that the plaintiff shall make J a party, and subject this trust fund before his land is subjected to the payment of the debt. But it appearing that W is a bankrupt and that the plaintiff had no judgment against him, and this debt not being mentioned in the deed, and P not proving that he was a surety of W in the debt, the plaintiff was not bound to proceed against that trust fund.

III. **Parties—Purchasers Pendente Lite.**—After the bill was filed one of the alienees of P conveys a part of the land conveyed to him by P in trust to secure a debt. This was a conveyance

***Enforcement of Judgment Liens—Equity Jurisdiction.**—Under Va. Code 1887, sec. 3571, it is not necessary that there should be any other ground for jurisdiction in order to enforce a judgment lien in equity. See *Hutcheson v. Grubbs*, 80 Va. 257; *Gordon v. Rixey*, 76 Va. 704.

Remedy against Real Estate.—The doctrine set forth in the third headnote is sustained in *Stovall v. Bank*, 78 Va. 191.

Parties—Purchasers Pendente Lite.—The principal case, as to its holding that the purchasers *pendente lite* were not necessary parties, is expressly affirmed in *McGee v. Johnson*, 85 Va. 161. See also *Williamson v. Jones*, 39 W. Va. 234; *Arnold v. Casner*, 22 W. Va. 454.

Interlocutory Decree—Appeal.—The rule laid down in the fourth headnote is affirmed in *Mining Co. v. Chase*, 95 Va. 56.

pendente lite, and it is not necessary that the plaintiff should amend his bill and make the trustee and creditor parties, in order to dispose of the subject.

IV. Judicial Sales—Interlocutory Decrees

—Amendments—Costs.—There being no averment in the bill or admission or proof that the rents and profits of the land retained by P will not pay the debt in five years, it was error to decree a sale of the land before having this enquiry made. But the decree appealed from being interlocutory, this court will amend the decree in this respect, and as amended affirm it, with costs to the appellee.

In January, 1874, Valentine Thrash brought his suit in equity in the circuit court of Roanoke county, to enforce the lien of a judgment which he had recovered at the November term, 1873, of that court, against Tazewell Price. The judgment was founded on a bond executed to Thrash by Warfield Price and Tazewell Price on the 13th of September, 1862, for \$3,000, payable on demand, and it being a Confederate debt, it was scaled by the court, and Warfield Price having been declared a bankrupt, judgment was rendered against Tazewell Price for \$1,200, with interest from the 10th of April, 1865, and \$8.72.

The bill, after setting out the judgment and bond, states that Tazewell Price was the owner of an undivided moiety of three thousand four hundred and sixty acres of land lying in the counties of Roanoke, Franklin and Floyd, purchased by him and his brother Warfield Price, and conveyed to them jointly by deed bearing date the 18th of May, 1863; that on the 22d of February, 1869, Tazewell Price and wife, for the pretended sum of \$1,800, conveyed to Charles H. Hancock, the brother of Mrs. Price, four hundred and twenty acres of this land; that on the 24th of February, 1869, Tazewell Price conveyed

517 *to Christopher Hancock, in trust for the sole and separate use of his wife Elizabeth, another portion of the said moiety of land containing six hundred acres, the pretended consideration of which deed was that Tazewell Price had received the sum of \$2,280, which was due to said Elizabeth in her own right from the estate of her father, Benjamin Hancock. These two deeds were recorded on the same day, viz: the 21st of June, 1869. And said Tazewell Price and wife, by deed bearing date the 6th of February, 1873, conveyed to their son-in-law, N. Hockman, and his wife Harriet, and to their son, Charles W. Price, all their interest in four hundred acres of the same land. The pretended consideration for this deed was one dollar. Said Price has thus conveyed away about fourteen hundred acres of his moiety in the tract of three thousand four hundred and sixty acres, leaving only three hundred acres of mountainous land of little value, wholly insufficient to pay the plaintiff's judgment.

He charges that there was no consideration for the deed to Charles R. Hancock, but it was conveyed to him to be held in secret trust for the benefit of said Price and his wife and their children; and said Hancock had never taken possession of the land, but it has been used and enjoyed by said Price in the same

manner he did before the conveyance. He charges further that the wife of Tazewell Price had no separate estate derived from her father; and the pretended agreement that in consideration of \$2,280 received by said Tazewell from the estate of the father of his wife he was to settle upon her lands to that amount, was a mere subterfuge to defraud his creditors; that by the will of Benjamin Hancock, the father of Mrs. Price, which he exhibits, Tazewell Price and his wife were expressly excluded from all interest in his lands, and she derived from the personal estate of her father in August, 1862, as

518 her share, \$1,880, which *was paid in Confederate currency. This sum was received by Tazewell Price, and it belonged to him; and he also received as a legatee in said will \$400 left to him by the testator; and this is added to the first-mentioned sum of \$1,880, to make up the sum of \$2,280 stated as the consideration of the deed.

He further insists that if Mrs. Price had been entitled in her own right to the said sum of \$1,880, and she and her husband had the right to make such an agreement as is specified in said deed, the land conveyed, including as it does the mansion-house and other improvements, was worth four or five times as much as \$1,880 of Confederate money in August, 1862. The deed to Hockman and wife and their son, Charles W. Price, was voluntary, without consideration, and therefore void as to creditors. And making Tazewell Price and Elizabeth his wife, and the grantees in the several deeds mentioned, parties defendants, he called upon them to answer all the allegations of the bill as fully, &c., and he prayed that the deeds might be set aside as to his judgment, and the lands, or so much as might be necessary, sold for the payment of his judgment and the costs of this suit, and for general relief.

The bill was taken for confessed as to all the defendants except Tazewell Price. He demurred, pleaded and answered. In his plea he avers that the debt represented by plaintiff's judgment is the joint property of the plaintiff and Joseph M. Terry; and that by deed bearing date the 24th of January, 1874, the defendants, Hockman and wife, conveyed one hundred acres of land conveyed to them and Charles W. Price, to Lewis Huff, trustee, in trust to secure a debt to W. D. F. Duvall, and prays whether he shall make any further answer to the bill until it is amended and the said Terry, Huff and Duvall are parties thereto.

Price in his answer admits the judgment, but says that *he was the surety of Warfield Price, the principal debtor. He says that the plaintiff, since this suit was commenced, is pursuing his remedy at law, suing out execution under which the sheriff has levied on and seized a portion of respondent's personal effects, and applied the proceeds in partial satisfaction of the judgment, and that plaintiff has sued out processes of garnishment against three alleged debtors of respondent, at the present time in this court on its law side. And he submits whether plaintiff shall be permitted to harass him by pros-

ecuting his remedy in the two tribunals of law and equity at the same time for the same debt.

He says Warfield Price and himself purchased the tract of three thousand four hundred and sixty acres of land; that they afterwards divided the same, not finally, but so as to give respondent the eastern portion and said Warfield the western portion, leaving the dividing line unfixed; that Warfield Price executed a deed by which he conveyed to Joseph M. Terry his portion of the land, in trust, to secure respondent the sum of \$708.07, due by bond, and also to indemnify respondent as his surety on debts due from him, meaning to include the debt of the plaintiff; that this deed enures to the benefit of the plaintiff, and that he is bound to exhaust this security before he can subject the lands of the respondent, especially as said Joseph M. Terry, as respondent has been informed and charges, has become interested in said judgment to the extent of half ownership thereof. And he avers that said deed of trust, which he makes an exhibit with his bill, affords ample means of paying the whole debt.

As to the deeds referred to in the bill, he says that to Charles R. Hancock was not without valuable consideration, nor was it designed to hinder, delay and defraud respondent's creditors, but was on the consideration of \$1,800, which was paid respondent in 520 the presence of *witnesses. As to the deed of Christopher H. Hancock, in trust for respondent's wife, he also denies it was intended to hinder or defraud his creditors. That whatever might be his right to the money coming from her father's estate, at law, he was advised that a court of equity would regard it as substantially and justly the property of the daughter, his wife, according to the expressed wish of her father; and accordingly respondent, having been informed that in equity a wife is entitled to a settlement out of her property or out of the property she brings her husband, &c., he says the said conveyance was not voluntary, and certainly not made to hinder or defraud his creditors. He admits that the deed to Hockman and wife and Charles Price was voluntary, and a pure gift to his children, but he denies that it was intended to hinder or defraud his creditors. He says he is individually free from debt, all his individual debts not amounting to more than \$300; that he is bound as surety for the plaintiff's debt, but that he had always looked upon the deed of trust upon the land of Warfield Price as completely securing that debt, and he insists it is still ample to secure it. And independent of that security, respondent owns property, real and personal, more than three times sufficient to pay all that is due on said judgment. He says that the three hundred acres of the large tract, which he still retains, is worth fully \$8 per acre; he had in fact been offered \$10 per acre for a part of it. He refers to other property he owns, real and personal, including the debt secured by the deed of Warfield Price; and he estimates that this property is worth at the least

\$5,000, more than three times the value of the balance of the said judgment.

In conclusion, he says his goods and chattels and choses in action are more than sufficient to satisfy said judgment, and the plaintiff has had ample remedy and means of satisfaction by legal process without resort 521 to chancery *to subject respondent's land; that the lands of Warfield Price, conveyed in trust to secure plaintiff's debt, should be first exhausted; and if it should become necessary to resort to respondent's land, that retained by him should be first applied to the satisfaction of the judgment.

The cause came on to be heard upon the bill taken for confessed as to all the defendants except Tazewell Price, and upon his demurrer, plea and answer, and the exhibits, when the court overruled the demurrer, and being of opinion that the lands in the bill mentioned were subject to the lien of the plaintiff's judgment, decreed that unless the defendant do within sixty days from the date of the decree, pay to the plaintiff the sum of \$1,200, with interest, &c., subject to certain credits stated, commissioners named should sell at public auction, &c., the lands in the bill mentioned, or so much thereof as may be sufficient to satisfy and pay the aforesaid demand, upon the terms of \$250 cash, and for the residue of the purchase money upon a credit of one, two and three years, with interest from the day of sale, taking from the purchaser bonds, &c. But in making said sale the land not aliened to be first sold, and then, if necessary, enough of the lands aliened as will be sufficient—the land last aliened to be first sold, &c. From this decree Tazewell Price obtained an appeal to this court.

G. W. Hansbrough, for the appellant.

J. F. Johnson and Logan, for the appellee.

BURKS, J. The appellee's bill was filed to enforce his judgment lien against the unaliened lands of the appellant, and also against other lands which had been aliened by him to his wife, children and brother-in-law, parties to the suit, and which 522 lands are charged in the bill to *have been conveyed with the fraudulent intent to hinder, delay and defeat his creditors, and especially the appellee, in the recovery of their debts.

Process to commence the suit was served upon all the defendants. The appellant appeared and filed a demurrer, plea and answer to the bill. The other defendants made default. No depositions were taken on either side, and the cause, duly matured, was heard on the bill of the appellee, the demurrer, plea and answer of the appellant, replications and joinder, exhibits, and the decrees nisi at the rules; and the court taking the bill for confessed as to all of the defendants except the appellant, and holding that all of the lands in the bill mentioned were subject to the lien of the appellee's judgment, ordered them to be sold, the lands unaliened to be first sold, and the other lands in the in-

verse order of their alienation, and as to these last, the sale was suspended until the further order of the court. From this decree the appellant alone applied for and obtained an appeal. His counsel assigns as error in the decree, that the lands of the alienees are held liable and ordered to be sold. There are several answers to this assignment of error. In the first place, if there be error in decreeing these lands to be sold, it is not to the prejudice of the appellant. The sale could injure the alienees only, and they are not here complaining. Moreover if they did complain it would be of no avail to them. The bill charges the conveyances to be fraudulent. The allegations are positive and explicit, and were in the court below treated as true on the bill taken for confessed as to them. They never appeared and made defense in that court, doubtless because they had no defense to make, and for the same reason they did not unite in the appeal. It is incredible that they should not have defended their title to lands alleged in the pleadings to be valuable, if such title had been valid as against the

523 lien asserted by the *complainant. If we may look to the appellant's answer to the bill as a defense made for them, we see very readily why they did not answer in person.

The appellant's deed of 6th February, 1873, to his son and to his daughter and her husband, purports on its face to be for a nominal consideration only, and he admits that it is voluntary.

He denies that the deed of settlement to the separate use of his wife was either voluntary or made with intent to defraud his creditors, and claims, in substance, that the consideration was the wife's property, received by him from her father's estate, to which she was equitably entitled, and which she agreed he should take and have as an equivalent for the settlement which was made. The bill charges that he received the wife's legacy (\$1,880) from her father's executor in 1862, in Confederate money, and at the same time, and in like currency from the same executor, a legacy of \$400 bequeathed directly to him, and that the aggregate of these sums (\$2,280) makes the precise sum recited in the deed of settlement as "received by him in her right from the estate of her deceased father," and these allegations are not denied in the answer. The deed of settlement bears date on the 24th day of February 1869, nearly seven years after the legacies were received. It is true the deed recites the agreement referred to and the receipt of the wife's legacy thereunder, as the consideration for the settlement upon the wife, but the recitals, although evidence against the grantor, are not evidence against a creditor of the grantor. Where such recitals are relied on to affect a creditor not a party to the deed, there must be distinct proof of the previous agreement, and none was furnished in this case. *William & Mary College v. Powell & others*, 12 Gratt. 372, 384, 386.

The conveyance to Charles R. Hancock, the brother-in-law of the appellant, bears

524 date, the day before the *date of the

settlement on the appellant's wife, and both deeds were admitted to record on the same day. This conveyance purports to be in consideration of \$1,800 in hand paid by the grantee, and the appellant, in his answer, says, that the money was actually paid to him "in the presence of witnesses."

The bill which was filed in February, 1874, charges that the grantee has never taken possession of the land covered by this conveyance, and that the same has been used and enjoyed by the appellant in the same manner as before the said conveyance, and these allegations are not denied in the answer, nor were any of the witnesses, in whose presence the money is said to have been paid, examined, nor has the grantee ever asserted any claim to the land in this suit.

Looking to the whole record I am well satisfied that each of these conveyances, if not fraudulent in fact, is at least not upon consideration deemed valuable in law, and is therefore void as to the appellee's judgment. The debt on which the judgment was based is evidenced by bond dated nearly seven years before the first of these conveyances was executed.

Another assignment of error is that the unaliened lands of the appellant were ordered to be sold when it was neither alleged nor proved that the complainant (the appellee) had exhausted his remedy at law to obtain satisfaction of his judgment out of the personal estate of the appellant.

Previous to the general revision of the laws in 1849, there were two legal remedies by which the judgment creditor was enabled to reach the lands of his debtor. One was through the execution of *ca. sa.* under which the debtor was taken and imprisoned, and might be discharged from imprisonment on surrendering his property, and the other was by *elegit*, whereby all the goods and chattels of the debtor (except his oxen and 525 beasts of *the plow), and a moiety of all his lands and tenements whereof he was seized at the date of the judgment or at any time afterwards, were delivered to the creditor by reasonable price and extent, to have and to hold the goods and chattels as his own, and the moiety of the land as his freehold until thereof the judgment was satisfied.

The creditor having these legal remedies, equity had no jurisdiction to decree a sale of the lands to satisfy the judgment unless it was made to appear that the remedy at law to enforce the judgment was inadequate. It was always regarded that the legal remedy by *elegit* was inadequate where it was shown that the rents and profits of the land would not satisfy the judgment within a reasonable time, and in such case a court of equity would take jurisdiction and decree a sale.

Such was the state of the law in 1849, when the *ca. sa.* was abolished, and to supply its place other existing remedies were enlarged and some new ones were provided. The liens of judgments and decrees for money, which theretofore had been mere incidents of the *elegit* and attached to a

moiety only of the debtor's land, were made express, direct, positive, absolute charges on all the real estate of the debtor, and the *elegit* was made to conform to the statutory lien. *Borst v. Nalle & als.*, 28 Gratt. 423, 430. Code of 1873, ch. 182, §§ 6, 1.

The lien of the *fi. fa.* was enlarged so as to extend to all the personal estate of or to which the judgment debtor is possessed or entitled, although not levied on or capable of being levied on under the law, as it then existed, and this additional lien was made continuous; that is, it was provided that it should "cease whenever the right of the judgment creditor to levy the *feri facias* under which the lien arises, or to levy a new execution on his judgment, ceases or is suspended by a forthcoming bond being given and forfeited, or by a supersedeas or
526 other *legal process," and means were provided for enforcing this lien. Code of 1873, ch. 184.

And it was at the same time enacted as follows: "The lien of a judgment may always be enforced in a court of equity. If it appear to such court, that the rents and profits of the real estate subject to the lien will not satisfy the judgment in five years, the court may decree the said estate, or any part thereof, to be sold, and the proceeds applied to the discharge of the judgment." Code of 1873, ch. 182, § 9.

Looking to the policy of the legislature at the revision, and to the broad and comprehensive language of the enactment, I do not doubt that a judgment creditor, if he so elect, may resort to a court of equity to enforce the lien of his judgment against the real estate of his debtor, without first proceeding by execution at law to subject the personal estate, or assigning any reason for not doing so. The remedy in equity against the real estate (now the only remedy since the *elegit* was abolished, Acts 1871-2, ch. 373, p. 469), is not dependent upon the inadequacy of the legal remedy to satisfy the judgment out of the personal estate, or the insufficiency of such estate for that purpose, but it may "always" be resorted to, whether there be or not personal estate of the debtor sufficient to satisfy the judgment. The remedy is given in general terms, and if it had been intended to limit its application to cases in which there was no personal estate of the debtor, or where such estate was not sufficient to satisfy the judgment, it would doubtless have been so provided in express terms. See the case of the Commonwealth by. &c., *v. Ford & als.*, 29 Gratt. 683, in which it was held, that the right of the commonwealth to seize and sell under execution the real estate of defendants against whom she had judgments did not deprive her of the right, if she
527 elected to exercise it, to resort to a court *of equity to subject such real estate to the lien of such judgments.

All the property, real and personal, of the debtor, except what is exempt under the law, is liable for the payment of his debts. The personal property may ordinarily be reached under execution at law, while the real estate can be subjected by suit in equity only. If

the creditor resort to the real estate first and the debtor has personal property which he prefers should be applied to the payment of the judgment, he certainly can make the application himself more speedily and at less expense than an officer of the law can under an execution, and thus relieve his real estate to the extent of the value of the personal estate so applied. If he fail or refuse to make the application, it is his own fault. Creditors seldom, if ever, resort to equity to enforce their judgments against the lands of their debtors, unless and until they are compelled to do so, because the proceeding is both dilatory and expensive. When they do resort to it, however, the rights of the debtor are protected in the most ample manner. His lands cannot be sold if the rents and profits thereof will satisfy the judgment in five years, and when sold, a day is usually given him for the payment, and the sale must be on a reasonable credit.

While the appellant assigns as error that the appellee does not allege in his bill that he has exhausted the appellant's personal property by execution, he yet complains in his answer that he has been harrassed with executions sued out by the appellant since the commencement of this suit. However that may be, he does not claim that he has not received credit for anything realized on these executions, and he does not deny that the greater part of the judgment still remains unpaid. He avers in his answer that his property, real and personal, which remains unaliened and therefore confessedly liable for the appellee's judgment, is "at least
528 of the value of \$5,000, and more *than three times the value of the balance of the said judgment;" "that individually he is singularly free from debt;" "that his individual debts do not amount to more than \$300, all told," and leaves us to infer that his debts as surety are not large, for the judgment of the appellee is the only debt he specifies as owing by him as surety. The presumption is, that the judgment of the appellee is the only judgment against him, as none other is mentioned in his answer and no judgment creditor has ever applied to become a party to this suit. If his statements be true, he might and should have paid the appellee's judgment long ago. He admits that it is owing, and that his property is bound by it, and claims that he owns property of value more than three times the balance due on the judgment. It would have been no less wise than just, I think, if he had paid the appellee's judgment without this fruitless attempt to evade it.

Another assignment of error is that the appellant is surety on the debt upon which the appellee's judgment was recovered, and that the deed of trust to Joseph M. Terry was given by the principal debtor, among other things, to indemnify the appellant as such surety, and that the court should have compelled the appellee to resort to this deed of trust in exoneration of the appellant before subjecting his property.

The alleged principal debtor is not a party to the suit, is bankrupt, and the appellee has

no judgment against him. If the assumption of the appellant's counsel that the appellant is surety were true, without conceding that the appellee in that case should be required to resort to this deed of trust, it is a sufficient answer to this assignment of error to say, that it does not appear by the record that the appellant is surety. The bill contains no such allegation or admission. It is averred in the appellant's answer to be so, but the averment is affirmative matter, and is not proved. The deed of trust indemnifies

529 *the appellant in general terms as surety upon any and all papers upon which the appellant is bound as such surety. But the debt on which the appellee's judgment was recovered is not specified in the deed as one of the debts on which the appellant is surety, and if it were so specified and described the deed would be no evidence of the fact against the appellee, as he is not a party to the deed.

There was no necessity of making Joseph M. Terry a party to the suit. He is the trustee in the deed of trust referred to, but as we have seen the appellee was not bound to resort to that deed in this suit. The appellant avers in his plea that Joseph M. Terry is the joint owner with the appellee of the judgment sought to be enforced. If the fact averred, taken as true, would be a sufficient reason for requiring him to be made a party, still there was no proof of such joint ownership. After the suit was brought, and a short time before the decree appealed from was rendered, as appears from a deed in the record, Hockman and wife conveyed a portion of the land which had been conveyed to them by the appellant to one Lewis Huff, as trustee, to secure an alleged debt to W. D. F. Duvall, and it is assigned as error that Huff and Duvall were not made parties by amended bill. If these persons had any interest in the subject of the suit they acquired it pendente lite, and it was not necessary, therefore, that they should be brought before the court to enable it to dispose of the subject. At all events, if they claimed any such interest as made their presence as parties necessary, they might and should have brought the matter to the notice of the court by petition, and had their claims passed upon.

The last assignment of error to be noticed, is that the unaliened lands of the appellant were ordered to be sold without its being made to appear that the rents and

530 *profits thereof would not satisfy the appellee's judgment in five years.

The bill contains no allegation as to the rents and profits, and the answer of the appellant is silent on the subject. There is no proof; no enquiry was asked or ordered. The fact of the insufficiency of the rents and profits to satisfy the judgment within the prescribed period should be made to appear before any sale is made, and if the appellant desires it, he may have an enquiry to determine that fact. But this is no cause for reversing the decree. The decree being interlocutory may be amended in that respect, and as amended affirmed. *Ewart v. Saun-*

ders, 25 Gratt. 203; *Horton & others v. Bond*, 28 Gratt. 815.

I am of opinion, on the whole case, there is no error in the decree complained of for which it should be reversed, but that the decree should be amended as above indicated, and as amended be affirmed.

The other judges concurred in the opinion of BURKS, J.

Decree amended and affirmed.

531 *Barr, Assignee, v. White & als.

July Term, 1878, Wytheville.

C files his bill in the circuit court of R, to subject the real estate of D to satisfy a judgment for \$199.80, with interest from the 20th of April, 1860, and costs (\$6.96), which C had recovered against D. The bill charges that the rents and profits will not discharge the debt in five years. The bill is taken for confessed, and there is a decree that A, appointed a commissioner, sell the land or so much as may be necessary to satisfy the judgment and the costs of this suit, upon credits stated. A sells the whole tract for \$2,000 to W, who complies with the terms of the sale; and A reports the sale to the court, and it is confirmed. After the sale, but before it is confirmed, D is declared a bankrupt; and without taking any step in the state court he applies to the United States district court, and there obtains a decree setting aside the sale, which decree is reversed by the United States circuit court, and the assignee in bankruptcy of D directed to proceed in the case in the state court to obtain such relief as he may be entitled to—HELD:

1. **Jurisdiction—When State Court Not Ousted.***—The state court having possession of the case, and having made a decree therein before the bankruptcy of D, he or his assignee can only proceed in that court to maintain their rights. Citing *Eysler v. Gulf & als.*, 1 Otto 521.

2. **Validity of Decree—Knowledge of Assignee.**—The assignee of D, who knew of the proceedings in the state court, not having made himself a party in that court, and it not appearing that court even knew of the bankruptcy of D, the decree of the court confirming the report in the absence of the assignee was a valid decree.

3. **Judicial Sales—Setting Aside after Confirmation.**†—W being a *bona fide* pur-

***Jurisdiction—When State Court Not Ousted.**—In *Sively v. Campbell*, 23 Gratt. 893, it was held that after suit in equity to subject a debtor's land to satisfy a judgment, the jurisdiction of the state court is not ousted by the debtor going into bankruptcy. See also *Francisco v. Shelton*, 85 Va. 779, where the same is sustained. As discussing and sustaining the general rule that the court that first obtains jurisdiction of the parties and the subject matter (when there is concurrent jurisdiction) retains it, see *Griffin v. Birkhead*, 84 Va. 612; *Parsons v. Snider*, 42 W. Va. 517 and 12 Enc. Pl. & Pr. 151.

Validity of Decree—Knowledge of Assignee.—See *Bank v. Campbell* sustaining the rule laid down in the second headnote.

†**Judicial Sales—Setting Aside after Confirmation.**—For rules governing the court in setting aside judicial sales after confirmation by the

chaser of the land, and his purchase confirmed by the court, it is for D or his assignee, if they would set aside the sale, to show that the price was inadequate, or that only a part of the land should have been sold to pay the plaintiff's debt; and this they failed to do.

532 *4. **Bankruptcy—Rights of Assignee.**—The assignee is only entitled to have what D, the bankrupt, would have been entitled to if he had not been declared a bankrupt, viz: the surplus of the purchase money, after satisfying the plaintiff's judgment and the costs of this suit.

5. Judicial Sales—Inquiry into Rents and Profits.†—The bill having charged that the rents and profits of the land would not pay the debt in five years, and the bill having been taken for confessed, it was not error to decree a sale of the land without directing an enquiry whether the rents and profits would pay the debt in five years.

6. Return of Nulla Bona—When Necessary.—Under the statute, Code of 1873, ch. 182, § 9, it is not necessary that an execution of *feri facias* should have been returned *nulla bona*, before the plaintiff in the judgment may sue in equity to subject the lands of his debtor to satisfy the judgment.

In January, 1872, Samuel W. Cecil, suing for the benefit of James S. Witten, instituted a suit in equity in the county court of Russell county, to subject the land of John G. Duff to satisfy a judgment for \$199.80, with interest from the 20th of April, 1860, and \$6.96 costs, which said Cecil had recovered against said Duff in the county court of Tazewell county in August, 1860. The bill, after setting out the judgment, stated that an execution of *feri facias* had been sued out upon it, which went into the hands of the sheriff and was levied on certain property, and upon which the sheriff returned, "Barred from collection by homestead exemptions, December 1, 1871."

The bill further states that Duff owned certain lands in the county, upon which plaintiff's judgment is a lien; that the rents

court, see *Berlin v. Melhorn*, 75 Va. 639; *Insurance Co. v. Cottrell*, 85 Va. 857; *Langyher v. Patterson*, 77 Va. 470; *Patterson v. Eakin*, 87 Va. 49; *Karn v. Iron Co.*, 86 Va. 754; *Allison v. Allison*, 88 Va. 328; *Hickson v. Rucker*, 77 Va. 135. The rule laid down in these cases is that after confirmation the sale will be set aside only on the ground of fraud, mistake, surprise or other cause for which equity would give relief.

***Bankruptcy—Rights of Assignee.**—See *McAden v. Keen*, 30 Gratt. 400 and note.

†**Judicial Sales—Inquiry into Rents and Profits.**—The rule in regard to inquiry as to the sufficiency of rents and profits to pay the debt in five years for which the land is sought to be subjected is stated in *Muse v. Friedenwald*, 77 Va. 57, to be that when the insufficiency is stated and not denied there need be no inquiry; but when not alleged, or if alleged, the allegation is denied, there must be inquiry before a sale can be decreed. See also on this point *Manns v. Flinn*, 10 Leigh 93; *Ewart v. Saunders*, 25 Gratt. 203; *McClung v. Blirne*, 10 Leigh 394; *Price v. Thrash*, 30 Gratt. 515; *Johnson v. Wagner*, 76 Va. 587; *Brengle v. Richardson*, 78 Va. 406; *Horton v. Bond*, 28 Gratt. 815; *Etter v. Scott*, 90 Va. 762.

and profits of the land will not discharge his judgment in five years; and he prays that the land may be decreed to be sold for the satisfaction thereof. To this suit Duff was made a party defendant.

Duff did not appear or file an answer in the cause, and the bill was taken for confessed at the March rules, 1872. *On the 2d of July, the cause came on to be heard upon the bill taken for confessed and the exhibits of the judgment, execution and return, which were filed with the bill, when the court made a decree that the plaintiff recovered against the defendant, Duff, \$199.80, with interest and costs, and unless he paid the same on or before the 4th of August, 1872, H. C. Alderson, who was appointed a commissioner for the purpose, should, after giving four weeks previous notice of the time and place of sale, as directed in the decree, sell to the highest bidder at public auction, at the front door of Russell courthouse, on some court day, the land of the defendant in the bill mentioned, or so much thereof as may be necessary to discharge said lien, on a credit of one, two and three years, (except costs of suit and sale which was to be paid in cash), taking bonds and good security from the purchaser, payable to himself, bearing interest from the day of sale, and report, &c.

On the 12th of September, 1872, Alderson, the commissioner, returned his report, in which he stated that after giving notice, &c., he sold the lands in the manner required by the said decree, and one Robert A. White became the purchaser at the sum of \$2,000, and had executed his bonds with a surety named, which he said he returned with his report as a part thereof.

The cause came on again to be heard on the 5th of February, 1873, and there being no exception to the report, it was confirmed. At the August term of the court the cause was sent to the circuit court. And in March, 1874, it appearing that Duff still retained possession of the land and refused to deliver possession thereof to the purchaser, it was ordered that a writ of possession should issue, &c. And the cause was continued on the docket until the November term, 1876.

In June, 1876, John W. Barr, assignee in bankruptcy of John G. Duff, filed his **534** petition, which was afterwards *agreed to be taken as a bill of review. After setting out the proceedings in the case he states that on the 29th of August, 1872, Duff was duly adjudged a bankrupt, and received his certificates of protection as such; that on the 14th of September, 1872, Commissioner Alderson filed his report; that on the 4th of October, 1872, the said H. C. Alderson was elected assignee of said bankrupt, and on the 5th of February, 1873, the said report of sale was confirmed. He refers to the writ of possession which had been ordered by the circuit court, which he states was returned by the officers charged with the execution by reason of a restraining order issued out of the district court of the United States; that in 1876, H. C. Alderson was removed as the

assignee of said bankrupt, and himself appointed in his stead, and that in May, 1876, an alias writ of possession was issued returnable to June rules.

He further insists that upon said Duff's becoming a bankrupt, the said suit of Cecil against him abated, and that no further proceedings could be lawfully had therein affecting his rights or the rights of his creditors until the same was by proper process revived against his assignee; that upon the said Duff's being adjudged a bankrupt, all his property and rights of whatever kind passed to and became the property of his assignee, and the said suit could only proceed against the assignee; that the former assignee, Alderson, was the attorney of the plaintiff in said suit, and was thus apprised of the bankruptcy of Duff.

He further insists that the report of the sale of the land is defective, and that it shows upon its face that the commissioner did not follow the requirements of the decree of sale entered by the county court, which only directed the sale of so much of said land as might be necessary to pay the debt of \$199.80, with interest and costs, whilst the

commissioner sold land to the amount
535 of *\$2,000 in value. He says the report

does not state when the sale was made, nor are the purchaser's notes filed, as stated in the report. And making Cecil, Duff, the sheriff, Witten and White defendants, he prays that the sheriff may be restrained from executing the writ of possession, and that the proceedings had in the case after the bankruptcy of Duff, be reviewed and set aside. The injunction to restrain the sheriff from executing the writ of possession was granted.

While demurred to and answered the bill of review. He refers to the proceedings in the county court, and insists that the decrees of the court ordering and confirming the sale are conclusive and binding upon the parties, no appeal having been taken therefrom. And he avers that this proceeding by the assignee is at the instance, for the benefit, and at the costs of Duff, and if he has lost his right of appeal, or his right to have a review of the proceedings it is his fault. He states that Duff, instead of appearing in the county court of Russell and making his defence, invoked the aid of the district court of the United States at Abingdon; and that court did reverse the decrees of the county court of Russell, but upon appeal to the circuit court at Lynchburg, that court, on the 30th of March, 1876, reversed the decree of the district court, held that the circuit court of Russell had complete and exclusive jurisdiction in the premises, and directed Duff and his assignee to proceed in the state court to collect any portion of the purchase money of the land to which he may be entitled after satisfying the liens. And he filed a copy of the proceedings in the United States courts.

He further says that the land sold for a full price, for more than three times enough to pay every debt Duff owes according to his own sworn statement in his schedule in

bankruptcy, and for nearly \$1,000 more than

Duff swore it was worth when he sought
536 to avoid the *sale and have it set apart to him in the bankrupt court, in order to defraud his creditors. The fact that Duff filed or can file an upset bid for said land does not indicate that it was not fairly sold for an adequate price, for after the payment of his debts he would be entitled to the surplus. Respondent purchased the land nearly four years ago; he made the cash payment of \$71.47, and executed his notes for the balance. He has been kept out of possession by Duff, and claims he is entitled to have an account of the rents and profits, and the amount credited on his bonds. He insists the commissioner had a right to sell the whole of the land, and that the report was a proper report, and there being no exceptions it was proper to confirm it.

By consent of the parties, Barr, as assignee of Duff, was made a defendant in the case of Cecil v. Duff, and the two cases came on to be heard together on the 11th of November, 1876, when the court decreed as follows:

"It appears to the court, that at the date of the decree directing the sale of the land in controversy, all necessary and proper parties were before the court; and the court is of opinion, therefore, that by that decree the county court had acquired such control over the title of the defendant, John G. Duff, as to enable that court to consummate any sale made under that decree against any subsequent assignee of the mere legal title, and especially as no assignee had been appointed on the day of sale under said decree, and all parties then in esse and interest were before the court. And the court is further of opinion, that this sale, having been made in a cause properly in court, in which all proper persons were parties, and having been confirmed, and more than six months having elapsed since the sale, the title of the purchaser cannot be defeated for the errors merely which appear in the proceedings. It seems further to the court that the bank-

rupt, Duff, having been continuously a
537 party to the said *suit of Cecil for. &c., against Duff, and having made no appearance, but having suffered all the proceedings to go by default, is bound by said sale and confirmation so far as the title of said White is concerned; and the original assignee in bankruptcy, H. C. Alderson, having had full notice of all these proceedings in the county court, and acquiescing in the same, must be presumed to have been well satisfied therewith, and with the said sale, and being the commissioner to whose hands the proceeds would come, may well be presumed to have been elected assignee in view of that fact; and the court is clearly of opinion that the assignee as such was not only warranted in resisting the remarkable attempt of the bankrupt to defeat the payment of the indebtedness to his creditors of about \$700, (as appears by his petition No. 2, filed in the said district court, on the 18th day of May, 1875), by an under-valuation of his property, as he now on oath admits, and shielding it under the exemption laws, but the assignee

as such would have violated his trust if he had not resisted it.

"The court is further of opinion, that the title of the assignee is merely a trust for the creditors till they are satisfied; and as to the surplus for the bankrupt; and as it appears that the proceeds of the sale made by Commissioner Alderson will pay and satisfy as well the debt of the plaintiff, Cecil, as the debts proved in bankruptcy, (the whole indebtedness of the bankrupt appearing, as aforesaid, to be about \$700), and as the right of the bankrupt to interfere with this sale is barred by the proceedings in the said suit of Cecil against Duff, and in the bankrupt court, it seems, therefore, to the court that all the relief the said assignee, Barr, is entitled to here is to be allowed to have the surplus of the proceeds of said sale after the decree in the said case of Cecil for, &c., *v.* Duff is satisfied. Therefore, it is adjudged, ordered

538 and *decreed, that the injunction heretofore awarded upon the petition of the assignee, Barr, be and the same is dissolved, and that after the satisfaction of the decree in favor of Cecil for the benefit of James S. Witten, rendered as aforesaid, in the said case of S. W. Cecil for, &c., *v.* John G. Duff, in the county court, the surplus proceeds of the sale aforesaid, be paid over to the said assignee, Barr, after deducting therefrom the costs of the defendant, White, incurred in his defense here, which are decreed in his favor against said assignee; and the commissioner, H. C. Alderson, will proceed, pursuant to the provisions of this decree, to collect and pay over the proceeds of the sale of the land in controversy made by him as aforesaid, and he will report to court. But before proceeding to collect said purchase money, he shall execute bond with good security, conditioned for the faithful performance of his duties as commissioner, before the clerk of this court in the penalty of \$4,000. And the question raised by the purchaser, R. A. White, in his answer, that he is entitled to rents and profits arising from the land purchased by him for the time the possession of the same has been withheld from him, is reserved for future adjudication."

And thereupon Barr applied to a judge of this court for an appeal; which was allowed.

Daniel Trigg and White & Buckanan, for the appellant.

Campbell & Trigg, for the appellee.

STAPLES, J., delivered the opinion of the court.

The appellee, White, purchased the land in controversy under a decree of the county court of Russell. He complied with the terms of sale by making the cash payment and executing his bonds for the deferred installments, 539 and there is every reason to believe he would have paid them off at maturity but for the obstacles interposed by third persons. The sale was reported to the court by the commissioner, and was regularly confirmed without objection. The question now arises, whether there was any such irregularity in the sale or in the pro-

ceedings of the commissioner, or in the conduct of the parties, as to warrant this court in setting aside the sale and vacating the title of the purchaser. In the first place, it is insisted that the land was sold at a very inadequate price, and that the commissioner, in violation of the terms of the decree, made sale of the whole tract, when the sale of part only was necessary to satisfy the judgment creditor.

There is not in this record, nor in the record of the proceedings of the district court of the United States, any evidence tending to sustain either of these allegations. The upset bid made in the latter court by Duff, the debtor, is not evidence of the value of the land, because, as was said by counsel, Duff being entitled to the surplus proceeds after the payment of all his debts, and these debts being greatly less than two thousand dollars, the amount of the appellee's purchase, he might well afford to bid twice the value of the land. The district court of the United States in setting aside the sale made to the appellee, did not base its decree upon either of the grounds now suggested. The evidence shows that the land was assessed in 1872, the year in which the sale was made, at nine hundred and seventy dollars. Duff, himself, in his deed of homestead filed in 1873, estimates it at eleven hundred and sixty dollars.

In the face of these facts, without a scintilla of proof to the contrary, it is impossible, with any show of reason, to say that two thousand dollars was an inadequate price. The presumption is precisely the reverse.

The decree directed the commissioner 540 to sell the land in the bill and *proceedings mentioned, or so much thereof as was necessary, to discharge the plaintiff's debt. The commissioner sold the whole ninety-seven acres. It may be that a sale of part would have been sufficient, and could have been made without detriment to any one. This depended upon the nature, quality and condition of the property. It may be that the land was not susceptible of partition, and that its chief value consisted of buildings and other appurtenances which could not be conveniently sold in parcels. Upon these points the record furnishes no information, and we are now dealing with the rights of a bona fide purchaser, after a confirmation of the sale without objection, and after the lapse of more than three years before the bill of review was filed. The district court of the United States, when it undertook to set aside the sale made to the appellee under the decree of the county court of Russell, at the instance of Duff himself, certainly with his consent, entered a decree for the sale of the entire tract. Surely the county court could do substantially the same thing, by confirming a sale at an adequate price, made in the interests of all the creditors.

When the decree of the district court just alluded to was reversed by the circuit court of the United States at Lynchburg, upon the ground that the whole matter properly belonged to the state court, which alone had jurisdiction, the circuit court made the fol-

lowing provision in its decree of reversal: "The district court is advised to direct the assignee of said Duff to take such proper proceedings in the circuit court of Russell county as may be necessary to secure the surplus of the proceeds of sale of said lands for the benefit of the bankrupt's estate, if any there be." It is very true the same decree contains a reservation of the right to Duff, the bankrupt, also to institute in the state court any proceedings he may deem necessary to the protection of his interests.

He, however, has instituted no proceedings *of any kind; he is not a party in

this record except as a defendant in the original suit. The appellant, the assignee in bankruptcy, in filing this bill to set aside the sale, seems therefore to have gone beyond the instructions given him in the bankrupt court. His duty was not to ask for a vacation of the sale, but to secure the surplus of the proceeds for the benefit of the bankrupt's estate. It is worthy of observation that in his bill of review he neither avers that the land was sold for an inadequate price, nor that the commissioner had violated his duty in selling the whole tract instead of a part. If the purpose was to impeach the sale on these grounds, the matter ought to have been put in issue by proper averments in the bill, and thus afford the appellee an opportunity of meeting the points by his answer and his proofs. Under all these circumstances the proposition cannot for a moment be entertained to set aside the sale to the appellee upon the ground of inadequacy of price, of irregularity in the sale, or in the conduct of the commissioner who made it.

The ground mainly relied on in the bill of review for vacating the sale, is that upon Duff's becoming a bankrupt the suit of Cecil, the creditor, abated, and no further proceedings could be lawfully had therein affecting his rights or the rights of his creditors, until the suit was properly revived against the assignee in bankruptcy. Now it will be seen that the bill does not charge that White, the purchaser, either at the time of the sale or of its confirmation, had any notice of the bankruptcy. He is not charged with fraud or improper conduct in any respect, and there is no reason for attributing to him anything of the kind. The decree for the sale was rendered before the adjudication in bankruptcy, and the sale was made before the assignee was appointed. No suggestion of the bankruptcy was made on the record, nor was the

matter brought in any manner to the

attention *of the court, although there was ample time to do so before the sale was confirmed. If the assignee failed in his duty in this particular the purchaser cannot be affected by his neglect or misconduct in the absence of all proof showing that injustice was done. The mere fact of the bankruptcy of the debtor could not of itself prevent the sale or its confirmation. It might render proper the introduction of a new party on the record, when properly suggested to the court, but it could not prevent or in any manner interfere with the execution of a

valid decree. Upon this point the case of *Eyster v. Graff et als.*, decided by the supreme court of the United States (1 Otto, U. S. R. 521) is a direct authority. In that case, Mr. Justice Miller, delivering the opinion of the court, said: "At the time the suit was commenced the mortgagor, McClure, was vested with the title, and was the proper and necessary defendant. But for the bankruptcy of McClure there can be no doubt that the sale under the foreclosure decree and the deed of the master would have vested the title in the purchaser, and that this would have related back to the date of the mortgage. Nor can there be any question that the suit having been commenced against McClure when the title or equity of redemption was in him, any person who bought of him or took his title or any interest he had, pending the suit, would have been bound by the proceedings and their rights foreclosed by the decree and sale. These are elementary principles. Is there anything in the bankrupt law, or in the nature of proceedings in bankruptcy, which takes the interest in the mortgaged property acquired by the assignee out of this rule?"

The learned judge then proceeds to show there is not, and that no reason existed why the same principle should not apply to the transfer made by a bankruptcy proceeding. He lays down the proposition that where an

assignee in bankruptcy is appointed

during the pendency of proceedings *in a state court for the sale of mortgaged property, he stands as any other purchaser would stand on whom the title had fallen after the commencement of the suit, a purchaser pendente lite, and if there be any reason for interposing, the assignee should have himself substituted for the bankrupt, or be made a defendant on petition. But if he fail to do so, it does not invalidate the proceedings. And further, that a state court cannot take judicial notice of the proceedings in bankruptcy, and it is its duty to proceed as between the parties before it, until by some proper pleadings in the case it is informed of the changed relations of the parties to the subject matter. These citations are given because they are directly in point, and because they are conclusive of the question, if the decisions of the supreme court of the United States are authority in such cases.

In the present case, if the assignee did not choose to object to the sale, there was nothing to prevent the debtor himself from doing so. He was interested in the question of homestead, and he was interested in the surplus remaining after the claims of creditors were satisfied. He had the right, notwithstanding his bankruptcy, to go forward and object to the confirmation of the sale, or to suggest his bankruptcy, and require his assignee to be brought before the court and to take care of his interests. Instead of this, he filed his petition in the United States court some eight or ten months after the sale was confirmed, with a view to oust the jurisdiction of the state court, to set aside the sale and to have his entire estate set apart as a homestead. This petition was dismissed.

and he was again remitted to his remedies in the state courts. But instead of pursuing them, after the lapse of nearly two years, he again applies to the United States courts to interpose in his behalf. He at last succeeds in July, 1875, in obtaining a decree

544 vacating the sale *made to the appellee, not upon any of the grounds now suggested, but because, in the opinion of the district judge, it did not appear the rents and profits of the land would not pay off the judgment lien within five years, and because there was no return of nulla bona upon the execution before the land was decreed to be sold. This decree practically assumed for the district court of the United States appellate jurisdiction to revise the proceedings and decrees of a state court. As already stated, it was afterwards reversed by the circuit court of the United States. And now, after all this delay, contention and expense, the state courts are asked to set aside a sale made in 1872, and regularly confirmed in February, 1873, without a particle of evidence impeaching its fairness, or the good faith of the purchaser.

It must not be forgotten that while a purchaser at a judicial sale acquires by his bid and its acceptance no independent right to have his purchase completed, but is merely a preferred proposer until confirmation, after confirmation by the court, his condition is very materially changed. His contract is then executed, and he is regarded as a complete purchaser, with all the rights incident to that position. Against him the courts are never disposed to interfere, unless for very grave and substantial errors in the decrees and proceedings upon which his title is founded. See *Zirkle v. McCue*, 26 Gratt. 517, and cases there cited.

With respect to the objection that no decree for a sale of the land ought to have been entered without an enquiry to ascertain whether the rents and profits would pay off the debt within five years, it is sufficient to say that the bill contains a direct averment that the rents and profits are not sufficient for that purpose.

No answer being filed by the defendant, the bill was taken for confessed, and a 545 decree for the sale entered *before the adjudication in bankruptcy. And even now the record contains no evidence upon the subject, nor is the matter put in issue by the pleadings. Even though it appeared that the county court of Russell plainly erred upon this point, this court would not for that cause now set aside *a sale fairly made for an adequate price, when it is manifest a sale is rendered necessary by the bankruptcy of the debtor, and when this court, if it should set aside the sale already made, would be compelled immediately to order a resale in the interest of all parties concerned.

One other objection remains to be considered, which might more properly have been noticed in the beginning, and that is, that the county court of Russell was not authorized to decree a sale of the land until it appeared that the debtor had no personal estate upon which an execution could be

levied. It appears that an execution was issued and levied upon certain effects of the debtor which were claimed by him under a homestead exemption. The creditor was under no obligation to contest this claim. He might, if he pleased, acquiesce in it and apply at once to a court of equity to enforce the lien of his judgment. It does not lie in the mouth of the debtor now to assert that his claim was unfounded; that the creditor ought to have disregarded it and insisted upon a sale of the property under the execution. This is a sufficient answer to the objection that the land was not liable. Another is found in the circumstances already mentioned, that the sale was made under a pro confesso decree, confirmed without exception, and no objection ever made until the bill of review was filed in this case.

But even though no execution had ever issued, the court had power to decree a sale under the statute. Upon this point it is only necessary to refer to the opinion of 546 *this court delivered by Judge Burks, in the case of *Price v. Thrash*, supra, p. 521.

Upon the whole, there is no error in the decree of the circuit court, and the same must be affirmed.

Decree affirmed.

547 *Withers v. Fuller & als.

August Term, 1878, Wytheville.

1. **Attaching Creditors—Garnishee.***—An attaching creditor can have no judgment against a garnishee until he has first established his claim against his debtor.
2. **Judgments Void for Want of Jurisdiction.**†—The county court has no jurisdiction at a monthly term of the court to render a judgment in favor of an attaching creditor against his debtor. Such a judgment is not simply voidable, but it is absolutely void, and cannot be the foundation for any subsequent proceeding.
3. **Valid Payments—Discharge of Garnishee.**—A county court may at its monthly term provide for the preservation of attached effects, and a garnishee having admitted his indebtedness to the debtor, the court may order him to pay his debt to a receiver appointed by the court, and a payment to the receiver by the garnishee is a valid payment, and a discharge of his indebtedness as to the attaching creditor.

***Attaching Creditor—Garnishee.**—*George v. Blue*, 3 Call 394 and *Gibson v. White*, 3 Munf. 94 sustain the rule laid down in the principal case that an attaching creditor can have no judgment against a garnishee until he has first established his claim against the debtor. See also *Coda v. Thompson*, 39 W. Va. 71.

†**Want of Jurisdiction—Judgment Void.**—Among the Virginia cases in support of the generally accepted rule that want of jurisdiction makes a judgment absolutely void and not simply voidable are *Wade v. Hancock*, 76 Va. 620; *Dorr v. Rohr*, 82 Va. 359; *Blanton v. Carroll*, 86 Va. 539. See also 12 Enc. Pl. & Pr. 179.

This was a writ of error and supersedeas to judgments of the circuit court of Russell county, rendered against Robert E. Withers. The case is fully stated by Judge Christian in his opinion.

White and Cummings, for the appellants.

William H. Burns, for the appellees.

CHRISTIAN, J., delivered the opinion of the court.

This case is before us on a writ of error to a judgment of the circuit court of Russell county. It appears from a transcript of the record that three several attachments were

548 issued out of the clerk's office of the county court of Russell on the 14th day of October, 1868, against the estate of A. L. Hendricks (alleged to be an absconding debtor), and in favor of James H. Fuller, A. G. Smith and E. D. Kernan, respectively, who were the attaching creditors. These attachments directed the sheriff so to secure the attached effects or estate "that the same may be forthcoming and liable to further proceedings thereupon to be had before the said county court at the next March term thereof." And he was further directed to make return on the next rule day (last Monday in October), as to how he had executed said attachment.

At the following January term of the county court of Russell, which it is admitted was a monthly and not a quarterly term of said court, the following order was entered in the case of Fuller v. Hendricks, and similar orders in the cases of the other two attaching creditors:

"The plaintiff having obtained an attachment against the estate of the defendant, and having had Robert E. Withers and William E. Sutton summoned as garnishees, this day came as well the plaintiff by his attorney, as the said Robert E. Withers and W. E. Sutton, in their own proper persons, who being duly sworn, the said Robert E. Withers acknowledged himself indebted to the defendant in the sum of \$525, with interest thereon from the 15th day of October, 1868, and the said W. E. Sutton acknowledged himself indebted to the defendant in the sum of \$100. Therefore it is considered by the court that the plaintiff recover of the defendant the sum of \$880, with legal interest thereon from the 1st day of November, 1860, till paid. And it is further ordered that the plaintiff recover of R. E. Withers the sum of \$525, with legal interest thereon from the 15th day of October, 1868, and of William E. Sutton the sum of \$100, which amounts are to be paid pro rata on this and two other judgments obtained against the defendant, one in favor of

549 A. G. Smith, the other in favor of E. D. Kernan and Malissa O. his wife; which judgments are subject to prior liens, if there be any."

At a subsequent monthly term of said county court the following order was entered in each of the three attachment cases:

"R. E. Withers having heretofore stated

that he owed A. L. Hendricks \$525, and a doubt arising as to who is entitled to said sum, it is ordered that J. F. McElhenney, who is hereby appointed a receiver for the purpose, do collect and loan out the said sum until the further order of the court."

It further appears that the plaintiff in error, Withers, in accordance with this order of the county court, paid over to the receiver the amount adjudged to be due from him to Hendricks, the attachment debtor.

Thus matters stood until the 23d September, 1873, when the attaching creditors sued out of the clerk's office of the county court of Russell, a scire facias upon the judgment of said court rendered at the January term, 1869, above referred to. By agreement of parties, and for reasons stated in the order, the causes were consolidated and removed to the circuit court of Russell. When the case came on to be heard in the circuit court the appellant, Withers, appeared and tendered his demurrer to the scire facias, which being overruled, he pleaded nul tiel record and payment. The plea of nul tiel record was rejected, and the cause was heard upon the plea of payment. In support of the plea of payment, Withers offered in evidence the order of the county court above referred to, directing him to pay the amount adjudged against him as garnishee, into the hands of the receiver of the court, together with the report of the receiver showing that the money had been paid to him by Withers, and that he (the receiver) had loaned it out to meet the order of the court. A jury being waived,

550 and the matters of law and fact being submitted to the court, judgment was entered in each case against the garnishee, Withers, for the sum of \$525, with interest from 15th October, 1868, to be paid pro rata to each of the attaching creditors; the court, as shown by the record, "being of opinion that the judgment of the county court rendered at its January term, 1869, was a final judgment, and though very peculiarly expressed, yet having been acquiesced in and unappealed from, the parties were, so far as it would avail, entitled to its benefit and bound by its terms. And it not appearing that the plaintiff in either case assented to the order of the court rendered at its February term, 1870, or either appeared or had notice of the action of the court, this court was further of opinion that so far as these plaintiffs were concerned the order appointing a receiver was void, and a payment made to him, though they actually came to the receipt of the money, could not bar them; and thereupon ordered the judgments to be revived in each case, though the judgments are each for the identical same sum. The court was of opinion that but one satisfaction could be had, as in each case the plaintiff assented to hold as trustee for the others as beneficiaries, and if, after one satisfaction, the parties should attempt to proceed, the court would interpose and quash any further execution. This court could only revive the judgments just as they stood originally, or else hold them void."

To this judgment of the circuit court

Withers applied for and obtained a writ of error from one of the judges of this court.

The court is of opinion that the judgment of the circuit court is erroneous.

It is well settled that an attaching creditor can have no judgment against a garnishee until he has first established his claim against his debtor. The court ought never to render judgment against a garnishee until the

debt, claim or demand of the plaintiff

551 in the attachment *is established by decree or judgment of a court of competent jurisdiction. See Drake on Attachments (§460), where the learned author

says: "As the whole object of garnishment is to reach effects or credits in the garnishee's hands so as to subject them to the payment of such judgment as the plaintiff may recover against the defendant, it results necessarily that there can be no judgment against the garnishee until judgment against the defendant shall have been recovered. And the judgment against the defendant must be a final one. If appealed from by the defendant there can be no judgment against the garnishee while the appeal is pending." For this statement of the doctrine, the author cites a number of cases from the different states. It is certainly the established doctrine of this court. In a recent case the president of this court, speaking of the nature of attachment proceedings, said: "Their general and almost universal nature is twofold—first, to obtain a judgment by a creditor against a debtor for the amount of the debt claimed; and secondly, to subject by attachment certain property or credits of the debtor to the payment of such debt. The first enquiry in such cases always is, whether there be in fact any such debt, and what is its amount; and that enquiry is governed by the same principles as if the suit was an ordinary one by a creditor against a debtor."

Now, in this case, there was no valid judgment against the debtor, and this was shown upon the face of the proceedings in the circuit court, for upon the demurrer to the scire facias and plea of nul tiel record the proceedings in the county court were spread on the record of the circuit court. By these proceedings it was shown that the judgment against the debtor was obtained at a monthly term of the county court, and at the same term, indeed in the same order, a judgment was rendered against the garnishee. The county court had no jurisdiction

at its monthly term to render such

552 judgment *against the debtor. Proceedings may be taken at a monthly term respecting the attached effects, or the garnishee as ancillary to the judgment, yet no judgment can be had against the garnishee until after judgment against the debtor by a court of competent jurisdiction. Now, it is well settled, both by the statute law and the decisions of this court, that at a monthly term of the county court, no judgment against a debtor upon action at law for the recovery of money can be had, but such judgment can only be had at the quarterly term of such court. Code 1873, ch. 154, § 3 and § 12; see also

Wynn v. Scott, 7 Leigh 63, and Claflin & Co. v. Steenbock & Co., 18 Gratt. 842. In this case the judgment was at a monthly term and it is plain the court had no jurisdiction.

It is argued by the learned counsel for the appellee, and this view seems to have been adopted by the court, that the judgment of the county court having been acquiesced in by the appellant, and no appeal having been taken, that judgment is conclusive against him. This is a radical error. A judgment pronounced by a court having no jurisdiction is a mere nullity, not only voidable but entirely void. Such a judgment may be assailed anywhere and everywhere, in courts of the last resort, as well as in inferior courts. Whenever proceedings may be had to enforce such void judgment it may be opposed, and the jurisdiction of the court that pronounced it questioned and assailed. There is an obvious distinction between such a case where the court has no jurisdiction to enter the judgment complained of, and a case where the court having a general jurisdiction, over the subject matter has erroneously exercised it. In the latter case the judgment cannot be questioned in any collateral proceeding, and if not appealed from is final; but where the court is without jurisdiction its judgment must be treated as a mere nullity, and all proceedings under it, or dependent on it are void. See

553 Cox v. Thomas' adm'x, *9 Gratt. 312;

Ballard v. Thomas and Ammon, 19 Gratt. 14; Lancaster v. Wilson, 27 Gratt. 624, and cases there cited. In this case the county court at its monthly term, having no jurisdiction, as seen by reference to the statute law and decisions of this court above referred to, to enter the judgment against the attachment debtor, that judgment was void, and consequently the judgment against the garnishee was premature, and no scire facias could be issued thereon to revive a judgment based upon a void judgment.

The court is further of opinion that upon the plea of payment the judgment of the circuit court ought to have been in favor of the garnishee. The order of the county court at the January term, 1869, declared that the moneys to be paid by the garnishee should "be paid pro rata on this and two other judgments obtained against the defendant—one in favor of A. G. Smith, the other in favor of E. D. Kernan and Malissa O. his wife—which judgment are subject to prior liens, if any."

The priorities of these judgments could not be settled by the garnishee. The court alone could do that; and no doubt it was for the purpose of settling these priorities and adjusting the rate of distribution of the fund among the attaching creditors, that the court at the following term directed the garnishee to pay over the money due the attachment debtor to a receiver of the court.

If, therefore, this irregular order of the county court, containing two judgments and a quasi order for an account of priorities all in the same order, had been entered at a quarterly term instead of a monthly term of

the county court, or if the proceedings had been entirely regular, the garnishee, on the plea of payment and the production of the receipt of the receiver of the court, ought to have had a judgment in his favor on the proceedings under the scire facias. A
 554 payment to the *receiver was a full discharge of the judgment against him. See Code 1873, ch. 148, § 17; Freeman on Judgments, § 167.

Upon the whole case, we are of opinion that the judgment of the circuit court of Russell must be reversed.

The judgment was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the three judgments aforesaid and the arguments of counsel, is of the opinion, for reasons stated in writing and filed with the record, that the said judgments of the said circuit court are severally erroneous. Therefore, it is considered that the said judgments, be reversed and annulled, and that the plaintiff in error recover against the defendant in error his costs by him expended in the prosecution of his writ of error aforesaid here, together with his costs in the said circuit court. And the court, now proceeding to render such judgment as the said circuit court ought to have rendered, it is further considered that the said scire facias in each case be quashed, and that the plaintiff in error go thereof without day; all of which is ordered to be certified to the said circuit court of Russell county.

Judgments reversed.

555 *Kent's Adm'r v. Cloyd's Adm'r.

August Term, 1878, Wytheville.

1. Administrators—Decree to Pay Debt.—

It is error to decree that an administrator *de bonis non* shall pay a debt of his testator out of the assets in his hands, upon an admission in his answer that there are debts due the estate uncollected more than sufficient to pay all the debts.

2. Equity—Creditor's Bill.*—Where a creditor's bill has been filed against the administrator, devisees and legatees, and a decree for an account has been made in the cause, no other creditor of the estate can maintain a separate suit in another court for the satisfaction of his debt. And if the bill shows he had knowledge of the decree for an account in the first suit, his suit will be dismissed upon demurrer to the bill.

In November, 1872, David C. Kent, administrator of Gordon Cloyd, deceased, brought his suit in equity in the county court of Pulaski county, which was removed to the circuit court of the county, against Isaiah H. Welch, administrator *de bonis non*, with the will annexed, of James R. Kent, de-

ceased, and the devisees and legatees of said James R. Kent, to subject the estate of said James R. Kent to satisfy a judgment which he had recovered against said Welch, administrator, as aforesaid, in the county court of Pulaski, for the sum of \$1,927.32, with interest and costs. The bill states that he had sued out an execution on his judgment which had been returned, "No property found;" that the personal estate, of which the said James died possessed, is wholly inadequate to pay his debts; that upon this state of facts he commenced this suit for the purpose of having so much of the real estate of which said

James died seized, administered by
 556 *this court, as would, with the aid of the personalty, discharge his debt. But shortly after it was instituted, he was informed that a creditor's bill had already been filed in the circuit court of Montgomery county, and that a decree for an account had been made therein. He was induced by this information to suspend the prosecution of his suit, and instructed his counsel to examine said suit, with a view of determining whether or not he could safely make himself a party to it for the recovery of the amount of his judgment. The counsel having made the requisite examination, advised plaintiff that the conditions of that cause and the complications connected with it, precluded the hope of realizing anything but trouble and expense for years to come by becoming a party to it. He thereupon determined to proceed with his own suit, and if required to do so, to pay the costs of the same himself, sooner than jeopardize his claim, or indefinitely postpone its collection by making himself a party to a cause which, after years spent in its prosecution, has yielded the plaintiff nothing but disappointment. He prays for an account of the administration of Welch, the administrator *de bonis non*, and if it shall be found necessary, that so much of the real estate may be sold as will pay off his judgment, and for general relief.

The defendants appeared and demurred to the bill, but the court overruled the demurrer; and the defendants not having answered, the bill was taken for confessed, and a decree was made directing Welch to render an account of his administration of the estate of James R. Kent, before one of the commissioners of the court. And the commissioner was directed to report what lands James R. Kent, died, seized and possessed of his own right.

The commissioner returned his report in August, 1874. He stated the debts of James R. Kent, principal and interest, to the time of the report, \$24,282.67; and he reported that the administrator, Welch, had
 557 property *administered all the assets which he had collected. Afterwards, John T. Cowan, one of the devisees, having answered, stating that the personal estate, yet to be collected, was sufficient to pay all the debts, in August, 1874, this court made another decree directing the commissioner to report the amount of uncollected assets of James R. Kent, then in the hands of the

*Equity—Creditor's Bill.—Saunders v. Griggs, 81 Va. 506 distinctly affirms the rule laid down in the second headnote of the principal case. See also Ewing v. Ferguson, 33 Gratt. 548, and note.

administrator, or to come to his hands, and of what these assets consist; if debts due, whether solvent and may be realized in a reasonable time or not. In response to this decree, the commissioner, on the 31st of March, 1875, reported that there were no assets in the hands of Welch, but there was to come to his hands from debts he mentions and the sale of lands in West Virginia, sums which make together \$26,000. And he says the administrator stated he did not know when any of the amounts would be realized. The commissioner cannot state whether the debts will be realized in a reasonable time or not.

After the report of the commissioner had been returned, Welch, who had been sometime absent in California, filed his answer in the cause. He denies that there is not sufficient personal assets of his testator's estate to pay off all the debts against it, but avers that there are sufficient assets unadministered to pay off all the debts; and he denies that the creditor's suit in Montgomery county is in such a complicated condition as to preclude the hope of realizing anything but trouble and expense for years to come.

At the foot of this answer is a note of the counsel of the plaintiff, which states: "It is admitted before the filing of this answer that the assets referred to in it are the same as mentioned in Commissioner Davis' report of the 31st of March, 1875, and filed in this cause."

The cause came on to be heard at the August term, 1876, when the court made a decree that the defendant, I. A. Welch, out of 558 the assets of his testator's estate in *his hands to be administered, pay to the plaintiff, David C. Kent, administrator of Gordon Cloyd, deceased, the sum of \$1,927.32, with interest, &c., and to G. W. Webb, another creditor, \$837.50, with interest; and leave is given the plaintiffs to sue out execution against the defendant Welch, administrator as aforesaid, for the sums decreed to be paid to them respectively, &c. And thereupon Welch, as administrator, &c., applied to a judge of this court for an appeal; which was allowed. For the facts in the Montgomery suit, see the opinion of Judge Staples.

Hudson and Gilmore, for the appellant.

Walker and Baskerville, for the appellees.

STAPLES, J., delivered the opinion of the court.

The court is of opinion that the decree of the circuit court rendered at the August term, 1875, is founded upon a misconception of the meaning and effect of the answer of Isaiah A. Welch, administrator de bonis non with the will annexed of James R. Kent's estate. That answer is not an unqualified admission of assets in the hands of the administrator sufficient to discharge all the liabilities of the estate, but an admission that certain assets then in litigation when collected would be sufficient for that purpose. This is rendered very clear by a statement

at the foot of the answer, made by complainant's counsel, to the effect that the assets referred to in it are the same as mentioned in the commissioner's report of 31st March, 1875, and filed in the cause. A reference to that report will show that the administrator stated to the commissioner there were no assets in his hands, but that there was due the estate about \$23,000, \$18,000 of which was then in litigation. 559 \$4,000 of bonds *upon sales of land in West Virginia, and the remaining \$3,000 a debt upon the Blacksburg Savings Bank. The administrator stated he did not know when any of these sums would be realized, and the commissioner was unable to form any reliable opinion on the subject. This statement, thus carefully guarded, the circuit court treated as an unqualified admission of personal assets sufficient to pay all the debts of the testator, and upon it rendered a decree for the whole amount of complainant's debt, being about \$3,000, against the administrator, to be paid out of the assets in his hands to be administered; and in default of such payment leave was given to sue out execution. It does not materially concern us to enquire whether this is a decree de bonis propriis or de bonis testatoris. Conceding that it is of the latter description, the complainants may sue out execution, and upon a return of nulla bona, the complainants may institute an action for a devastavit upon the administration bond against the administrator and his sureties, and recover the full amount of the decree. *Bush v. Beal*, 1 Gratt. 229. And thus it is, the administrator and his sureties are to be held liable for the debts of the testator upon a supposed admission of assets, when no such admission was made, and when it plainly appears that the assets have not been collected, without default on the part of the administrator, and, indeed, never may be collected.

The decree of the circuit court is therefore clearly erroneous and must be reversed and annulled. And this court, upon such reversal, might now render such decree as is warranted by the answer, or remand the cause for further proceedings, were it not for a greater difficulty lying at the very foundation of the suit itself. A brief statement will show what this is.

It appears that some time prior to 1870, a general creditors' bill was brought in the county court of Montgomery, and afterwards removed to the circuit court, 560 *against the personal representative, legatees and devisees of James R. Kent's estate, the object of which was to settle the administration accounts, ascertain the indebtedness of the estate, and to obtain a sale of real estate in the hands of devisees to meet an alleged deficiency of personal assets. In the progress of this suit accounts have been taken from time to time, showing the condition of the estate, the amount of assets, collected and uncollected, and the claims of creditors. This suit was pending in the year 1874, and there is every reason to believe it is still pending. The present bill was filed in October, 1873,

in the circuit court of Pulaski, by complainant, a judgment creditor of James R. Kent's estate, against the administrator with the will annexed and legatees and devisees of said estate. Complainant alleges that his counsel made an examination of the papers in the Montgomery suit, and advised complainant that the condition of that cause and the complications connected with it, precluded the hope of his realizing anything but trouble and expense for years to come by becoming a party to it. He thereupon determined to proceed with his own suit, and if required to do so, to pay the costs of the same himself sooner than jeopardize his claim or indefinitely postpone its collection by making himself a party to a cause which, after years spent in its prosecution, has yielded the plaintiff nothing but disappointment. At the March term, 1874, the defendants demurred to the bill, but the court overruled the demurrer and directed one of its commissioners to settle the administrator's accounts, and to report the value, location and quantity of the lands of which the testator died possessed. The commissioner made a partial settlement and report, based entirely upon papers and vouchers in the hands of the commissioner acting under the decrees of the circuit court of Montgomery, to which reference has already

561 been made. *This report was returned to the August term, 1874, at which time one of the devisees filed his answer. He insisted that the personal assets were sufficient to pay all the debts of the estate, but had not been collected by the administrator; and he explained the difficulties in the way of the collection. He insisted that the circuit court of Montgomery had taken complete jurisdiction of the assets and the administration of the estate, and he denied there were any such difficulties or complications in that suit as precluded complainants from obtaining complete relief there. Upon the coming in of this answer the court directed the commissioner to ascertain and report the amount of assets then in the hands of the administrator or to be collected; of what they consisted; whether they could be realized in a reasonable time, and the probable time required for their collection. Pursuant to this decree the commissioner made the report alluded to in the outset of this opinion, and he also reported the amount necessary to be paid by each devisee to meet the claims of creditors in this suit. After this report was filed the administrator, having returned to the state, filed his answer, and upon that answer, complainant abandoning apparently his remedy against the devisees, took the decree against the administrator, which has been already considered.

This brief statement will show the justice and wisdom of the rule which declares upon a decree for an account that the claims of all the creditors must be brought in under that decree; that such a decree operates as a suspension of all other suits, and is treated as a decree in favor of all the creditors. *Stephenson v. Taverners*, 9 Gratt. 398.

The complainant does not explain the

character of the complications which interfered with his remedies in the Montgomery suit. In the nature of things there 562 could *be done which would not equally affect any other suit involving a settlement of the whole estate. It is very probable the delay in the Montgomery suit was due in part to the want of proper diligence, and in part to the difficulties attending the collection of debts due the estate. If the complainant was dissatisfied with this delay he might have applied for leave to prosecute the suit in his own name, and if necessary to file a supplemental bill. *Hallett v. Hallett*, 2 Paige's R. 21, and cases there cited. If the circuit court of Montgomery erred in not decreeing a sale of the real estate to satisfy the claims of creditors, the remedy was in an appeal to a higher court. If the complainant may file an independent bill every other creditor may do the same in any county where any of the devisees may reside. Learned counsel seem to suppose it is a mere question of costs, which his client is willing to pay rather than be involved in the complications of the Montgomery suit. This is a misapprehension. The expense of several suits by different creditors is of course a matter for consideration, but it is not the chief consideration. When a decree for an account upon a creditor's bill is rendered it operates as a judgment in behalf of all the creditors. The court thereby takes control of the assets, and administers them under its own immediate supervision. The entire administration of the estate is drawn into that court. The same result follows when the heir or devisee is made a party with a view to the sale of the real estate. The court decrees the sale, takes control of the fund, and administers it in the interest of all concerned.

The practical effect of a bill by a separate creditor in another court, after a decree for an account in the first, is to oust the jurisdiction of the latter court of its administration of the assets. But this is not all; the proceeding is open to all the objections of a useless multiplicity of suits, and to 563 all the difficulties consequent *upon different decrees and different reports which, if conducted by different counsel and different commissioners, may vary in their principles and their results. *Kettle & Wife v. Craig*, 1 Paige's R. 416, in note.

In the present case the most that can be done would be to give complainant a decree for his debt to be paid out of the assets as they are collected. But it is obvious in this way he would obtain an advantage over the creditors in the Montgomery suit, if the personal assets prove insufficient to satisfy all the claims of creditors. If it be said he may at least obtain a pro rata share, the question arises, how is the Pulaski court to determine what is a pro rata share, without having all the creditors before it, and thus in effect assuming the very jurisdiction already attached to the Montgomery court?

The circuit court of Montgomery, in ignorance of the Pulaski suit, and of the claims asserted there, may make decrees and orders

of distribution wholly inconsistent with the proceedings and orders in the Pulaski suit.

It is very manifest, however, that the complainant was not looking so much to the personal assets, which he regarded as unavailing, as to the real estate in the hands of the devisees. But surely the Montgomery court, which had before it all the creditors except complainant, was the proper tribunal to determine whether the condition of the estate and the interest of creditors required a sale. If both courts decreed sales, it is easy to see the conflict and confusion resulting from different commissioners and different sales, as well as the inconvenience and expense to the devisees.

It is, however, unnecessary to dwell longer upon the evils necessarily flowing from two administrations of the same estate in different courts, at the suit of different creditors. That the Pulaski court erred in decreeing an account in this case does not admit of serious question. That court ought to have

564 dismissed the bill upon the *demurrer, because it showed that complainant was fully apprised of the proceedings in the Montgomery circuit court, and he gave no sufficient excuse for not applying to that court for relief. No possible good could be effected in retaining complainant's bill for any purpose, as his only remedy was in the suit in the Montgomery court.

For these reasons the decree must be reversed, and the bill dismissed.

The decree was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the decree aforesaid, and the argument of counsel, is of the opinion, for reasons stated in writing and filed with the record, that the said decree is erroneous; therefore it is decreed and ordered, that the said decree of the said circuit court be reversed and annulled, and that the appellant recover of the appellee, David C. Kent, administrator of Gordon Cloyd, deceased, his costs by him in this behalf expended, to be paid by the said administrator of Gordon Cloyd, deceased, out of the goods and chattels of his intestate in his hands to be administered. And the court now proceeding to render such decree in the premises as the said circuit court ought to have rendered, it is further ordered and decreed that the bill of the said David C. Kent, administrator as aforesaid, be dismissed and that the defendants therein recover against the plaintiff therein, their costs by them about their defence of said bill expended, to be paid out of the goods and chattels of his intestate in his hands to be administered; which is ordered to be certified to the said circuit court of Pulaski county.

Decree reversed.

565 *Justice v. English & als.

July Term, 1878, Wytheville.

I. In contemplation of the marriage of B and L, B by deed in which L joined, conveyed her property con-

sisting of personalty and a life estate in land, to M, in trust for her separate use, with full power in her to dispose of the rents and profits as if she had never married, and to transfer in such proportion and form as she shall from time to time direct, notwithstanding her coverture, by any writings under hand and seal attested by three or more credible witnesses, or by her will, executed and attested in the same mode. By a paper executed as prescribed in the deed, B directed her trustee to purchase two lots to be paid for out of her trust fund, and this was done and they were conveyed to the trustee on the same trusts. These deeds were duly recorded. The trustee dying, C and W were appointed trustees. Afterwards B, by deed executed by herself alone, and acknowledged by her in the clerk's office without privy examination, upon full consideration, conveyed the lots to W, and he died, and they were sold to different purchasers. B died intestate in 1862; and in March, 1875, her heirs filed their bill against the purchasers to recover the lots—HELD:

1. Wife's Separate Estate—Alienation.*—

The deed of marriage settlement directing how the trust fund may be disposed of by B, and the

*Wife's Separate Estate—Alienation.—In Frank v. Lilienfeld, 33 Gratt. 395, the court says: "The applicability of the maxim, *expressio unius est exclusio alterius*, in the determination of questions arising upon the construction of marriage settlements, as to the mode to be observed by the wife in the disposition of the property settled to her use, has led to much discussion and a great contrariety of decision among the courts. It seems to have been applied by this court in Williamson v. Beckham, 8 Leigh 20, and rejected in Lee v. Bank of United States, 9 Leigh 200, and in Woodson v. Perkins, 5 Gratt. 345; and in subsequent cases, the question whether, where the instrument creating the separate estate prescribes a mode of disposing of it, the prescribing of that mode, without negative words, should be construed as intended to exclude any other, on the principle of the foregoing maxim, has been adverted to as still an unsettled question in the state. See Nixon v. Rose, 12 Gratt. 425, 431; McChesney v. Brown, 25 Gratt. 393, 401; Justis v. English, 30 Gratt. 565, 571."

See also Ropp v. Minor, 33 Gratt. 97 and note, 2 Min. Inst. (3rd Ed.) 648; 22 Am. & Eng. Enc. Law 10. In Christian & Gunn v. Keen, 80 Va. 369, it was held that where real estate is granted to a trustee for the separate use of a married woman, free from her husband's debts to be disposed of upon her written request, for reinvestment, the proceeds to be held for her benefit upon like restrictions, she has the power of alienation and the grant of special power to dispose of the property in a particular manner does not divest her of her general power to dispose of it in any other manner. In Freeman v. Eacho, 79 Va. 43, the case was as follows: property was settled upon a married woman for her separate use, with power by a writing under her hand and seal, attested by two witnesses to direct her trustee to sell or incumber it. Later by writing with a scroll annexed but not recognized as a scroll in the body of the instrument to encumber it. Held, it was a case of defective execution of a power which a court of equity will remedy. In Price v. Bank, 92 Va. 472, the court said: "Where the instrument creating the separate estate prescribes one mode of alienation by the wife, the prescribing of that mode is not to be construed as an intention to exclude alienation by her in any other manner unless an intention

lots having been purchased under her directions, as prescribed in that deed, were a part of the trust estate, and being real estate could only be conveyed in the mode directed in the deed; and therefore the deed from B to W did not pass the title to the lots to W.

2. Same—Purchasers Affected with Notice.—The purchasers holding under W, are affected with the notice of the trusts, and will be treated as trustees for Mrs. B and her heirs.

3. Same—Defective Conveyance—Equity.—It is not a case in which equity will aid a defective conveyance in favor of a *bona fide* purchaser.

566 *4. Statute of Limitation.—Mrs. B being under coverture until her death in 1862, and the statutes of limitations having been suspended until December 31st, 1869, the statute of limitations does not bar the claim of the heirs of B; and under the circumstances the delay in bringing the suit does not bar the claim.

5. Return of Purchase Money.—Though there is a covenant of general warranty in the deed from B to W, yet there is nothing to show that she intended to bind her estate by that covenant, and no personal decree could have been made against her, and it does not appear that the heirs of B have received property in which the purchase money of the lots was invested, the purchasers are not entitled to have the purchase money returned out of the estate of B, or to subject the lots for it.

This case was heard at Richmond, but was decided at Wytheville. The case is fully stated in the opinion of Judge Burks.

Sands, Leake & Carter and Spilman, for the appellant.

James H. Dooley and Ould & Carrington, for the appellees.

BURKS, J. The heirs of Lucy Ann Leber, deceased, filed their bill in the chancery court of the city of Richmond against William M. Justis and others to set aside a deed made on the 7th day of May, 1847, by the said Lucy Ann Leber to John Watkins, and to have surrendered to them two lots of land near the city of Richmond, conveyed by said deed and claimed by the said Justis and others through said Watkins by successive conveyances.

The chancellor, at the hearing of the cause, rendered a decree declaring the deed to be absolutely null and void, and the lots to be the absolute property of the heirs, and refused to order an account requested **567** by the defendants. *From this decree an appeal was allowed Justis by one of the judges of this court.

The record shows the following case: Lucy Ann Leber, the widow of Jesse Blackburn, deceased, being the absolute owner of some personal estate, and entitled to an estate for her life in a tract of land, some

to do so can be clearly gathered from the face of the instrument.

Laches—Statute of Limitations.—See *Irvine v. Greever*, 32 Gratt. 411; *Brown v. Lambert*, 33 Gratt. 256, citing principal case.

personal property and money, in contemplation of marriage with Christian Leber, by deed dated, 14th February, 1833, conveyed and assigned her property and estate aforesaid to one Gustavus Adolphus Muir, to hold as trustee to her separate use. The trustee and intended husband united with her in the deed. After reciting the agreement between the parties and conveying the property to the trustee, the deed declares the following trusts: "To have and to hold the said property hereby conveyed unto the said Gustavus Adolphus Muir, his executors, administrators and assigns, upon such trusts, nevertheless, and for such intents and purposes, and under such provisions and agreements as are herein mentioned; that it to say, in trust for the said Lucy Ann Blackburn and her assigns, until the solemnization of the said intended marriage, then upon trust that the said Gustavus Adolphus Muir, his executors, administrators and assigns, shall and do permit the said Lucy Ann to have, receive, take and enjoy all the interest and profits of the said property assigned to and for her own use and benefit, uncontrollable as if she had never been married, and to transfer in such proportion and form as she, the said Lucy Ann Blackburn, shall, from time to time, direct, notwithstanding her coverture, by any writings under her hand and seal, attested by three or more credible witnesses, or by her will and testament, in writing, to be by her signed, sealed, published and declared in the presence of the like number of witnesses, direct, limit or appoint, to the intent that **568** the same may not be at the disposal of or subject in any manner to the control, debts, forfeitures, or engagements of the said Christian Leber, her intended husband."

The contemplated marriage was solemnized, and on the 22d day of October, 1838, Mrs. Leber, by writing under her hand and seal, attested by three witnesses, directed Henry L. Carter (who had been substituted as trustee in the place of Muir) to purchase for her two lots of land near the city of Richmond, owned by one Bernard Briel, provided the purchase could be made for \$1,750, and further directed that in case the purchase could be effected, the purchase money should be paid out of the property held by said Carter as her trustee, or out of the proceeds of the sale thereof. It will be observed that this writing was in strict pursuance of the power reserved by the deed of settlement. Carter, the trustee, accordingly made the purchase of the lots at the price limited by the written authority of Mrs. Leber, and Briel and wife conveyed the same to him by deed dated the 22d day of October, 1838. This deed refers to and recites in part the deed of settlement, and also refers to and annexes the written authority of Mrs. Leber for making the purchase, and contains the following declaration of trusts:

"Upon the trusts, however, and for the purposes declared and expressed in the said indenture or marriage settlement first herein recited, executed to the said Gustavus Adol-

phus Muir, bearing date the 14th day of February, 1833, and in whose place and stead the said Henry L. Carter has been appointed trustee as aforesaid, so that the said Lucy Ann Leber, late Lucy Ann Blackburn, may have, receive, take and enjoy all the interest and profits of the said property hereby conveyed and transferred in like manner is as provided in relation to the property assigned by the said indenture of the 14th day of February, 1833, and so that she

569 may have the same *rights, power and authority in all respects over the property hereby conveyed, assigned and transferred, that she has or had over what was assigned by the said indenture.

Carter, the trustee, afterwards died, and by decree of court, on a bill filed for the purpose, John Watkins and Charles H. Leber were appointed trustees, and invested with all the power and authority which were vested by the marriage settlement in the original trustee; and by the terms of the decree they were expressly "directed and required to take and hold all the property, real and personal, and all the money therein specified, and all other property, money or effects that the said Lucy Ann Leber may have acquired under and by virtue of the said marriage settlement, and to hold the same subject to all the uses, trusts and conditions specified and declared in the said deed of marriage settlement."

The trustees thus appointed accepted the trust, and on the 7th day of May, 1847, Mrs. Leber, still a married woman, by deed of that date conveyed, or attempted to convey, the two lots aforesaid to Watkins, one of her trustees. The deed was not executed by her husband, nor by either of the trustees. She alone signed it, and it was acknowledged by her before the clerk in his office for recordation, without privy examination and certificate thereof, and there was no writing directing a conveyance, signed, sealed and attested, as required by the deed of settlement.

All three of the deeds mentioned were recorded, and the deed to Watkins refers to the other two deeds as of record. It recites correctly the dates of the other two deeds and the names of the parties thereto, and describes the property embraced in the marriage settlement as "conveyed to G. A. Muir, in trust, to hold the same to the separate use and benefit of the said Lucy 570 Ann, to be *used and enjoyed by her as fully as though she were a feme sole, and to be transferred and conveyed to such person or persons as she should, by any writing under hand and seal, attested by three or more credible witnesses, direct, notwithstanding her coverture, and free from any control, contracts or liabilities of her husband, the said Christian Leber." It purports to be a deed of bargain and sale for the consideration of \$1,500, "which sum," it is recited, "has been paid by the said John Watkins to the said Lucy Ann Leber and invested in other property."

The deed also contains a covenant of warranty in these words: "And the said Lucy Ann Leber, for herself and her heirs, the title

to the said two lots or pieces of land, with the buildings and appurtenances thereunto, unto him, the said John Watkins, his heirs and assigns, do by — presents warrant, and will forever defend against the claims and demands of all persons whomsoever."

Watkins took possession of the land under the deed and held it until his death, which occurred in the latter part of the year 1861, and it then passed in parcels by successive conveyances to different alienees, the appellant being one of them.

Mrs. Leber died intestate on the 27th day of October, 1862. Her husband, Christian Leber, survived her and died on the 27th day of March, 1864. Charles H. Leber, the co-trustee of Watkins, died in June, 1870. The heirs filed their bill in March, 1873.

The first question to be determined, is whether the deed of the 7th May, 1847, from Mrs. Leber to Watkins, under whom the appellant claims, passed a good title to the lots therein mentioned. At the date of this deed, Mrs. Leber was a married woman, and

the lots were clearly a portion of her 571 separate estate. Whether *the deed, therefore, passed a good title, depends on the power she had to dispose of her separate estate.

In England, according to recent decisions, the power of a married woman in equity over her separate estate, both real and personal, unless restricted by the instrument creating it, is for the most part, that of absolute owner. There, in the absence of such restrictions, she may charge it, encumber it, alien and devise it by her sole act as effectually as if she were unmarried. In Virginia, her power is not quite so large. For here, while she may dispose of her separate personal estate and the rents and profits of her separate real estate in the same manner as if she were a feme sole, unless restrained, as she may be, by the instrument creating the estate, yet as to the corpus or body of her separate real estate, according to the course of decision of this court, she can dispose of that only in the mode, if any, prescribed by the instrument creating the estate, or unless prohibited expressly or impliedly by such instrument, in the mode prescribed by law for the alienation of real estate by married women, or by last will and testament, it would seem as provided for the first time by the Code of 1849. See Code of 1873, ch. 118, § 3; 3 Lomax Dig. (ed. 1855), 11, note 1.

These are well settled principles; but whether, where the instrument creating the estate prescribes a mode of disposing of it, the prescribing of that mode, without negative words, is to be construed as intended to exclude any other, on the principle of the maxim *expressio unius est exclusio alterius*, or the maxim of like import *expressum facit cessare tacitum*, is still "a much vexed and unsettled question" in this state. *McChesney & al. v. Brown's heirs*, 25 Gratt. 393, 401; *Penn & als. v. Whitehead & als.*, 17 Gratt. 503, 514; *Nixon v. Rose*, trustee, 12 Gratt. 425, 431, 432; *Woodson*, trustee, *v. Perkins*, 5 Gratt. 345; *Lee v. Bank U. States*, 9 Leigh 200; *William-*

572 son * & Beckham, 8 Leigh 20; *Vizonneau v. Pegram*, 2 Leigh 183; *West v. West's ex'or*, 3 Rand. 373; *McDowell v. Burging*; *Hawley v. Flint*; *Bank of Greensboro' v. Chambers & others*; (the three cases last named lately decided by this court at Richmond, and not yet reported); *Hulme v. Tenant*, 1 Lead. Cas. Eq. Part 2 (ed. 1876), 679, et seq., and English and American Notes.

How, if at all, equitable separate estates, of which we have been speaking, where they have been created by settlements since the married women's act recently passed by the legislature, will be affected by such act, need not now be considered, as the act is not retrospective. Acts 1876-77, ch. 329, pp. 333, 334; Acts 1877-78, ch. 265, pp. 247, 248. Under the deed of marriage settlement, Mrs. Leber reserved to herself the power of a feme sole over "all the interest and profits" of the property conveyed by that deed. This is plain from the language employed; the trust being to permit her "to have, receive, take and enjoy all the interest and profits of the said property hereby assigned to and for her own use and benefit, uncontrollable as if she had never been married." These terms import absolute dominion and unlimited power of alienation, but they are confined to the "interest and profits." They do not extend to the disposition of the "property" from which the "interest and profits" were to be derived. On the contrary and in immediate connection, she provides for the disposition of the "property," the principal subject, and prescribes for herself a particular mode of disposal. It might be argued with great force, upon the principle *expressum facit cessare tacitum*, that the express reservation of "uncontrollable" power over the interest and profits, and in the same connection a special designation of a particular mode of disposal of the principal subject should be construed as intended to exclude any other mode of disposing of such principal subject. However that may be, the writing of

573 *the 22d October, 1838, which she gave the trustee Carter, was a strict execution of the power reserved over the trust property. Whether the purchase money paid Briel for the two lots was "paid out of the property or the proceeds arising from the sale thereof," as authorized by the writing, or out of "the interest and profits" of the property, does not appear by the record, nor it is material. From whichever source derived, it was invested in real estate, subject substantially to the same powers and trusts provided by the deed of marriage settlement, as a comparison of the last-named deed with the deed from Briel and wife will show; that is, with absolute power in the wife to dispose of the rents and profits as if she were a feme sole, and with power to dispose of the corpus or principal subject, either in the mode prescribed by the deed, or if the prescribing of that mode does not exclude any other, then in the mode provided by law for the alienation of real estate by married women, to-wit: by deed in which her husband should unite, with her acknowledgment and privy examination

taken and certified, as the statute requires, and the deed duly admitted to record. As the latter mode was not adopted, it becomes unnecessary to decide what would have been the effect if it had been adopted, and to determine the "vexed question" before referred to. I, therefore, express no opinion upon it.

I do not perceive on what ground it can be maintained that the execution of the deed to Watkins was such a disposition of the property as is authorized by the deed of settlement. The writing contemplated is a writing under the hand and seal of the cestui que trust, attested by at least three credible witnesses, directing the trustee to convey or transfer the property as may be appointed. The deed executed has none of the requisites, except that it is a writing under the hand and seal of the cestui que trust. It

does not in terms direct a conveyance

574 *or transfer of the property, is not addressed to the trustees with that view, and it is not attested. It is contended, however that it is an attempted execution of a power and such a defective execution as will be aided by a court of equity. It is certainly true that in some cases in favor of certain classes, equity will give such aid. It will do so in behalf of bona fide purchasers for value and some other parties, where the instrument by which the execution is attempted is informal or inappropriate, or being formal or appropriate, the execution is informal, as where a certain number of witnesses is required and a less number is present, or where the instrument is required to be signed and sealed, and it is signed only, and so on. *Tollet v. Tollet*, 1 Lead. Cas. Eq. (ed. 1876), top page 365, 372.

Aid is extended where the defect is in matter of form, never where it is in matter of substance. In the case before us the instrument is not only inappropriate, and the execution of it not according to the form prescribed, in that it is not attested by the requisite number of witnesses, but it is not attested at all. This is more than a mere informality. Attestation in some form, at least, or to some extent, would seem to be requisite. I regard it as essential to the due execution of the power in cases like the one before us. In marriage settlements the object generally is two-fold—to protect the wife against the control and influence of her husband, and also against her own weakness and incapacity, and I am not disposed, by construction and the active assistance of the court, to break down the safe-guards which she has deliberately thrown around herself and her property. By the instrument creating her separate estate, Mrs. Leber chose to restrain, limit and regulate her power of disposing of that estate. Equity, deviating from the rule of the common law, accorded her this right. The restraint imposed was a modification of her estate. She thought

575 proper *to make the presence of witnesses—"at least three credible witnesses"—necessary to attest the disposition of her property, and for a court of equity to give effect to an alleged disposition,

and that to her own trustee, made in the absence of any witness, would seem more like creating a power than aiding in the execution of one.

It may be that Watkins, although trustee, yet being merely the passive depository of the legal estate, without any beneficial interest in it or power over it except to convey and transfer it to the appointee of his cestui que trust, acting in good faith, might not have been incapacitated, by reason of his fiduciary relation, from making a valid purchase of the equitable estate, if, in making the purchase, the provisions of the deed of settlement had been observed; but, as we have seen, they were not observed in any essential particular, and I am therefore of opinion that he acquired no estate, right, title, or interest, legal or equitable, under the pretended deed of the 7th May, 1847.

2. Can the appellant claim the protection accorded to a bona fide purchaser for valuable consideration? Clearly not. Watkins, under whom he claims, held the legal title to the property jointly with his co-trustee, Charles H. Leber, and the latter never united in any conveyance of that title. But if the devise of Watkins passed the title, those claiming under him were affected with notice of the trusts with which the title was clothed, and equity will treat them as trustees. Watkins, being trustee, had actual notice of the trusts, and those claiming under him had what is equivalent to such notice. The deeds on their face gave notice of the trusts, and they were of record. The appellant and all those claiming through Watkins must be taken to have had the knowledge which these deeds directly imparted, or to which anything appearing therein would, on due enquiry, have

576 led. *The appellant, in becoming a purchaser, was bound to make enquiry into the title, and wherever enquiry is a duty, the party bound to make it is affected with knowledge of all the facts which he would have discovered had he performed the duty. Means of knowledge with the duty of using those means are in equity equivalent to knowledge itself. *Cordova v. Hood*, 17 Wall. U. S. R. 1, 8; *Burwell's adm'r's v. Fauber & als.*, 21 Gratt. 446, 463, et seq.

3. But the appellant, in his answer to the bill, and his counsel in argument, invoke for his protection the act of limitations and lapse of time and the alleged acquiescence and laches of Mrs. Leber and her heirs.

Equity, in obedience to the law, applies the statute of limitations to all demands of a strictly legal nature, and in equitable demands by analogy it applies the same bar that the statute fixes for legal demands of the like character, and upon its own inherent doctrine not to entertain stale or antiquated demands, and not to encourage laches and negligence, will sometimes, in cases not barred by the statute, refuse to interfere after a considerable lapse of time from considerations of public policy, from the difficulty of doing justice, when the original transactions have become obscure by time, and the evidence may be lost, and from the consciousness that the repose of titles and the security of property are mainly promoted by a

full enforcement of the maxim, *vigilantibus, non dormientibus, jura subveniunt*. 1 Story's Eq. Juris. § 529; Id. § 64a; *Bargamin & als. v. Clarke & als.*, 20 Gratt. 544, 553, and cases there cited.

While in cases of direct or express trusts, as between trustee and cestui que trusts, the statute of limitations has no application during the continuance of the trust, the relations and privity between them being such that the possession of the one is the possession of the other; yet it has been held

that if a trustee repudiates the trust by 577 *clear and unequivocal acts or words, and claims thenceforth to hold the estate as his own, not subject to any trust, and such repudiation and claim are brought to the notice or knowledge of the cestui que trust in such manner that he is called upon to assert his equitable rights, the statute will begin to run from the time that such knowledge is brought home to the cestui que trust. 2 Perry on Trusts, §§ 863, 864, and case there cited. But in such case the bar is not applied, unless the cestui que trust be sui juris, or under no disability. Id.

Upon these principles, under the facts of this case, it is evident that the appellant is not protected in his claim by the act of limitations, lapse of time, alleged acquiescence or imputed laches. The limitation to the legal remedy is fifteen years. Code of 1873. ch. 146, § 1. The saving (Id. § 4) is in these words: "If at the time at which the right of any person to make entry or bring an action to recover any land shall have first accrued, such person was an infant, married woman, or insane, then such person, or the person claiming through him, may, notwithstanding the period mentioned in the first section shall have expired, make an entry on, or bring an action to recover such land, within ten years next after the time at which the person to whom such right shall have first accrued as aforesaid, shall have ceased to be under such disability as existed when the same so accrued or shall have died, whichever shall first have happened.

Taking it then to be true, as averred by the appellant in his answer, and of which there is some evidence in the record, that about or soon after the date of the deed to Watkins, 7th May, 1847, he entered thereunder upon the lot in controversy, and thenceforth until his death in 1861, with the knowledge of Mrs. Leber, had and held actual, continuous, exclusive, adverse possession thereof, yet Mrs. Leber, during all that time, and 578 until her death in 1862, *was a married woman, and consequently within the saving aforesaid of the statute. Continuously from the date of her death, when her estate devolved on her heirs, until the first day of January, 1869, stay-laws were in force and the operation of the statutes of limitation was suspended by legislative enactments. *Danville Bank v. Waddill*, 27 Gratt. 448; *Johnston & als. v. Gill & als.*, Id. 587. The heirs filed their bill on the first day of March, 1875, less than ten years from the first day of January, 1869, when the statute began to run against their claim. Acquiescence cannot be attrib-

uted to Mrs. Leber nor laches imputed to her, for the reason that she was all the while after marriage under disability, nor are the heirs justly chargeable with laches in not prosecuting their remedy during the continuance of the war, or for several years after its termination, while the condition of the country was unsettled and the statutes aforesaid were in operation; and the delay of six years after all obstructions were removed in filing their bill, is not so unreasonable as to be a bar to equitable relief.

4. It is finally urged by the appellant's counsel that if the heirs are accorded the relief sought it should be on condition that they account for the consideration alleged to have been received by Mrs. Leber for the sale and conveyance of the lots. So far as this pretension is based on the idea that the separate estate is chargeable, on recovery of the lots, with the purchase money paid therefor, it cannot be maintained.

The power of a married woman to charge or encumber her separate estate is incident to the *jus disponendi*, and the liability of the estate can arise only out of the supposed intention of the wife, and no pecuniary engagement can be a charge on the estate which is not connected by agreement, express or implied, with such estate.

The wife is exempt from all personal liability, and *from all personal decrees and judgments on her contracts. Her undertaking, so far as it is recognized by the court, is not that she will pay the debt, but that her separate estate shall be answerable for it; and that is bound so far only as she has agreed it shall be bound. *Darnell & wife v. Smith's adm'r & als.*, 26 Gratt. 878; *Burnett & wife v. Hawpe's ex'or*, 25 Gratt. 481.

The writing of May 7, 1874, as has been seen, is void as a deed of conveyance. The covenant of warranty contained in it, if not wholly void, at least does not bind Mrs. Leber personally, nor does it bind her separate estate unless so intended. To construe the covenant as an undertaking binding the lots, which she was then attempting to convey, would be manifestly in opposition to her intention, if not absurd; and there is nothing in the nature and terms of the covenant, the subject matter, the situation of the parties, or the circumstances of the transaction, which indicates any intention on her part, or from which such intention may be fairly inferred, to charge the residue of her separate estate.

In enforcing the engagements of the wife against her separate estate, equity always has respect to her intention in making the engagements, and certainly never raises an implied assumpsit to charge the estate in opposition to her intention. In *Williams v. Duke of Bolton*, 4 Bro. C. C. 297; S. C. 2 Ves. Jr. 138, a married woman, having separate property, for a consideration which she received, sold an annuity charged upon that property. The annuity being void for want of a proper memorial, it was held that the grantee would not have an equity specifi-

cally to affect the fund clothed with a trust for the separate use of a married woman, with the consideration, upon the ground of the difficulty of raising an implied assumpsit contrary to the intention of the parties. See 1 Lead. Cas., Eq. (Ed. 1876), Part 2, pp. 696, *697, where the case above referred to and other cases of like import are cited by the English annotators.

Although, however, the consideration for the lots is not chargeable thereon, nor on the general separate estate, yet if it was paid by the trustee to Mrs. Leber and invested in other property, and as invested it remained until her death and then descended to her heirs, equity and good conscience would seem to require that they should surrender or account for it on receiving back the lots. In such case equity would be extended to them only on condition of their doing equity to others. But unfortunately for the appellant, the case supposed is not made out by the record. There is some evidence tending in some degree to show the purchase of other property by Mrs. Leber, and that possibly the purchase money claimed to have been paid by Watkins, may to some extent have gone into this property. But the evidence on this point is far too vague, uncertain and unsatisfactory, to be relied on as the basis of a decree. If, however, it had been made clear that Watkins paid a full consideration for the lots, and that the money so paid was invested by or for her in other property, to hold the heirs liable to account for this property in their suit to recover the lots, it would have been necessary to prove that such property descended to the heirs; and it is not pretended that there is any such proof in the record. Upon the whole case, I am of opinion that there is no error in the decree of the chancellor, and that the same should be affirmed.

The other judges concurred in the opinion of BURKS, J.

The decree was as follows:

This cause, which is pending in this court at Richmond, having been there fully heard, but not determined, *this day came here the parties by their counsel, and the court having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the said decree. Therefore it is decreed and ordered, that the same be affirmed, and that the appellees recover of the appellant their costs by them about their defence of said appeal expended, and thirty dollars for their damages; which is ordered to be entered on the order-book here and to be forthwith certified to the clerk of this court at Richmond, who shall enter the same on his order-book, and certify it to the said chancery court of the city of Richmond.

Decree affirmed.

582 *Trotter & als. v. Newton & al.

September Term, 1877, Staunton.

Absent, BURKS, J.

I. **Caveat—Enquiry as to Title.**—In a case of caveat founded on the alleged better right of the caveator to the land in controversy, the first enquiry is as to his title or interest in the subject.

II. **Same—Infirmary of Caveatee's Title.**—The caveator cannot recover upon the mere infirmity of the title of the caveatee; for however defective that may be, no one has a right to interpose for the purpose of preventing him from carrying his entry into grant unless he has a better right, legal or equitable, in himself.

III. **Pleading—Averment.**—The caveator must state in his caveat the grounds on which he claims the better right to the land in controversy, and he will not be permitted to abandon on the trial the right which he has set out in his caveat as that under which he claims, and prove a different right.

IV. **Statement of Case.**—In February, 1796, D obtained a grant for 4,660 acres of waste mountain land; the grant showing that there was excluded from the grant $47\frac{1}{2}$ acres of prior claims of F. In 1854, T bought D's land at a judicial sale. In 1873, N laid a warrant on the $47\frac{1}{2}$ acres and applied for a grant, and T filed his caveat to prevent the issue of the grant, and stated as the grounds of his claim, among others—1st. That F had entered and surveyed the land, and it did not appear that his right had ever been forfeited; and 2d, That T had been in possession of the land under color of title for more than twenty years, paying taxes upon it—**Held:**

1. **Caveat—Title in Third Person.**—T cannot set up title in F to defeat the caveatee; but must show a better right in himself.

2. **Same—Requirements of Valid Title.**—

As T only purchased the land of D, which did not include the land in controversy, and does not connect himself with the right of F, he must

583 show an exclusive, actual *and continued possession under a colorable claim of title, for the period required by the statute to ripen his possession into a valid title.

***Caveat—Title.**—In a caveat the caveator must show the better right to the land in controversy to be in him. He cannot recover upon the ground of the weakness of his adversary's title. *Harper v. Baugh*, 9 Gratt. 508.

†**Same—Pleading—Averments.**—The caveator must state in his caveat the ground on which he claims the better right to the land of his adversary, and he will not be permitted to abandon on the trial the right which he has set out in his caveat as that under which he claims, and prove a different right. *Harper v. Baugh*, 9 Gratt. 508. See also *Clements v. Kyles*, 13 Gratt. 468.

Exceptions from Grant—Burden of Proof.—Where the title papers of the plaintiff in ejectment disclose the fact that the exterior boundaries of the survey upon which a grant or deed to one under whom he claims is founded, includes lands which have been excepted from operation of the grant, it is incumbent on the plaintiff to show that the lands in controversy are not within the excepted lands. *Reutens v. Lawson*, 91 Va. 226. See also *Carter v. Hagan*, 75 Va. 557; *Bryan v. Willard*, 21 W. Va. 65; *Stockton v. Morris*, 39 W. Va. 432; *Harman v. Stearns*, 95 Va. 58.

3. **Same—Evidence.**—The whole track being waste mountain land, and the evidence not showing any continued possession of the land in controversy, T cannot maintain his caveat.

V. **Same—Warrant.**—In the petition for an appeal T states that he had located a warrant on the land in controversy, and claims that he is protected by the provisions of § 14, ch. 108, Code of 1873—**Held:**

1. **Statute—Actual Possession.**—That the statute only applies to a party who has actual possession and claim; which T did not have.

2. **Pleading—Appeal.**—The claim not having been made in the court below, cannot be considered in the appellate court.

3. **Same—Failure to State Claim in Caveat.**—This ground of claim not having been stated in the caveat, cannot be afterwards set up.

This case was decided in October, 1877, but there was a motion for a rehearing of the decree, which was overruled at this term of the court. It was a case of caveat in the circuit court of Augusta county, in which A. D. Trotter and others were the caveators, and Isaac Newton and Major D. Vines were the caveatees. The case was submitted to the decision of the judge, and he rendered a judgment for the caveatees. And the caveators having excepted, applied to a judge of this court for a supersedeas; which was awarded. The case is stated by Judge Christian.

D. Fultz, for the appellants.

Sheffey & Bumgardner, for the appellees.

CHRISTIAN, J., delivered the opinion of the court.

Statement of the Case.

This was a case of caveat in the circuit court of Augusta county. The caveators are the appellants, A. D. Trotter, 584 *James I. A. Trotter, Thomas N. Kinney, and other heirs at law of Jefferson Kinney. On the 10th day of December, 1873, they filed in the office of the register of Virginia land office their caveat to prevent the issuing of a grant to the appellees, Isaac Newton and Major D. Vines, for forty-seven and one-half acres of land situated in said county of Augusta, on the water of Mary's creek (now called Smith river), surveyed for said Newton and Vines on the 4th day of June, 1873, by James M. Silling, assistant surveyor of John D. Dilley, surveyor of Augusta county.

The specific grounds upon which they file their caveat are set forth as follows:

"Said caveators respectfully represent that in the year 1854 said A. D. Trotter purchased of one David L. Young and William Kinney, commissioners in the cause of Harnesbarger's adm'r v. Dowell's heirs, in the circuit court of Augusta county, a tract of 4,660 acres of land, in which said tract of land the said $47\frac{1}{2}$ acres now sought to be entered by the said Newton was embraced, and went to make up said 4,660 acres; that a short time after said purchase said James I. A. Trotter and Jefferson Kinney, who was then living, became associated with said A.

D. Trotter in said purchase and joint owners of said tract of land; said A. D. Trotter was placed in possession of said land, and immediately upon his said purchase, and he and said James I. A. Trotter and Jefferson Kinney held exclusive and uninterrupted possession of said tract of land, including said 47½ acres, up to the day of the death of said Jefferson Kinney, and said caveators have held like possession ever since. The sale of said tract of land made by said commissioners, Young and Kinney, was ratified by decree of circuit court of Augusta rendered in the above-named cause, and by a subsequent decree rendered therein said commissioner,

Young, was required to convey said 585 land to said caveators by a good *and sufficient deed; and said commissioner has so conveyed said tract of land to said caveators by deed duly recorded in the clerk's office of county of Augusta. From the time said tract of land was sold to said A. D. Trotter as aforesaid, up to the present date, the taxes assessed against it have been promptly paid up. Said caveators object to the issuing of a grant to said Newton for said 47½ acre tract of land—

"1st. Because said Newton and Vines, and each of them, well know that said caveators were in the possession, use and enjoyment of said land, and had had the same in possession ever since the purchase by said A. D. Trotter from Commissioners Young and Kinney, as aforesaid, and yet wholly failed to notify said caveators of their intention to file an application for a grant thereof. (See § 13 of ch. 112 of Code.)

"2d. Because the law has not been complied with by said applicants upon filing their said application, in this, that they have wholly failed to make and have endorsed upon the survey filed by them an affidavit such as is required from all persons applying for a grant of lands, under an act of assembly approved February 21, 1871, (see Session Acts of 1870-71, page 136); and in this, that they have wholly failed to have the affidavit of the surveyor of the county endorsed on said survey, as by said act above cited they are required to do.

"3d. Because said tract of land is not liable to entry. The survey filed by said applicants, shows that said land has been surveyed and entered by Thomas Fulton and John Dougherty, March 10, 1795; there is no evidence to show that said land has been forfeited, or that it has in any wise become liable to re-entry.

"4th. Because the plat and survey returned by said Newton was made by the surveyor without any authority for so doing. It nowhere appears that said 586 survey was *made by virtue of a land office treasury warrant, issued from your office, and is therefore void.

"Said caveators have had full and complete possession of said land for twenty years under color of title derived by decree in the above-named chancery cause, and for that time they have paid all taxes against said land; this it is insisted should make their claim superior to the claim of any party seeking a grant at

this late day, and for reasons above set forth by said caveators, pray that the application of said Isaac Newton may be rejected, and said caveators left in the quiet and peaceable possession of said land; and as in duty bound they will ever pray, etc.

"A. D. Trotter,

"James I. A. Trotter,

"Thomas N. Kinney,

"And the other heirs at law

of Jefferson Kinney, deceased."

To these specific grounds of caveat thus set forth, the caveatee filed his answer and pleas in the words and figures following, to-wit:

"This day came the defendant, Isaac Newton, by his attorneys, Sheffey & Bumgardner, and saith that the plaintiffs their caveat aforesaid ought not to have and maintain against the said defendant by reason of the matters and things in said caveat alleged, because said defendant, as to the first alleged cause for which a grant for the premises in said caveat mentioned should not issue to said defendant, saith:

"1. That said defendants, Isaac Newton and Major D. Vines, did not know that the caveators were in the possession, use and enjoyment of the said land in said caveat mentioned, or that said caveators had had the same in possession ever since the alleged purchase thereof by A. D. Trotter, one of

said caveators, from Commissioners 587 *Young and Kinney, and therefore, said defendant, in his own right, and assignee of said Major D. Vines, was well justified in applying for a grant for said land without giving notice to said caveators, or either of them.

"2. That as to said second cause or reason why said grant should not issue to said defendant, he saith, that the law has been complied with by said defendant, upon filing his said application, and that he did cause to be made and endorsed upon the survey filed by said defendant proper affidavits according to law.

"3. That as to said third cause or reason why said grant should not issue to said defendant; he saith, that, in fact, said caveators claim title and interest in said land mentioned in said caveat, under and by virtue of a grant issued by the commonwealth of Virginia to a certain Major Dowell; and said defendant further, in fact, saith, that said caveators have no title or interest in, and to the land in said caveat mentioned, and that said caveators have no title thereto, under and by virtue of any grant from the said Thomas Fulton and John Dougherty, or either of them, or from any person or persons whatsoever, claiming by, through or under the said Thomas Fulton and John Dougherty, or either of them.

"4. That as to said fourth cause or reason why said grant should not issue to said defendants, he saith, that the plat and survey returned by said defendants was in fact made by the surveyor in pursuance and by authority of law; that said survey was in fact made by virtue of land office treasury warrants, duly issued according to law, and

that it so appears by certificate of said surveyor on said survey and plat.

"5. That as to said last or fifth cause or reason why said grant should not issue to said defendant, he saith, that said caveators, or either of them, have not had full and complete possession of said lands for twenty years, under color of title, as alleged in

588 said caveat; that in *fact, said caveators have not had full and complete possession of said land at any time, and specially, that they did not have actual possession of said land at the time said defendant and said Major D. Vines made the entry upon, and by virtue of which said survey was made and said grant is demanded.

"Whereupon, said defendant prays judgment that said caveat be dismissed, &c.

"Sheffey & Bumgardner,

"For defendant."

Upon these issues thus made up in said circuit court of Augusta county (a jury being waived and all questions of law and fact being referred to the court), and upon the examination of evidence, documentary and oral, the said circuit court pronounced its judgment, and to this judgment a writ of error was awarded by one of the judges of this court.

Opinion.

The court is of opinion that there is no error in the judgment of the circuit court. While cases of this kind are now of rare occurrence in this court, the rules which govern them are well defined by the decisions of this court and may be stated as follows:

First. In every caveat founded on the alleged better right of the caveator to the land in controversy, the first enquiry is as to his title or interest in the subject. He cannot recover upon the mere infirmity of the title of the caveatee; for however defective that may be, no one has a right to interpose for the purpose of preventing him from carrying his entry into grant, unless he have a better right, legal or equitable, in himself.

Second. The caveator must state in his caveat the grounds on which he claims the better right to the land in controversy, and he will not be permitted to abandon

589 *on the trial the right which he has set out in his caveat, as that under which he claims, and prove a different right. See *Walton v. Hale*, 9 Gratt. 194; *Carter v. Ramey*, 15 Gratt. 346; *Harper, &c., v. Baugh & al.*, 9 Gratt. 508.

Let us now apply these principles to the case before us.

The caveators claim title to the land in controversy (the 47½-acre tract) upon two grounds—First, as purchasers under a decree of the circuit court of Augusta county, rendered on the 7th November, 1856, directing a sale of the real estate of one Major Dowell. The sale was made by Young and Kinney, commissioners of said court, and at the sale the appellants (the caveators) became the purchasers. Under this purchase they claim title to the land in controversy. Second. They claim that they had the actual and uninterrupted possession of said land under a

claim and color of title for the period of twenty years.

As to their claim as purchasers from Young and Kinney, commissioners, it is plain that they acquired at that sale only such title as was in Major Dowell. That was all the commissioners sold and conveyed, and that was all the purchasers acquired.

The record in this case conclusively shows that Major Dowell, under whom the appellants claim as purchasers at the judicial sale referred to, founded his claim to the lands sold by Young and Kinney, commissioners, upon a grant of the commonwealth issued by letters patent on the 9th day of February, in the year 1796. But in this very patent, containing the lands sold by said commissions, and purchased by the appellants, the 47½ acres (the land in controversy), is expressly excluded. That patent contains the following clause: "But it is always to be understood that the survey upon which this grant is founded includes forty-seven and a half acres

of prior claims surveyed for Thomas 590 Fulton and John Dougherty, *the 10th of March, 1775, exclusive of the above quantity, &c., which having a preference by law to the warrants and rights upon which this grant is founded, liberty is reserved that the same shall be firm and valid and may be carried into grant; and this grant shall be no bar in either law or equity to the confirmation of the title to the same as before-mentioned and reserved." And accordingly we find that on the 11th of April, 1798, a grant by letters patent, reciting warrant issued on 13th day of August, 1783, was issued to the said Thomas Fulton and John Dougherty, for the said forty-seven acres of land, which is the same land now in controversy. It is plain, therefore, that Dowell never having the legal title in him, the purchasers at the sale of his lands acquired no title. And it being conclusively shown that the legal title was in Fulton and Dougherty, derived by them from the commonwealth, and the appellants not connecting their title with them, they have failed to show any legal title in themselves.

But failing in this, the appellants (who are the caveators) rely upon an equitable title based upon actual adverse possession for twenty years under a color of title, which they insist has now ripened into a perfect title. Let us now examine this claim of the caveators. If they succeed in asserting their claim as caveators against the caveatees, it must be upon the ground that they have the better title, derived not from any legal title in them, or in Dowell, under whom they claim, but upon the ground that they have had an adverse possession for the period of the prescriptive bar of the statute, which gives to them the better title against the caveatees.

Judge Baldwin, in the leading case of *Taylor's devisees v. Burnside*, 1 Gratt. 165, 190, followed by this court ever since, has succinctly stated the rule governing a claim of title under adverse possession, as follows:

591 "When we look to the elements of an adversary possession *in reference to conflicting claims and the statutory

prescriptive bar, we find it to consist of an exclusive, actual, continued possession, under a colorable claim of title." It must be: first, exclusive; second, it must be actual as contrasted with constructive possession; and, third, such exclusive and actual possession must continue in the claimant or those under whom he claims for the period prescribed by the statute. These three things must concur in order to constitute a valid title founded on a claim of adverse possession.

Applying these principles to the case before us, it is clear that the caveators have not shown by the evidence such acts of actual and exclusive possession as entitle them to claim the land in controversy. The land which they purchased at the sale made by Commissioners Young and Kinney was an extensive boundary of wild mountain land, described by one of their own intelligent witnesses. Major Hotchkiss, "as a perfect wilderness, and did not look (in 1868) as if a human being had ever visited them." There is some evidence, it is true, to show that cattle had been grazed on some parts of the land so purchased, and that brush fences had been placed upon some portions of the same, but even these temporary fences have gone down years ago and not a trace of them was left when the entry was made by the caveatees; nor is there any evidence showing that the forty-seven and one-half acre tract in controversy was so grazed, or that it was ever enclosed. Indeed, one of the caveators, who was examined as a witness, admits that the fences on the land were two miles from the forty-seven and one-half acre tract; that the lands were wild mountain lands, and that the fences spoken of were only at such points in the mountains as was necessary to keep stock from leaving the lands in certain directions; that the mountains most generally themselves made a fence.

There was evidence also proving
592 that one of the caveators *had frequently sent his son and others to get specimens of ores from the forty-seven and one-half acre tract, which had been sent to various parts of the United States, accompanied by maps he had made of these lands. And he admits he had no other possession, except by sending for specimens of ores, and by such fencing and grazing as above described.

The court is of opinion that such acts of ownership and possession on the part of the caveators as are proved by the evidence in the record, are not sufficient to constitute the elements of an adversary possession, which in order to give title must be exclusive, actual and continuous, under a color of title, for the period of the statutory prescriptive bar. This would be true if the case stood alone upon the uncontradicted evidence of the caveators. But the evidence is conflicting and contradictory. It is proved by the caveatees that there was no actual possession by any one, and that the ore banks on the forty-seven and one-half acre tract were once mined by one Bryan, who had made or repaired a road in 1835; that all the work ever done on the forty-seven and one-half acre

tract was done by Bryan, who died in 1852 or '3; that no one had been in possession of the property since; that the whole was a vast wilderness of mountain land, over which cattle ranged generally, and it was no sign of separate ownership that cattle ranged over these mountains; and that caveatees never knew of any claim of ownership or possession on the part of caveators, who were never in actual possession.

Now, in this case a jury being waived, the court tried both questions of law and fact, and there being a certificate of the evidence, this court will treat it as a demurrer to evidence. So treating it, it is impossible to conclude upon the evidence set out in the record, that the caveators have established, as against caveatees, a better right to the land in controversy.

593 *As to the second and fourth grounds of caveat set out by the caveators, it is sufficient to refer to the following agreement of counsel found in the record of the trial in the court below:

"It was agreed by the counsel for the caveators that the requirements of the statute, objected to in the specifications of the caveat, had been complied with, and these objections were waived."

With respect to the third specifications, to-wit: "3d. Because said tract of land is not liable to entry. The survey filed by said applicant shows that said land has been surveyed and entered by Thomas Fulton and John Dougherty, March 10th, 1795. There is no evidence to show that said land has been forfeited, or that it has in anywise become liable to re-entry," it is sufficient to say that the caveators do not profess to claim under Fulton and Dougherty; and it is no concern of theirs that the land has been surveyed and entered by the latter, unless they can show a better right in themselves. They cannot rely on any infirmity in the title of the caveatees, but can only succeed upon showing a better legal or equitable title in themselves. *Carter v. Ramey*, 15 Gratt., supra.

In his petition for a writ of error, the learned counsel for the caveators relies upon the fact that they had also located a warrant on the land in controversy, and claims that they (the caveators) are protected by the provisions of the 14th section of chapter 108, Code 1873. That provision is as follows: "If

any person not having such possession and claim shall locate a warrant on such land without having given such notice, then the person having such possession and claim, may, at any time before a grant issues to the person thus failing to give such notice, locate a warrant on such lands and
594 file with the *register a caveat to prevent the issuing of a grant to the person thus failing to give such notice."

Now, in taking this position, for the first time in his petition here, the learned counsel assumes that the caveators were in actual possession of the land of controversy. This assumption, as has been seen, is not sustained, but is disproved by the record. But it is sufficient to say the point was not made in the court below. It was not alleged in the

specifications as one of the grounds of caveat; it was not put in issue in the circuit court, and cannot be considered for the first time in the appellate court.

In *Harper, &c., v. Baugh, &c.*, 9 Gratt. 508, it was held by this court that the caveator must state in his caveat the grounds on which he claims the better right to the land in controversy, and he will not be permitted to abandon in the trial the right which he has set out in his caveat as that under which he claims, and prove a different right.

Judge Allen, delivering the opinion of the court in that case, says: "The law requires the caveat to express the nature of the right on which the plaintiff claims the land. The object of the caveat is, in part, to notify the caveatee of the grounds on which the caveator claims the better right, that he come prepared to controvert it; and it would be surprise on him to permit the caveator to abandon at the trial the right which he had set forth in his caveat, as that under which he claimed, and prove a different right. Such a course would lead to injustice, and is in conflict with the terms of the statute, which requires the nature of the better right to be expressed in the caveat."

Upon the whole case, we are of opinion that there is no error in the judgment of the circuit court of Augusta county, and that the same be affirmed.

595 *ANDERSON, J. The question is not whether the caveator has a good title against the world, but whether he has a better right than the caveatees. It is a comparison of their rights. The caveatees have no right at all. Their own survey, for which they seek to obtain a grant from the commonwealth, shows upon its face that the same land had been previously located by Fulton and Dougherty, and the record shows, had been carried into grant by them, by patent bearing date as far back as 1798. That being so, it is not waste and unappropriated land, and it has not been forfeited to the commonwealth. There is not a particle of evidence to show that it has been forfeited. There are no other lands, than such as fall within one or the other of these two descriptions, that are subject to location by land office treasury warrant, or to grant by the commonwealth, except inclusive surveys. The commonwealth having previously parted with her title to other parties, she is invested with no title which can pass by her grant to others. And the statute expressly prohibits the register of the land office from receiving "into his office any plat and certificate of survey, which evidently comprehends the rights of any other than him for whom such survey is made, notwithstanding any deductions or reservations;" and it declares that "every such survey shall be void." It evidently appears on the face of the survey itself, which the caveatees returned to the register's office for a patent, that it comprehends the rights of others, for it says "it is the same land formerly surveyed to Thomas Fulton and John Dougherty, March the 10th, 1795, and reserved in the survey of Major Dowell's 15,100 acre survey of May 1, 1795,

containing 47½ acres." It may be said that the foregoing does not show that the survey returned to the register's office "evidently comprehends" the rights of others, because the surveyor omitted to state that Fulton and

Dougherty afterwards obtained a patent for their *said survey. It seems to me that what is stated does evidently show that the caveatees' survey comprehends the rights of others. Fulton and Dougherty had rights, because they are reserved to them in Dowell's patent; and this appears on the face of the caveatees' survey. The prohibition is not made to depend upon evidence that the survey comprehends another's legal title, but "rights" of others, which may be acquired by entry and survey. But the register has in his office the patent which emanated to Fulton and Dougherty in 1798, a copy of which is filed in this cause. By turning to which, registered in his office subsequent to the date of the survey which is given, which he should do, he will find conclusive evidence that the survey for which he is asked to issue a patent to the caveatees, evidently comprehends the rights of others. And having this evidence on the face of the survey, and in his own possession, it seems to me that he could not issue a grant to the caveatees without violating a plain provision of the law; and that a grant so issued, by the express terms of the statute, would be void.

It was plainly the intention of the legislature to prevent the issuing patents for land, which evidently comprehended the rights of any other than him for whom the survey was made, in order to prevent the disturbance of titles to land and litigation and strife. And this is further shown by the next (the 43d) section, which prohibits the issuing a grant upon the survey returned to the register's office, "unless there be endorsed on such survey the affidavit of the person applying for the grant, as well as that of the surveyor making the survey, that they verily believe that the land embraced in the survey has not been previously appropriated, or that it was at the time of the entry thereof liable to entry." &c. The first they could not make, it is reasonable to presume, because they

597 knew it had been previously appropriated. *But if they knew it had been previously appropriated, or had such knowledge of it that they could not swear that they believed it had not been previously appropriated, it cannot well be perceived how they could make affidavit that they believed it was liable to entry at the time of the entry thereof. I do not mean to say or intimate, that they had not some views of their own which justified them in their own minds in that belief, but I cannot conceive what they were. Certainly under the law, if the land had been theretofore appropriated by others, it was not subject to their entry, unless it had been forfeited to the commonwealth; and they have furnished not the slightest evidence of a forfeiture to justify their belief.

Of one thing I think there can be no question or contrariety of opinion, and that is, if a grant is issued to these caveatees, it de-

feats the purpose and intention of the legislature by these enactments.

These conclusions are well supported by authorities cited by Judge Fultz in the clear and forcible presentation of the case for the appellants in their petition. In *Carter v. Ramey*, 15 Gratt. 346, cited by him, the court said: "In this case it is agreed that the land embraced in the caveatees' survey lies wholly within the boundaries of the tract of 4,000 acres, granted to one Richard Smith by patent bearing date 21st of February, 1768, and that the 4,000 acre tract had never been forfeited to the commonwealth, under her revenue laws or otherwise. Thus it is not liable to entry, either as waste or unappropriated or as forfeited land, and the entry of the caveator, so far as it embraced the land of the caveatee, being wholly unauthorized by law, was simply void, and could confer no equity whatever. And a grant founded upon such void entry would pass nothing, there being nothing in the commonwealth upon which the grant could operate." In *Levasser v. Washburn*, 11

598 Gratt. 572, *the court held that, "in the absence of a statutory provision authorizing the location of forfeited lands, no title could be acquired to such land by entry and survey, and a patent obtained for them would be merely void." *Hannon v. Hannah*, 9 Gratt. 146, is to the same effect.

If the grant for lands which have been previously appropriated, and which have not been forfeited, is void, surely the same causes which would avoid and annul it after it has been issued are sufficient to prevent the issuing of it.

But it is said that this may all be true; but how does it concern the caveators? They have no interest in the land, and no rights which can be affected by the issuing of the grant, and have no right to come into court to resist the issuing of the grant to the caveatees. Is this so? Have they no interest in the subject and no rights involved in the question?

They were the innocent purchasers of the identical land for which the caveatees seek to obtain a grant from the commonwealth under a decree of the circuit court of Augusta in 1854, about twenty-three years ago. The sale of them was confirmed by a subsequent decree of the court, and a commissioner (D. S. Young) appointed to convey the land to them, which conveyance he made, and the deed was recorded. The land they purchased contained 4,660 acres, and is part of a tract of 15,100 acres granted by the commonwealth to Major Dowell, upon a survey which included 47½ acres of prior claims surveyed for Thomas Fulton and John Dougherty, which is reserved to them by the said grant. The land purchased by the caveators was laid off and surveyed from the main tract by the county surveyor, and no reservation made by said survey of the 47½ acres. And no reservation of it is made in the decrees of sale and confirmation, or in the deed conveying the title to the caveators.

There is no evidence in the cause that 599 they *knew that the 47½ acres re-

served by the patent was within the boundary sold and conveyed to them, or in fact that they were aware that any reservation at all was made by the patent, or that they had even seen the patent; and if they had seen it they could not have learned from that that any part of it was within the boundaries sold to them; and no reservation being made by the survey which was made under the supervision of the court, and the same being decreed to be sold without any reservation, and sold under that decree to them without any reservation, and so conveyed to them, they are the purchasers of all the land within the boundary sold to them, which embraces every foot of land embraced in the caveatees' survey. And they are the purchasers of the same, and have held it under the decree of the court for more than twenty years, and by subsequent conveyance. And having purchased the whole tract of 4,660 acres by the acre, they have held the 47½ acres precisely as they have held the balance of the tract ever since the purchase, and have paid for every acre of it. They allege that two of their joint purchasers, immediately after their purchase, took possession of it, and grazed cattle upon the whole tract, and fenced a portion of it, and that they have held peaceable and uninterrupted possession of it ever since, for more than twenty years.

There is no proof that these purchasers have ever had any visible occupation and improvement of any part of the forty-seven and a half acres, except the taking samples of ore from the ore banks upon it, and including the same in the maps of the 4,660 acres which Major Hotchkiss made for them and which were given to the public, and unless they can connect themselves with Elisha Bryan's possession, I think that they have not proved such a possession as would, in a controversy between them

600 and Fulton and Dougherty, or persons claiming under *their title, bar their better title. But I need not stop to pursue that enquiry, as it is not a question of title between them and the holders of the outstanding better title; that is not involved in this suit, but it is a controversy between them and the caveatees, which has the better right. It is not necessary that they, the caveators, should show a better title than Fulton and Dougherty. There is no controversy between them. Nor can the caveatees rely on an outstanding better title than another, with which they do not and cannot pretend to connect themselves. By so doing they show that they themselves have no rights. All that it is necessary for the caveators to show is, that they have a better right than the caveatees have, and that they have an interest which entitles them to object to the issuing of a grant to the caveatees.

They have such an interest. They have better right than the caveatees, which involves a comparison of rights, and consequently leads to an enquiry as to what are the rights of the caveatees as well as the caveators. The former, we have seen, have no rights

whatever, but are attempting to acquire what the law prohibits to them. The latter, as we have seen, is a purchaser of the identical forty-seven and a half acres of land under a decree of the court more than twenty years ago, and have paid for it, and have held such possession of it as would be good against the caveatees who had no title, nor color of title, the possession of a part being the possession of the whole as to them, though it might not be good against the holder of the better title, to bar which it would be necessary to have uninterrupted and exclusive possession, *pedis possessionem*, of a part of the forty-seven and a half acres, which cannot, however, benefit the caveatees; they have no connection with said title, and do not claim under it, but against it. It seems to me that the caveators have had such possession under color of title as would have clearly entitled them to have maintained an action of trespass

601 against the caveatees, and consequently to maintain this caveat; and having shown that they have better right to the land than the caveatees have, as they bought and paid for it more than twenty years ago, have held it ever since under a decree of the court, and for years under a deed in execution of said decree, uninterruptedly until the present time, and paying the taxes upon it; that although they may not have as good a title as Fulton and Dougherty, they have a better right than the caveatees, and therefore I am of opinion to reverse the decree of the circuit court.

Judgment affirmed.

602 ***Balt. & Ohio R. R. Co v. Sherman's Adm'r.**

September Term, 1878, Staunton.

Absent, BURKS, J.*

1. Suits by Corporations—What Averments Unnecessary.†—In an action against a railroad company, it is not necessary to aver in the declaration that it is a corporation, nor is it necessary to prove on the trial that the defendant is a corporation, unless with the plea there is filed an affidavit denying that it is. The court will *ex officio* take notice of the fact.

2. Action by Administrator—Evidence.—In an action under the statute by the administrator of a party killed upon a railroad track against the company, the plaintiff may upon the trial, and before the jury has rendered a verdict, introduce evidence to

*The case was argued before his election.

†**Suits by Corporations—Averments.**—In an action of *assumpsit* the writ and declaration was in the name of a plaintiff which indicated that the plaintiff was a corporation. The defendant pleaded *non-assumpsit*, but did not file an affidavit that the plaintiff was not a corporation. Held under the statute, Va. Code 1887, sec. 3280 it was not necessary that the plaintiff should prove that it was a corporation. See also *Crews v. Bank*, 31 Gratt. 348; *Douglas v. R. R. Co.*, 44 W. Va. 267.

prove that the deceased left a widow and children, and the number and ages of the children.

3. Contributory Negligence—Trespasser on Track.‡—In an action on the case by the administrator of a person killed upon a railroad track against the company, the deceased not being an employee of the company or passenger, but walking on it for his own convenience, but not of necessity, it was held in this case, upon the evidence, that there was little ground to charge negligence upon the company; but if there was negligence on the part of the company, there was contributory negligence on the part of the deceased; and certainly the negligence of the company, if any, was not so gross as, notwithstanding the contributory negligence of the deceased, to render the company responsible for the damages sustained by the plaintiff from the killing of the deceased.

This was an action of trespass on the case in the circuit court of Shenandoah county, brought in December, 1874, by the administratrix of Nathan G. Sherman, deceased, against the Baltimore and Ohio Railroad Company, to recover damages for the

603 killing of the said *Sherman upon the road of the said company. On the trial the defendant took several exceptions to rulings of the court, two of them to the refusal of the court to give some thirty-six instructions asked for by the company, and another to the giving by the court of twenty-eight asked by the plaintiff; but these were not considered by this court. There was a verdict and judgment in favor of the plaintiff for \$3,000. And thereupon the company applied to a judge of this court for a writ of error and supersedeas; which was awarded. The case is fully stated by Judge Moncure in his opinion.

Williams & Williams and William B. Compton, for the appellant.

Moses Walton and H. C. Allen, for the appellee.

‡**Contributory Negligence—Rule as to Trespassers.**—The rule as the duty of a railroad company towards trespassers on its track is laid down as follows in *R. R. Co. v. Joyner*, 92 Va. 354: "Except at public crossings and other places where the public have a right to use railroad property, a railroad company has an exclusive right to the uninterrupted use of its roadbed, track, and other property. It owes no duty to trespassers but cannot with impunity inflict on them wanton or reckless injury. The duty of provident circumspection which foresees and forestalls danger, is due to passengers only. But when the peril of a trespasser is discovered, it then becomes the duty of the company to do all that can be done consistently with its higher duty to others to save him from the consequences of his own improper act regardless of whether he was guilty of contributory negligence or not." In other Virginia cases plaintiffs who were injured while on the track as trespasser, have been held guilty of contributory negligence. See *R. R. Co. v. Harman*, 83 Va. 553; *R. R. Co. v. Anderson*, 31 Gratt. 812; *Spicer v. R. R. Co.*, 34 W. Va. 514; *Raines v. R. R. Co.*, 39 W. Va. 50; *Rudd v. R. R. Co.*, 80 Va. 546; *R. R. Co. v. Boswell*, 82 Va. 932; *Moore v. R. R. Co.*, 87 Va. 489. But see *R. R. Co. v. White*, 84 Va. 498.

MONCURE, P., delivered the opinion of the court.

On the 14th day of December, 1874, Juan F. Sherman, administratrix of Nathan G. Sherman, deceased, brought an action of trespass on the case against the Baltimore and Ohio Railroad Company, in the circuit court of Shenandoah county. The action was brought under the provisions of the act of 1870-71, ch. 29, p. 27, §§ 1, 2, 3 and 4, which are embodied in the Code of 1873, p. 996, ch. 145, §§ 7, 8, 9 and 10, which are as follows:

"7. Whenever the death of a person shall be caused by the wrongful act, neglect or default of any person or corporation, and the act, neglect or default is such as would (if death had not ensued), have entitled the party injured, or if she be a married woman, her husband, either separately, or together with her, to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which would have been liable if death had not ensued, *shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony, provided that in no case shall the recovery exceed the sum of ten thousand dollars.

"8. Every such action shall be brought by and in the name of the personal representative of such deceased person, and within twelve calendar months after his or her death. The jury in any such action may award such damages as to it may seem fair and just, and may direct in what proportion they shall be distributed to the wife, husband, parent and child of the deceased.

"9. The amount recovered in any such action shall, after the payment of costs and reasonable attorneys' fees, be paid to the wife, husband, parent and child of the deceased, in such proportion as the jury may have directed, or if they have not directed, according to the statute of distributions, and shall be free from all debts and liabilities of the deceased; but if there be no wife, husband, parent or child, the amount so received shall be assets in the hands of the personal representative, to be disposed of according to law.

"10. Rights of action under this act shall not determine, nor shall such actions, when brought, abate by death of the defendant."

The declaration contains five counts, and is, in substance, as follows:

In the first count, it is charged that the defendant on the 3d day of September, 1874, on the track of a certain railroad running through the corporate limits of the town of Edinburg in said county, and within the corporate limits of said town, then and before the committing of the grievances thereafter mentioned, in the possession and use of, and operated by said company, for the purpose of running steam locomotive engines and coaches on and over the same, did carelessly and negligently, and *with great force and violence run and drive its engines and coaches upon and against

said Nathan G. Sherman, there then being, and thereby, then and there, with said engine and coaches, did so greatly wound said Nathan G. Sherman, that by reason thereof he then and there died, and his death was caused by said wrongful act, neglect and default of said railroad company, wherefore the plaintiff, administratrix aforesaid, says she is entitled to recover damages to the amount of \$10,000 under the laws of Virginia for such cases made and provided, and therefore she brings suit, &c.

In the second count it is, among other things, charged that the defendant did so carelessly and negligently manage and conduct a train of cars, that by reason thereof the rear car of said train became detached and separated from the other cars of same, and being so detached and separated, ran with great force and violence against said Nathan G. Sherman there then being, and thereby did so greatly wound him that by reason thereof he then and there died, &c.

In the third count it is, among other things, charged that the defendant did so carelessly and negligently manage and conduct a train of cars, that by reason thereof the rear cars of the same became detached and separated from said train while it was in rapid motion, and being so detached and separated ran with great force and violence against said Nathan G. Sherman, who was walking within the corporate limits of said town of Edinburg on the track of said railroad, in the same direction that said train was running, and who had stepped on said track after said train passed him, and in the interval between said train and said detached rear cars, and thereby with said cars then and there did so greatly wound said Nathan G. Sherman, that by reason thereof he then and there died, &c.

In the fourth and fifth counts it is, among other things, *charged that the said injury complained of was done "on the track of a certain railroad in Shenandoah county," instead of "a certain railroad running through the corporate limits of the town of Edinburg in said county," as charged in the other counts.

The defendant demurred to the declaration, and to each count thereof, and the plaintiff joined in the demurrer. The defendant also put in the plea of not guilty, on which the plaintiff joined issue.

On the 25th day of August, 1875, the demurrer being argued, was overruled, and a jury was sworn to try the general issue joined between the parties, but being unable to agree after being together several days, a juror was withdrawn and the cause continued.

On the 8th day of December, 1875, another jury was sworn to try the case, which, after being several days engaged in such trial, at length found a verdict in these words: "We, the jury, find for the plaintiff upon the issues joined, and ascertain the damages of said plaintiff at the sum of \$3,000." And on the 20th day of December, 1875, a judgment was rendered in favor of the plaintiff against the defendant for the said sum of \$3,000, with legal interest from the 18th day of December,

1875, until paid, and the costs of plaintiff in that behalf expended.

To the said judgment the defendant applied to a judge of this court for a writ of error and supersedeas; which was accordingly awarded.

The first assignment of error in this case is that the court erred in overruling the demurrer to the declaration and each count thereof.

We are of opinion that the circuit court did not err in this respect. Neither is the whole declaration, nor is any count thereof, demurrable. The defendant is sued as a corporation, and there is no affidavit in the case denying such incorporation. In such case it is 607 expressly made *unnecessary, by statute, to prove the fact of the incorporation. Code, p. 1094, ch. 167, § 40. Much less is it necessary to aver such fact in the declaration. 3 Robinson's Pract. (new edition), p. 524, and the cases cited. This court as well as the court below will, ex officio, take notice of the fact.

The second assignment of error is that the court erred in allowing the evidence of the witness, Hockman, to go to the jury in reference to the family left by the deceased, N. G. Sherman, after objection.

This assignment of error is founded on the first and second bills of exceptions taken in the case. The first states that upon the trial of the cause, after the jury was sworn to try the issues joined, the plaintiff, before she had completed the examination of her witnesses in chief, called C. Hockman as a witness in her behalf, and propounded to him the following question, after having examined him as to other matters: "State whether N. G. Sherman left at his death a widow, and whether she is still living?" To which question the defendant objected, but the court overruled the objection and allowed the witness to answer the same, who thereupon answered: "That the said Sherman left a widow who is now living, and who is the plaintiff in this suit;" to which said ruling of the court the defendant excepted. The second bill of exceptions states that upon the trial of the cause the plaintiff, before she had completed the examination of her witnesses in chief, called C. Hockman as a witness in her behalf and amongst other questions, propounded to said witness the following: "State if the said N. G. Sherman left any children that are now living?" To which question the defendant objected, but the court overruled the objection and allowed the witness to answer the question, and said witness thereupon answered that the said Sherman left five children now living, aged 608 respectively twelve, ten, eight, six, four or five years—the *first, second and fourth being girls, and the third and fifth boys; to which ruling of the court the defendant also excepted.

We are of opinion that the circuit court did not err in allowing the said evidence of the witness, Hockman, to go to the jury. The facts to which said evidence relates are pertinent and material in regard to the ascertainment and apportionment by the jury of the amount of damages to be allowed under

the statute (Code, p. 996, ch. 145, §§ 7, 8 and 9); and there is no necessity to make any averment in regard to the same in the declaration, as the right of action is not dependent thereon, but only the quantum and distribution of the damages are affected thereby. It is not necessary to defer the introduction of such evidence until after the finding by the jury of the right of action in favor of the plaintiff; but all the evidence in the case, not only in regard to the mere right of action, but also in regard to the quantum and distribution of the damages, may properly be introduced together, and before the jury retire to consider of their verdict. See *Balt. & Ohio R. R. Co. v. Whitman's Adm'r*, 29 Gratt. 431.

The third assignment of error is, that the circuit court erred in overruling the motion of the defendant to set aside the verdict and grant a new trial on the ground that the verdict was contrary to the evidence, contrary to the law, and contrary to the instructions given by the court, as stated in the third bill of exceptions.

The question presented by this assignment of error is, by far, the most important one arising in the case, being in effect, whether upon the merits, the verdict ought not to have been in favor of the defendant, even conceding the correctness of the decision by the court of all the other questions decided in the case.

The facts proved on the trial of the cause are certified in the said third bill of exceptions. According to the facts 609 *as so certified the plaintiff's intestate was killed on the track of the defendant's railroad by the cars of the defendant, which ran over him while on his way from his home to his place of business in the town of Edinburg, the two places being distant from each other about three-quarters of a mile. It is not pretended that the act which caused the death was wilfully done by the defendant. It was certainly the result of an accident, but whether such accident was occasioned by the neglect of the defendant, and whether there was contributory negligence on the part of the plaintiff's intestate in producing the occasion, and whether, if there was, the negligence of the defendant was such and so gross as, notwithstanding any such contributory negligence, to render the defendant responsible for the damages sustained by the plaintiff from the accident aforesaid, are the questions upon which this most important assignment of error seems to depend.

The facts of this case, as certified in the third bill of exceptions, are as follows:

"That N. G. Sherman, the plaintiff's intestate, on the morning of the 3d of September, 1874, at an early hour, left his home, distant some three-fourths of a mile from the phosphate works in Edinburg, for the purpose of going to said phosphate works, where he was employed as a workman; that his home was some five hundred yards outside the limits of the corporation of Edinburg, and that he traveled a path leading across a partially plowed field to the rail-

road, and which path crosses said road near the mouth of the cut situated about seven hundred and seventy-five yards northeast of the railroad depot at Edinburg; that when said Sherman got to the railroad he started down the track, either between or outside the rails, in the direction of said phosphate works, which are situated a short distance from the railroad depot at Edin-

burg, on the southeast side of said
610 *railroad; that he traveled two hundred and three yards in the direction of said phosphate works along the railroad track until he reached a point where he was killed, designated on the map by a red mark, which is two hundred and three yards from the point where he first came upon the track, and three hundred and eighty-nine and one-third yards from the said phosphate works; that he was a man of sober and industrious habits, and that he was a man of ordinary intelligence, and had been a school-teacher—had taught a country school for a few months; that he was a man of fair English education; that he provided well for his family and gave them every attention for a man in his condition of life.

It was further proven that the defendant's cars, known as the through freight train, consisting of engine No. 159, a camel-back ten-wheel engine and tender, and eleven freight cars, with a passenger car in the rear, left Sandy Hook, on the Baltimore and Ohio Railroad, at 11:15 o'clock on the night of September 2d, 1874. in charge of Conductor Lewis Farr, with George Riley as brakeman. John C. Dempsey as engine-man, Lewis Beard as pilot, and William Donovan as fireman; that when the train reached Winchester, which is about thirty-five miles northeast of Edinburg, one of the said freight cars was taken from said train, and another car was added to the train at Strasburg Junction, a station seventeen miles from Edinburg; that said last named car was the seventh car from the engine; that when the train reached Woodstock, a station five miles northeast of Edinburg, the train was behind time, and just below said town of Woodstock, the train became uncoupled on an up grade by the breaking of a coupling-pin, which had been put in at Strasburg Junction in the bumper of the car which had been attached to the train at that point, and the engine with the six front cars ran past the depot at Wood-

stock to a point some one hundred and
611 fifty yards southwest *of said depot, which breaking was not remembered by any of the hands on the train except George Riley, who coupled it up; that it then backed and was coupled to the rear part which had been left some eight hundred yards northeast of said depot, by said George Riley, brakeman; that the train then went on after taking on a passenger at Woodstock. Mr. W. W. Logan, who was going to Staunton; that the train ran slowly up the grades until it crossed a point known as the summit, which is about one and one-half miles northeast of Edinburg depot, and from which point to the depot at Edinburg, the railroad is down grade at the rate

of thirty-four feet to the mile; that there are two cuts through which said railroad passes between the summit and Edinburg, one of them being about one hundred and fifty or two hundred yards long, the other about one hundred and fifty or two hundred yards long, and the southwestern mouth of the one nearest Edinburg being situated two hundred and thirty-six feet from the point where said N. G. Sherman came upon said railroad, out of the plowed field over which he came; that the railroad runs on a considerable curve through said cut, and that about the time the engine got to the mouth of the cut next to Edinburg, the fireman discovered that the six rear cars had become detached from the rest of the train, and were about thirty yards in rear of same; that he immediately told the engineman; that the engineman immediately blew his whistle for brakes to be put down on the rear part which had become detached; that he also opened his valves and ran away from the rear part; and that he ran with the engine and other cars past the depot and water station at Edinburg, and stopped his engine about the bridge across Stoney creek, which bridge is one hundred and forty-five yards from the depot; that as soon as the whistle was blown for brakes, the conductor, who was in the passenger car in the rear of the detached

612 section, responded to the *signal and went to the brake on the front part of the passenger car, which was a double brake that operated on the front and rear of the car at the same time, and which he put down; the brakeman was out on the platform when the signal was given and immediately went forward on the train, putting down the brakes, and that they checked the speed of the said detached section of cars within from one hundred to two hundred yards from the mouth of the cut and before they reached the point where said Sherman was killed; but the evidence was conflicting as to the rate of speed at which both section were running from a point on the line of the road about one hundred yards north of the point on said road opposite Sherman's house to the point where Sherman was killed. At the first-named point the testimony of the defendant fixed the rate of speed at from six to twelve miles per hour—that of the plaintiff at thirty miles or passenger rate, and from the mouth of the cut next Edinburg to and beyond the place where Sherman was killed, the evidence of the defendant fixed the rate of speed from four to eight miles per hour, and the evidence of the plaintiff was that the running was very rapid and twice as fast as their usual rate of speed at and along that part of the line; that said Sherman got out of the way or was not injured by the engine and front part of the train, but that he stepped on the track just as the detached section reached the point where he was killed, and that he was run over and killed by said detached section of cars, and was found lying on his back with his head towards Woodstock and his feet towards the Edinburg depot, with his body and right leg inside the track between the rails, on the east side,

and his left leg and arm outside the rail; that the engineman, pilot and fireman on the front part of the train did not see him as they passed, and that neither the conductor nor

brakesman who had charge of the detached *section saw nor knew he was on or near the track; that none of said employees knew that he was killed until the train arrived at Harrisonburg, a point on the road about thirty-four miles southeast of Edinburg; that the rear part of the train which had become detached, was let gradually run down to a point near the depot at Edinburg, and that when it got there the engine and other cars were backed and coupled to it, and that the engine took water and went on with the train in the direction of Harrisonburg; that when the rear part came down to the point near the depot an old hat was discovered on the bumper near the left-hand side—going west—of the car, which was the front car of said detached section, and which was a house car; and that George Riley, brakeman, saw the hat, and it was where the party coupling it up could see it, but no one about the depot knew that any one was hurt or killed until after the train had left the depot and started to Harrisonburg, when it was reported that a man had been killed; that there were some hands in the employ of the railroad company at the depot who, with others, went back in the direction where the deceased was lying, and took charge of his remains and brought them to the phosphate house; that a telegram was sent by the telegraph operator at Edinburg, to Mr. J. H. Averill, the assistant supervisor of the railroad, who was at the time at Sandy Hook, and that he telegraphed to the conductor of the train at Harrisonburg that his train had killed a man, which was the first information any of the employees on the train had of the accident; that the accident occurred about sunrise on the morning of September 3d, 1874; that the weather had been dry for some time before; that it was a little foggy, and that the engine threw down considerable smoke, as is usual with freight camel-back engines; that from the point where said

Sherman came upon the track to where he was killed, a *distance of two hundred and three yards, the track is perfectly straight and runs on a high embankment or fill, in some places forty feet high, with nothing to obstruct the view; that there was a path on either side of the track and ample room for a train to pass without injuring a person walking in either path; that there was also a path on either side of the embankment which would lead to the phosphate works, and a wagon road from a point northeast of where he was killed to the phosphate works, near the foot of said embankment; that there was a path across the railroad about two hundred or two hundred and twenty-five yards south of the point where he was killed, but no path across the road near where he was killed; that Sherman took the route of the railroad to the phosphate house on his way to and from his work; that on Sunday people from the villages would walk out on that part of the

track; that people going to Edinburg from Taylortown and that direction, frequently walked that route, and Hockman, a witness for plaintiff, who had lived on the road from the time it was built, had during that time met as many as one hundred people on said railroad, and that cattle passing on said road would walk the paths at either side of the track, and to some extent the road had been used by country people—one or two families going to the stores in Edinburg from the northwest, the route from Taylortown that way being five hundred yards nearer to the depot and adjacent stores; that the point where the deceased was killed was within the corporate limits of Edinburg, a town of five hundred inhabitants, two hundred and eighty-one yards within said corporate limits, but some distance from that part of the town which is built up, and some distance from any street or alley; that there were no houses near the point and none between the places where he came upon the track and the phosphate works, except one

small house at the right or west *side of the road, designated on the map; that the engine was a camel-back ten-wheel engine, not as powerful as some engines of her make, but strong and powerful enough for the purposes for which she was used; that the track from the north end of the cut next to Woodstock to the mouth of the cut next to Edinburg was in its usual condition; that considerable work had been done to it since the Baltimore and Ohio Railroad Company took possession of the road in September, 1873, and that although some of the cross-ties were sometimes found loose, and some of the joints of the rails were sometimes lower than at other points (some dipped as much as an inch lower), yet it was regarded by the track-walker and supervisor of the track and the hands employed to keep it in order, as the best part of their track, and regarded by all those who had any connection with the road as in good order and perfectly safe for trains; that the corporate limits of the town of Edinburg embraces a large quantity of farming land, some of it very rough and comparatively inaccessible, and a portion of this rough land lies adjacent to a part of the line of the railroad within the said corporation, and that it is three-fourths of a mile long by three-eighths of a mile wide, parallel with the Valley turnpike; and the corporate limits of Edinburg was only proven after a survey by an engineer, run according to the corporate lines heretofore established as the limits of said town as far back as 1857, and that the depot agent who was in charge of the depot when Sherman was killed, was present at said survey, but who was examined by the plaintiff and did not know at the time of the re-survey where the lines of the corporation west of the railroad ran—and by no other testimony; that from the point at which said Sherman was killed a person could see in the direction from which the train came one thousand and fifty-six feet, or three hundred and *fifty-two yards,

along the line of said railroad track, there being no intervening object, and into the mouth of the cut, the distance to the mouth of the cut being eight hundred and forty-five feet; that one witness, at the distance of four hundred yards, and at an angle of forty-five degrees from said Sherman, observed him step upon the track just as the train struck him; that another witness at a distance of about ninety yards, and at right angles to him, also observed the train strike him, as it was afterwards shown by his finding the body of said Sherman on the track at a point where he had seen something white fly down the bank, which he took to be a paper thrown off by a train hand, but which proved to be a cloth around his Sherman's dinner, which he had in a basket, which was also found at the foot of the embankment. Said witness, upon going to the foot of the embankment, found the basket, and then went up to the track and found the body; that the attention of all the parties who observed the train that morning (except Isaac Ruby, the witness who was ninety yards at right angles, as aforesaid, from Sherman), being some six or eight in number, was called to the train by the unusual whistling of the engine as it came out of the cut, and before it reached said Sherman and after it had become detached. It was also proven that freight trains always carried a passenger car or conductor's car, commonly called a caboose, at the rear end of every train; that the attention of Charles Holtzman and G. W. Miley, two of plaintiff's witnesses, who were one hundred yards off, was attracted to the fact that the train, as it passed the depot at Woodstock, after it had broken loose as aforesaid, had no passenger car or caboose attached—the same having become uncoupled before it got to Woodstock, and the witness, Logan, who was at the depot observed the same thing; that it was the duty of the engineman, when he discovered

his train was uncoupled, to blow for
617 brakes and then to run far *enough away to keep the rear or detached part from running into his train; that it was also the duty, under the rules of the company, of those in charge of the rear part, to run it forward gradually to connect with the train, or to move forward to a point where a safe view could be obtained front and rear.

It was also proven that there was no brake on the front part of the foremost car of the detached section, but the brake was at the rear of said car, and that freight cars generally had but one brake; that the cause of the train becoming uncoupled after it passed the summit was the jumping out or breaking of a coupling-pin between the same two cars which became uncoupled near Woodstock, but not in the same bumper, but no part of the pin was found in the bumper, where it it always found if the pin is broken; that said coupling-pin was a regular Baltimore and Ohio Railroad pin, at least ten inches long, of usual length and thickness, which had been placed in the bumper by the brakeman,

George Riley, before the train left Harper's Ferry; that the usual length of the Baltimore and Ohio Railroad pin was not less than ten inches, and not less than one and one-fourth inches in diameter. It was further proven that pins came out from other cause than those named—from being too short or worn smooth; that a pin of greater length than that used would take longer in coming out, but that the pin used was as long as the pins usually used by other roads, and longer than that of the Chesapeake and Ohio, and Washington City, Virginia Midland and Great Southern railroad, and was considered safe; but that the Manassas and Chesapeake and Ohio railroads used smaller pins; that the coupling used between said cars was the regulation coupling of the Baltimore and Ohio Railroad, a straight link coupling thirteen inches long and one and one-quarter inches in diameter, and that it was a

618 safer link and better *than the crooked link, the only other used by railroads, and the pin was a regulation pin, and that the regulation pin was considered a safe and good kind of pin by railroad men; that the two which became uncoupled were both house cars—one was known as a high bumper, the other as a low bumper car, which bumpers varied in height ten inches, and that the pin broke in the lower bumper casting at Woodstock, and the pin that jumped out or broke was in the high bumper casting, near Edinburg; that said last named pin was the largest and best pin the brakeman could get at Harper's Ferry; that it was a sound and good pin, and was examined by the brakeman before he put it in the casting at Harper's Ferry; that the rear part of the train which became detached, and which ran over Sherman, consisted of a passenger car, four gondolas and a house car, the passenger car being the hindmost one, and the house car the foremost one; that both freight and passenger trains are liable at all times to become uncoupled by the breaking or jumping out of coupling pins; that such accidents are of very frequent occurrence on railroads, and that no means has yet been discovered or devised to prevent it; that all the hands on the said train were proven to be competent hands, and of general good character as prudent and diligent hands; that the engineman, John C. Dempsey, was an experienced engineman, and had been in the employ of the company for some time, but had only made a few trips over the road from Harper's Ferry to Harrisonburg, commencing on the 26th August and continuing until after the 3d of September, 1874, to-wit: to October 24th; that the pilot, L. Beard, was an experienced brakeman who was acquainted with the road, and who was put on the engine with said John C. Dempsey to show him the road, and had been with said engineman as pilot from the 26th August, 1874, on every trip

he made over said road up to and in-
619 cluding *September 3d, 1874; that the fireman was an old and experienced fireman, and that the conductor and brakeman were experienced and careful men, who understood their business, but the conductor

had only been running over the road from Strasburg to Harrisonburg from the 20th of August, 1874, but the brakeman had been on said part of the road since September, 1873; that when the train crossed the summit the engineman shut off steam and ran down the grade; that after they crossed the summit one or two brakes were put down on the rear part of the train; that the brakeman's duty was to attend to the brakes and also to any baggage, and also the company's mail, both of which he received and delivered at stations, and it was proven that W. W. Logan was the only passenger.

It was further proved that there was a wagon road leading from Sherman's home to the phosphate house, which was proven by Isaac Ruby, one of the plaintiff's witnesses, to be always travelled when he lived in said house and worked at said phosphate works, which he did just previous to said Sherman's occupancy of said house.

It was further proven that the track-walker on the road between Edinburg and Woodstock passed over the road from Edinburg to Woodstock, through the two cuts, on the day before Sherman was killed, and also on the same day after he was killed, and that he found the road on both days in good order.

It was also proven by plaintiff that said Sherman left a widow and six children, one of whom has since died; that he was a man about thirty-five years of age.

Defendants also gave in evidence the map or diagram of the locality of the accident, which was proven to be a correct diagram made from actual measurement, and also profile maps of the same made from actual measurement, which maps are marked "A," "B" and "C."

620 *It was also proved that from eight to ten trains pass over said railroad every day, and have done so since 1873.

It was also proven that said Sherman had worked for his board and twelve dollars per month, and this was the only evidence of the value of his services.

Plaintiff also gave in evidence to the jury the map of the town of Edinburg, which is recorded in the deed book of said county of Shenandoah (a copy of which is marked "D"—Clerk).

It was further proven that after the remains of the deceased were taken to the phosphate house, the deceased was examined by Dr. D. W. Prescott, one of his employers and one of the owners of the phosphate works, but which fact was proven by another person introduced as a witness; that at the two points where the train became detached on the morning of September 3d, 1874, George Riley, the brakeman, was the only person who examined into the cause of the breaking loose of the train, and he coupled up the detached sections both at Woodstock and Edinburg; that it was the general duty of the conductor to see to the coupling of his train, he being responsible for it, in person or by his subordinates, for whose conduct he is responsible.

It was proven that the schedule time of the said train was an average for the whole

distance, from Sandy Hook to Harrisonburg, of twelve and one-half miles per hour; that the train was behind time, but as to what length of time the evidence was conflicting; that between Woodstock and Edinburg, on the morning of September 3d, 1874, the conductor and brakeman who had been running the train during the whole night appeared to be sleepy and drowsy in appearance and movement before the train was discovered to be detached, but that they were in and out of the car, and when the train was discovered to be uncoupled one of them was at **621** the brake *on the passenger car; that it was the duty of the brakeman to be on the outside of the train on starting down a grade.

It was proven that a detached train of six cars going down a grade of thirty-four feet to the mile could be stopped within three hundred and fifty yards by the active exertions of a conductor and brakeman by the application of all the brakes, and that it was the conductor's duty to aid in putting down the brakes; that when the rear part of the train was seen coming around the phosphate house, by the parties at the depot, it was coming slowly and gradually, and stopped before it got to the water tank; that the length of an ordinary railroad car is thirty-two feet, and that the length of an engine and tender is fifty feet from pilot or cow-catcher to the end of tender. Passenger cars average forty feet in length; that the railroad company were not in the habit of using bell-ropes on freight trains or such trains as the one hereinbefore described, and had not used them for several years, the same having been discarded as being too inconvenient and impracticable for freight trains, and that there was no bell-rope on this train connecting the rear car with the bell upon the engine; that such ropes would frequently but not always give notice of the separation of a train at the time when it occurred, but that it was difficult of use on freight trains on account of the frequency of their getting out of place, becoming fastened, and sometimes ringing the bell by accident and not by design, and because the company regarded them as useless, and that they have been generally discarded by railroads.

It was further proven that the train was first discovered by the men on the engine and by the conductor on the detached portion of the train, and by the blowing for the brakes, to be broken loose at a point somewhere between a point opposite Sherman's **622** house and the north end of *the cut next to Edinburg, which cut it between one hundred and fifty and two hundred yards long.

It was further proven that the trains uniformly stopped at Edinburg, and that the trains were allowed, under special orders, to run fifteen miles per hour, but not to exceed that rate. It was proven that the penalty of the violations of the rules of the Baltimore and Ohio Company by its employees was suspension or dismissal.

First. Was the accident which produced the death of the plaintiff's intestate, Nathan

G. Sherman, occasioned by the neglect of the defendant, the Baltimore and Ohio Railroad Company?

The defendant's cars which occasioned the damage, were known as the through freight train, consisting of a camel-back ten-wheel engine and tender and eleven freight cars, with a passenger car in the rear; and was under the charge of Lewis Farr as conductor, George Riley as brakeman, John C. Dempsey as engineman, Lewis Beard as pilot, and William Donovan as fireman. It is not pretended that the number of hands in charge of the train was not ample for its safe and proper management, nor that they were not properly distributed among the necessary portions of the work. It is certified as part of the facts proved in the cause, "that all the hands on the said train were competent hands, and of general good character as prudent and diligent hands; that the engineman, John C. Dempsey, was an experienced engineman, and had been in the employ of the company for some time, but had only made a few trips over the road from Harper's Ferry to Harrisonburg, commencing on the 26th August, and continuing until after the 3d of September, 1874, to-wit: to October 24th; that the pilot, L. Beard, was an experienced brakeman, who was acquainted with the road, and who was put on the engine with said John C. Dempsey to show

him the road, and had been with said **623** engineman as pilot from *the 26th August, 1874, on every trip he made over said road up to and including September 3d, 1874; that the fireman was an old and experienced fireman, and that the conductor and brakeman were experienced and careful men, who understood their business; but the conductor had only been running over the road from Strasburg to Harrisonburg from the 20th August, 1874, but the brakeman had been on said part of the road since September, 1873."

It does not appear that any of the hands, thus proved to have been sufficient in number and competency for the duties they had to perform on the occasion referred to, were remiss in performing the duties which devolved upon them on the special occasion referred to. Such an uncoupling of cars as occurred on that occasion, was proved to have been a matter of common, if not frequent occurrence, without any default on the part of the company. The certificate of facts on this subject being: "That the cause of the train becoming uncoupled after it passed the summit, was the jumping out or breaking of a coupling-pin between the same two cars which became uncoupled near Woodstock, but not in the same bumper, but no part of the pin was found in the bumper, which is always found if the pin is broken; that said coupling-pin was a regular Baltimore and Ohio Railroad pin, at least ten inches long, of usual length and thickness, which had been placed in the bumper by the brakeman, George Riley, before this train left Harper's Ferry; that the usual length of the Baltimore and Ohio Railroad pin was not less than ten inches, and not less than one

and one-fourth inches in diameter. It was further proved that pins came out from other causes than those named—from being too short or worn smooth; that a pin of greater length than that used would take longer in coming out; but that the pin used was as long as the pins usually used by other roads, **624** and longer than that of *the Chesapeake and Ohio, Washington City, Virginia Midland and Great Southern railroads, and was considered safe; but that the Manassas and Chesapeake and Ohio railroads used smaller pins; that the coupling used between the said cars was the regulation coupling of the Baltimore and Ohio Railroad, a straight link coupling, thirteen inches long and one and one-quarter inches in diameter, and that it was a safe link, and better than the crooked link, the only other used by railroads, and the pin was a regulation pin, and that the regulation pin was considered a safe and good kind of pin by railroad men; that the two which became uncoupled were both house cars; one was known as a high bumper, the other as a low bumper car, which bumpers varied in height ten inches, and that the pin broke in the low bumper casting at Woodstock, and the pin that jumped out or broke was in the high bumper casting near Edinburg; that said last named pin was the largest and best pin the brakeman could get at Harper's Ferry; that it was a sound and good pin, and was examined by the brakeman before he put it in the casting at Harper's Ferry; that the rear part of the train which became detached, and which ran over Sherman, consisted of a passenger car, four gondolas and a house car, the passenger car being the hindmost one, and the house car the foremost one; that both freight and passenger trains are liable at all times to become uncoupled by the breaking or jumping out of coupling pins; that such accidents are of very frequent occurrence on railroads, and that no means have yet been discovered or devised to prevent it."

It was proved that the railroad, at and near the place where the accident occurred, was in good order at the time it occurred, it being certified as a fact "that the 'track-walker' on the road between Edinburg and Woodstock, passed over that part of the road through the two cuts on the day before Sherman was killed, and also on **625** *the same day after he was killed, and that he found the road on both days in good order." It does not appear that the discovery was not made on the train of the uncoupling of the cars near Edinburg in a reasonable time after it occurred, or that the best means were not used to restore their connection, or that it was not restored in a reasonable time after the separation occurred. It does not appear that there was any want of diligence on the part of any of the hands on the train in looking out, after being informed of such separation, for any persons who might happen to be upon the track, and warning them against danger. The deceased, though on the track when the front part of the train approached the place where he was walking, stepped off the track before it

reached him, and thus saved himself at that time; but he stepped back upon the track after the front part of the train had passed, and precisely at the time of so stepping back he was struck by the rear part of the train and killed; so that none of the hands on the train had time to warn him of his danger even if they had seen him when he stepped back on the track, which they did not.

"The evidence was conflicting," according to the certificate of facts, "as to the rate of speed at which both sections were running, from a point on the line of the road about one hundred yards north of the point on said road opposite Sherman's house, to the point where Sherman was killed. At the first-named point the testimony of the defendant fixed the rate of speed at from six to twelve miles per hour, that of the plaintiff at thirty miles, or passenger rate, and from the mouth of the cut next Edinburg to and beyond the place where Sherman was killed, the evidence of the defendant fixed the rate of speed at from four to eight miles per hour,

and the evidence of the plaintiff was that
626 the running was very *rapid and twice as fast as their usual rate of speed at and along that part of the line."

If there was any neglect of duty on the part of the defendant which can be said to have occasioned, in whole or in part, the accident which produce the death of the plaintiff's intestate, it must have been the undue speed at which the train was running when the accident occurred. Upon that question we have seen the evidence was conflicting; according to that of the defendant, the speed was certainly not undue, but was very moderate. According to that of the plaintiff, such speed exceeded what had been prescribed by the regulations of the defendant, but whether it can be said to have been undue or not, so far as concerns this case, is, to say the least, very doubtful. These regulations are adopted for the convenience and safety of the defendant and of those who travel upon the road as passengers in the cars of the defendant, or those who cross the road at a place where they have a legal right to cross it, and not of those who may choose to walk upon the road for their own convenience or pleasure, and without any legal right so to use it. It was "proven that the trains uniformly stopped at Edinburg, and that the trains were allowed, under special orders, to run fifteen miles per hour, but not to exceed that rate. It was proved that the penalty of the violation of the rules of the Baltimore and Ohio Company by its employees was suspension or dismissal."

But even if there was any neglect of duty on the part of the defendant which can be said to have occasioned, in whole or in part, the accident which produced the death of the plaintiff's intestate, it is necessary to enquire:

Secondly. Was there contributory negligence on the part of the plaintiff's intestate in producing the cause of his death? We think there certainly was. He chose to run

the risk of walking on the railroad as
627 a part of his *way from his home to

his place of labor at the phosphate works, situated a short distance from the railroad depot at Edinburg. "He travelled two hundred and three yards in the direction of said phosphate works, along the railroad track until he reached a point where he was killed; which is two hundred and three yards from the point where he first came upon the track and three hundred and eighty-nine and one-third yards from the said phosphate works." There was no right of way, public or private, along this part of the railroad track, except the public right of way of the Baltimore and Ohio Railroad Company. There was no necessity for using it as a private way, even if there was any convenience in so doing. There was a path on each side of the track which might just as well have been used for walking as the track, and just as conveniently, and with perfect safety. "It was further proved that there was a wagon road leading from the Sherman's house to the phosphate house, which was proven by Isaac Ruby, one of plaintiff's witnesses, to be always travelled when he lived in said house and worked at said phosphate works, which he did just previous to said Sherman's occupancy of said house." Sherman knew that trains travelled the railroad many times every day, and might travel it at unexpected times, and that trains might unexpectedly become uncoupled at any time, and that a person who chose to walk on the track instead of walking in one of the side paths or in the road at the foot of the embankment on which the railroad ran, must do so at his own risk, and must take care to look out for and avoid danger by stepping off the track in time.

It is true the place where the accident occurred was within the territorial limits of a town containing five hundred inhabitants; but it was not within the settled or improved part of the town, and was not in one

of its streets; but was "some distance
628 from that part of the *town which is built up, and some distance from any

street or alley; there were no houses near the point, and none between the place where" Sherman "came upon the track and the phosphate works, except one small house." "The corporate limits of the town of Edinburg embrace a large quantity of farming land, some of it very rough and comparatively inaccessible, and a portion of this rough land lies adjacent to a part of the line of the railroad within the said corporation." "From the point at which said Sherman was killed, a person could see in the direction from which the train came 1,056 feet, or 352 yards, along the line of said railroad track, there being no intervening object, and into the mouth of the cut, the distance to the mouth of the cut being eight hundred and forty-five feet." The attention of all the parties who observed the train that morning, except Isaac Ruby, "being some six or eight in number, was called to the train by the unusual whistling of the engine as it came out of the cut, and before it reached said Sherman, and after it had become detached. It was also proven that freight trains always carried a passenger car or conductor's car, commonly called a

caboose, at the rear end of every train; that the attention of Charles Holtzman and G. W. Miley, two of the plaintiff's witnesses, who were one hundred yards off, was attracted to the fact that the train as it passed the depot at Woodstock, after it had broken loose as aforesaid, had no passenger car or caboose attached, the same having become uncoupled before it got to Woodstock; and the witness Logan, who was at the depot, observed the same thing.

That the defendant did not prevent Sherman from walking on the track of the railroad, or object to his doing so, was merely a permission to him to do so at his peril. He knew the danger he thereby incurred, and how careful he would have to be **629** to guard against it; *and if he chose to encounter it on his own responsibility, the defendant was willing that he should do so. It cannot be inferred from such permission that the defendant intended to impair or diminish in the least degree its right to the full use of the road. To have that effect the evidence of their consent, if it could be given at all, should at least be very clear. It is not pretended that there is any such evidence in this case.

The instinct of self-preservation seemed therefore to require that Sherman should use incessantly, while he was walking upon the track, both his eyes and his ears to discover any signs of danger, whether approaching from behind or before. Had he heeded this plain admonition he would certainly have escaped all danger. His walking upon the track instead of in one of the paths on the sides of it, and his not properly looking out or listening for danger while so doing, have been the chief, if not the only cause of death, and at least made him guilty of contributory negligence in regard to such results. It now only remains to enquire on this branch of the subject:

Thirdly. Was the negligence of the defendant, if any, such and so gross as, notwithstanding such contributory negligence, to render the defendant responsible for the damages sustained by the plaintiff from the accident aforesaid?

We think that a negative answer to this question plainly results from what has already been said, and we will therefore say nothing more on the subject, but to express our conclusion in regard to it, which is that the circuit court erred in overruling the motion of the defendant to set aside the verdict and grant a new trial.

We are therefore of opinion, that for that cause the judgment ought to be reversed and annulled, the verdict of the jury set aside, and the cause remanded for a new trial to be had therein according to the principles **630** hereinbefore *declared, which makes it unnecessary to consider or decide the questions presented by the remaining bills of exceptions.

We have not referred to any books or cases (with a single exception) in the foregoing opinion. The law on the subject, so far as material, can be found in *Sherman & Redfield on Negligence*, ch. 3, p. 23, "contribu-

tory negligence"; ch. 17, p. 332, "injuries causing death"; Wharton on Negligence, ch. 9 "contributory negligence"; and in the cases referred to in the notes to those chapters.

The judgment was as follows:

This day came again the parties by their counsel, and the court, having maturely considered the transcript of the record of the judgment aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the circuit court did not err in overruling the demurrer to the declaration and each count thereof; nor in allowing the evidence of the witness Hockman to go to the jury, in reference to the family left by the deceased (N. G. Sherman) after objection, as mentioned in the first and second bills of exceptions taken in the case.

But the court is further of opinion, that the circuit court did err in overruling the motion of the defendant to set aside the verdict and grant a new trial, on the ground that the verdict was contrary to the evidence, contrary to the law, and contrary to the instructions given by the said court, as stated in the third bill of exceptions.

Wherefore, without deciding whether or not the said circuit court erred in refusing to give to the jury the thirty-three instructions which were offered by defendant's counsel,

631 *the twenty-eight instructions which were given by the said court, or any of them, as mentioned in the fourth bill of exceptions taken in the case; or in refusing to give to the jury the instructions Nos. 19, 26 and 33, and in lieu thereof giving to the jury the twenty-eight instructions aforesaid, as mentioned in the fifth bill of exceptions taken in the case; the decision of the said questions, or any of them, being wholly immaterial and unnecessary to the determination of this case, in the view taken of it by this court, that according to the facts certified in the record to have been proved on the trial, the law is plainly in favor of the defendant in the court below, the plaintiff in error here, so that, if the facts proved on another trial be substantially the same as proved on the former trial, the case must then, according to the said view, be determined in favor of the plaintiff in error; it is considered, adjudged and ordered by the court, that for the error aforesaid the said judgment be reversed and annulled, and that the plaintiff in error recover against the defendant in error its costs by it expended in the prosecution of its writ of error aforesaid here, to be levied of the goods and chattels of her said interstate in her hands to be administered. And it is further adjudged and ordered, that the said verdict of the jury be set aside, and the cause remanded to the said circuit court for a new trial to be had therein in conformity with the principles declared in the foregoing opinion and judgment; which is ordered to be certified to the said circuit court of Shenandoah county.

Judgment reversed.

632 *Armentrout's Ex'ors & als. v. Gibbons & als.

September Term, 1878, Staunton.

Statement of Case.—In 1856 M sold and conveyed her share of a tract of land to her brothers, J and H, reserving a vendor's lien in the deed for \$1,204.93. In 1860 J and H sold and conveyed with general warranty the whole tract to A for \$23,500, of which one-third was paid in cash, and bonds of \$2,000 given to H for the balance, payable in each year from 1861 to 1867, and \$1,666.66 in 1868, reserving in the deed a vendor's lien as security. In 1860 H assigned the four bonds falling due in 1865-66-67 and 68 to K, and K assigned to G in April, 1861, the bond due in 1866, and in November, 1865, she assigned to G the bond due in 1867. In the latter part of 1860, or the first of 1861, K assigned to S the bond due in 1865. A died in 1867, having paid off the first four bonds and made payments to G on the sixth, and after his death A's executors paid to K the last bond. The deed from M to J and H was recorded, but was destroyed by the federal forces in 1864. After the war, C, as assignee of M, filed a bill to enforce the vendor's lien in the deed from M for the \$1,204.93, and obtained a decree. Pending C's suit, G filed his bill to enforce the vendor's lien in the deed to A, for a balance due on the two bonds assigned to him. A's executors and devisees insisted that they should have credit on the bonds assigned to G and S for the amount of C's decree, they insisting that the purchase money paid by A in his lifetime and the executors since, was paid without any knowledge of C's lien on the land, that deed having been destroyed. J and H were insolvent—**HELD:**

1. Subrogation—Assignees.*—A was entitled to a credit on account of the purchase money due by him as vendee of said land for the said sum of \$1,204.93, with interest, and he was so entitled as against the assignees of said bonds, at least if the assignments were made without his consent.

2. Assignment—Liability to Set-Off.—That the liability of such assigned bonds to such right of set-off is not in the order in which said bonds are payable, *but in the reverse order of their assignment; and if some of said bonds were assigned and some were not, the unassigned bonds were liable to said right of set-off before the assigned bonds, even though the unassigned bonds were payable before the assigned bonds.

3. Vendor's Lien—Destruction of Record.—That the said land remained liable in the hands of A, the vendee, to the said vendor's lien for the said sum of \$1,204.93 and interest, notwithstanding the destruction of the record of the deed, and that the said A and his executors may have paid the full amount of the purchase money and interest without actual knowledge of the existence of such lien at the time of such payment, the due

***Subrogation—As a Right.**—Subrogation, as a matter of right, independently of contract, takes place for the benefit of a purchaser who has extinguished an incumbrance upon the estate which he has purchased. It will be applied whenever the person claiming its benefit has been compelled to pay the debt of a third person in order to protect his own rights or save his own property. *McNeil v. Miller*, 29 W. Va. 483. See also *McCloskey v. O'Brien*, 16 W. Va. 791; *Blair v. Mounts*, 41 W. Va. 706.

recordation of the said deed in which said lien was reserved being constructive notice to him and them of the existence of such lien, and as effectual for this purpose as actual notice of its existence, or as if the deed had not been destroyed.

4. Assignment—Notice.—If A received notice of the assignment of the said bonds to K, before his payment of the bonds of 1861-62-63 and 64, then such payment to the extent of the said sum of \$1,204.93, with interest, was a payment in his own wrong. But if he made such payment without such notice, then he or his estate is entitled to a credit for the said sum of \$1,204.93 on the said assigned bond.

5. Constructive Notice—Exoneration.—The bond for \$1,666.66, paid by the executors of A to K, was subject to the said set-off in preference to and in exoneration of the bonds assigned by K to G and S; and this though the executors paid it without knowledge of the said C's lien. Both A and his executors were chargeable with constructive notice of said set-off by reason of the recordation of the deed aforesaid, and the liability of said estate resulted from such notice.

6. Vendor's Lien—Settlement of Account.—The bill having been filed to enforce the vendor's lien upon the land, it was not necessary that the plaintiff should have a settlement of an account of the personal estate of A for the purpose of exhausting the same in the payment of his debts before he could enforce the charge reserved on the land for the payment of the purchase money. This charge is as effectual as would have been a deed of trust on the land to secure the purchase money; which certainly might have been enforced by a sale, either before or after A's death, without a necessity of first exhausting the personal estate.

The case is fully stated by Judge Moncure in his opinion.

William B. Compton and William J. Robertson, for the appellants.

Robert Johnston, for the appellees.

MONCURE, P., delivered the opinion of the court.

In January, 1871, Abel Gibbons exhibited his bill in chancery in the county court of Rockingham county, charging, among other things, "that on the 4th day of April, 1860, James M. Loffland and H. M. Loffland sold and conveyed by deed of general warranty, and John C. Woodson, trustee, conveyed by deed of special warranty, to David Armentrout, 488 acres, 2 roods and 4 poles of land lying in the county of Rockingham, in consideration of \$23,500, of which \$7,833.33 $\frac{1}{3}$ was paid in hand, and the balance to be paid as follows, to-wit: \$2,000 annually on the 1st day of April, 1861, 1862, 1863, 1864, 1865, 1866, 1867, and \$1,666.66 $\frac{2}{3}$ on the 1st day of April, 1868, for which deferred payments the said David Armentrout executed his bonds to Henry M. Loffland, and to secure the deferred payments a lien was expressly reserved in the deed conveying the said land;" that on the — day of —, in the year 186—, (in August, 1867,) the said David Armentrout died, leaving a will whereby he appointed B. F. Armentrout

and H. B. Armentrout his executors, who proved the will, a copy of which was filed with the bill; that two of said bonds of \$2,000 each, to-wit: one falling due April 1st, 1866, and one falling due April 1st, 1867, have been transferred to complainant; that there yet remain unpaid and due upon said

635 *bonds the following amounts, to-wit: on the bond which became due on the 1st day of April, 1866, the sum of \$828.51, with interest thereon from the 17th day of March, 1870, and on the bond which became due on the 1st day of April, 1867, the sum of \$2,000, with interest thereon from the 1st day of July, 1870; that the personal estate of said David Armentrout has been exhausted, and is insufficient to pay said debt due to complainant, who by reason of the lien retained in said deed, has a right to have it paid out of the proceeds of the sale of said land. He therefore prays that the widow, executors and devisees of said David Armentrout, be made defendants to said bill; that so much of said land as might be necessary should be sold for the payment of said debt, and for general relief.

Besides a copy of said will there were filed with said bill as Exhibit C, the said two bonds which were transferred to complainant, on each of which is endorsed an assignment in these words: "I assign the within to C. E. Kirtley, December 11th, 1860. H. M. Loffland." On the bond due in 1866 is also endorsed an assignment in these words: "For value received I assign the within to Abel Gibbons, April 18, 1861. C. E. Kirtley, pr. Alfred Welsh, agt." And credits in these words: "Credits received April 16, 1866, by order on Joseph Andrew for sixty dollars. \$100: Paid on within one hundred dollars, October 6, 1866. \$100: Paid on within one hundred dollars, February 18, 1867. Credit, July 15, 1867, by \$900. Credit by cash one hundred and one dollars and thirty-six cents, April 1st, 1869. Credit as of July 1st, 1869, by \$14.81 interest. Credit March 17, 1870, by \$200, paid by B. F. Armentrout." And on the bond due in 1867 is also endorsed an assignment in these words. "November 26, 1865. I assign the within note to Abel Gibbons, for value received. C. E. Kirtley, per Alfred Welsh." And credits in these

636 words: "Cr. by *cash one hundred and twenty dollars, April, 1869. By one year's interest April 1st, 1868. Cr. by one hundred dollars July 30, 1870. Cr., Sept. 19, '70, by \$20."

In July, 1872, on motion of the defendants, B. F. Armentrout, H. B. Armentrout and A. D. Armentrout, leave was given them to file their answers to said bill, which was accordingly done, to which answers the complainant replied generally.

In the joint answer of B. F. Armentrout and H. B. Armentrout, in their own right and as executors of David Armentrout, they say in substance, among other things, that they admit the truth of the allegations of the bill in regard to the conveyance of the said land to the said David Armentrout for the price payable as aforesaid, for which a lien was reserved in the deed, and in regard to his death and will and appointment of exec-

utors and their qualification. They say they believe his personal estate is sufficient to pay all his debts; "that said bonds of \$2,000 each, falling due the 1st of April, 1866 and 1867, were assigned by H. M. Loffland to C. E. Kirtley, December 11, 1860, as was also the bond for \$1,666.66 $\frac{2}{3}$, falling due April 1st, 1868, as will appear from the endorsements on said bonds; and the endorsements show that the said two bonds were assigned to the complainant—the first on the 18th of April, 1861, the other on the 26th November, 1865—but whether these endorsements are correct or not, respondents do not know or admit, and call for proof thereof. The bond for \$1,666.66 $\frac{2}{3}$ was paid by respondent, B. F. Armentrout, as executor of David Armentrout, to C. E. Kirtley, the holder thereof, in different payments, the last of which was made on the 12th of May, 1869, as will appear from the bond and endorsements thereon, marked X, and filed with said answer. The bonds of \$2,000 each, falling due in April, 1861, 1862, 1863, and 1864, were all paid by David Armentrout in his lifetime, and

637 he made *some payments on the bonds falling due in 1865 and 1866. The bond falling due in 1865 was assigned to Z. Shirley and lost during the war, and since the war, as respondents believe, the said David Armentrout, at the instance of said Shirley, executed a new bond, being a duplicate of the original, in order that he might have evidence of the debt, but without any purpose of changing the debt or in any way affecting the rights or responsibilities of the parties, which bond is now held by said Shirley. It is true that a lien was reserved in the deed to said David Armentrout to secure the payment of all the bonds mentioned, and there could have been no difficulty in the payment of any of said bonds but for the fact that within the last few months one T. D. Collins has instituted a suit in this court, on the chancery side thereof, claiming that he held a prior lien on the said land for the sum of \$1,204.93 $\frac{3}{4}$, with interest thereon from the 26th day of August, 1861, due by the bond of said H. M. and J. M. Loffland, executed to Mary K. Loffland, for the same land, and assigned to said Collins, which bond purports to be executed on the 26th day of August, 1856, and to be secured by a lien in the deed from Mary K. to H. M. and J. M. Loffland of the same date, all of which will fully appear from the record of said suit;" of which a copy is made a part of said answer. "Respondents do not admit that said debt of \$1,204.93 $\frac{3}{4}$ and interest is a lien upon said land sold to David Armentrout but if it is (as seems most likely at present), they claim that the amount thereof must be deducted from the bonds of \$2,000 now held by complainant and Z. Shirley, as the said David Armentrout in his lifetime, and respondents since his death, have paid all the residue of the purchase money for said tract of land, without any knowledge or intimation of the lien of said Collins or any other lien thereon, the evidence of which was lost by the burning of the records

638 *in 1864, and only accidentally discovered by complainant about the 1st of

January, 1871. Respondents since the death of their father had no means of knowing the existence of said lien (as the records were destroyed), and they are satisfied that David Armentrout never knew of it in his lifetime." "Respondents claim that as all the purchase money for said land has been paid in good faith and without notice of any prior equities or liens except the bonds held by complainant and Shirley, and as the said land was conveyed to said David Armentrout by deed with general warranty, if the lien of said Collins upon the land is established, the burden of it must fall upon complainant and Shirley, who stand in the place of their assignors, and no decree should be rendered against the land or these respondents until that question is decided, and if that lien is established, then respondents should receive credit on said bonds for the amount thereof, as the said H. M., J. M. and Mary Loffland are insolvent. Respondents further answer and say that a decree has been rendered in said suit of T. D. Collins *v.* Loffland, &c., by which the said land is ordered to be sold to pay to said Collins said debt of \$1,204.93 $\frac{3}{4}$ and interest, a prior lien on said land," as appears from the said copy of the said record, which is marked SS, and filed with the answer. Respondents insist that the existence of said prior lien constitutes a breach of the general warranty of title in the deed for the same land from H. M. and J. F. Loffland to said David Armentrout, and the amount which has to be paid to extinguish the Collins' lien is a good and legal offset against the bonds of said David given for said land, no matter in whose hands they are. Whatever was paid by David Armentrout in his lifetime, or by his executors since his death, was paid without the knowledge of the existence of the Collins' lien, except certain small sums paid in 1871, without prejudice to respondents, &c.

639 *The answer of H. B. and A. D. Armentrout is to the same effect with the preceding.

By an order of the county court of Rockingham county, made in September, 1872, this cause was removed to the circuit court of said county.

There were filed with the answer of B. F. and H. B. Armentrout, as Exhibit X, the said bond for \$1,666.66 $\frac{2}{3}$, with endorsements thereon in the words and figures following, to-wit: "I assign the within to C. E. Kirtley, December 11, 1860. H. M. Loffland." "Received payment in full, May 12, 1869. C. E. Kirtley." And as Exhibit SS, a copy of the record of the said suit of T. D. Collins, plaintiff, *v.* H. M. Loffland, &c., defendants.

The only evidence in the case was the deposition of B. F. Armentrout, which was taken by consent of parties to be read as evidence in behalf of the defendants. He was one of the executors and sons of the said David Armentrout. He testified, among other things, that he was familiar with his father's business during the latter part of his life; he is satisfied H. M. Loffland has gone into bankruptcy, and believes Mary K. and J. F. Loffland are insolvent. As far as

he knows three of his father's bonds given for said land remain unpaid. Mr. Abel Gibbons holds two of them, and Mr. Zack Shirley the other. When witness paid his father's said bond for \$1,666.66 $\frac{2}{3}$ he did not know and had not heard of any lien of T. D. Collins on said land, and first heard of it when process was served upon him in said Collins' suit aforesaid, in January, 1871. Does not think his father, in his lifetime, had any knowledge of this Collins' lien. His father died on the 3d of August, 1867. The amounts credited on the bond for \$2,000, payable the 1st of April, 1866, were paid at the dates of said credits respectively. Those dated in the lifetime of his father were paid by him, except the \$900 credited July 15, 1867, which was paid by witness for his father who was then sick. Being

640 *asked by the plaintiff this question: "The three unpaid land bonds, and the \$1,666.66 $\frac{2}{3}$ bond were assigned by H. M. Loffland to Catharine E. Kirtley at the same time?" witness answered: "They were, so far as I know from the dates of the assignments endorsed on the bonds held by complainant, Abel Gibbons, and on the \$1,666.66 $\frac{2}{3}$ bond, they were assigned at the same time. I have never seen the bond held by Z. Shirley." And being asked by the same this question: "Do you know that the bond of your father which Shirley holds came to him from Loffland through Mrs. C. E. Kirtley?" he answered: "I think I heard Shirley say so."

On the 11th day of October, 1872, the cause was heard on the said bill, answers, replication thereto, exhibits and evidence, when it was decreed that the said executors of David Armentrout, out of the assets of their testator in their hands to be administered, do pay to the complainant \$828.51, with interest thereon from the 17th day of March, 1870, and \$2,000, with interest thereon from the 1st day of July, 1870, till paid, subject to a credit of \$200 as of the 8th day of September, 1871, and his costs expended in the court below. And in case of default for sixty days in making such payment, the said land, or so much thereof as might be necessary, was decreed to be sold by commissioners appointed by said decree for the purpose, and in the manner and on the terms prescribed by said decree, which commissioners were directed to report their proceedings under said decree to the court.

From the said decree the said executors and devisees of said David Armentrout obtained an appeal to this court. This court was of opinion, on the hearing of the cause, for reasons stated in writing and filed with the record, that the circuit court erred in disposing of the cause in the absence of Zachariah Shirley as a party, and therefore reversed and annulled the said decree.

641 *with costs, and remanded the cause to the circuit court with instructions to that court to require the appellee, Gibbons, to make said Shirley, or his personal representatives, parties to the cause, and to consider further the equity set up in the answer of Armentrout's executors. The decision of

this court in the case is reported in 25 Gratt. 271.

After the cause got back to the circuit court, the said Gibbons filed an amended and supplemental bill in the case, charging that the bonds for \$2,000 each, falling due on the 1st of April, 1866, and the 1st of April, 1867, and the bond for \$1,666.66⅔, falling due 1st April, 1868, in the original bill mentioned, were assigned to Catharine E. Kirtley by H. M. Loffland, the obligee therein, on the 11th day of December, 1860; that the said bond falling due 1st April, 1866, was by said Kirtley on the 18th day of April, 1861, for value received, assigned to the plaintiff, and the said bond falling due 1st April, 1867, was also by her on the 26th day of November, 1865, assigned to him for value received. The bond of \$1,666.66⅔, was not assigned by said Kirtley at all, but payment thereof was received by her on the 12th day of May, 1869, from the executors of David Armentrout, who had full notice of the rights of the plaintiff concerning the same. Said bond showed on its face that it was for the last deferred instalment of the price of said land purchased by David Armentrout from H. M. Loffland, and the personal representatives of said David well knew it when they paid the same. Zachariah Shirley claims to be the holder of the bond for \$2,000 falling due the 1st of April, 1865, and there is still a balance due thereon which is a lien on the said land, but what was the nature and extent of the rights of said Shirley, plaintiff did not know, though he claimed that his rights were superior to those of said Shirley in regard to

642 the *same. C. E. Kirtley had died, and Francis W. Kirtley was her administrator, but her estate and that of H. M. Loffland are insolvent and worthless. The representatives of David Armentrout and Zachariah Shirley, and the administrator of Catharine E. Kirtley were made defendants to said bill, and there was a prayer for general relief.

In April, 1875, the death of said Shirley having been suggested, the cause was revived against the executors of said Shirley as such, and in their own right, who thereupon filed their answer, and therein stated in substance, among other things, that in the latter part of 1860, or early part of 1861, before the late war commenced, their testator purchased from C. E. Kirtley, who assigned to him for value received, a bond bearing date the 4th of April, 1860, for the sum of \$2,000, falling due the 1st of April, 1865, being given as one of the deferred payments on the land sold by J. M. and H. M. Loffland to David Armentrout, on which land said bond was a lien, and which bond was assigned to C. E. Kirtley by H. M. Loffland; that during the late war said bond was taken by the federal forces and, as respondents believe, was subsequently lost or destroyed; that immediately after the war, in the spring of 1865, the obligor in said bond, D. Armentrout, executed and delivered to respondents' testator a bond bearing even date with the lost bond, and falling due at the same date, and for the same amount,

expressing upon its face that it was so made in lieu of the said lost bond, and so delivered, without intending thereby to change or affect in any manner the rights or responsibilities of any of the parties; that immediately after said delivery, said testator, for value received, transferred to respondents, S. P. and Thomas J. Shirley, for their own use, the bond aforesaid, which is now for their use, and is subject to certain credits endorsed thereon, a copy of which 643 bond and *credits, marked X, is filed with the answer. And respondents claim priority over the plaintiff in a right to satisfaction of said bond out of said land or the proceeds of sale thereof.

In the same month, April, 1875, the executors of David Armentrout answered said amended and supplemental bill. They admit that C. E. Kirtley and H. M. Loffland are insolvent, and they insist, as they did in their answer to the original bill, that the lien of Collins, which was unknown to them or their testator, and which they have been compelled to pay by decree of court, is a good and valid offset in their hands against the bonds of their testator given for said land, no matter in whose hands they are, and that respondents are therefore entitled to credit for the amount of said Collins' debt on the bonds held by complainant and said Shirley or his assignees, no matter how those parties may be entitled inter sese.

The only evidence in the case upon the amended and supplemental bill is the deposition of Alfred Welsh, which was taken in behalf of the plaintiff. He testified, among other things, that he lived with Mrs. C. E. Kirtley, and attended to all her business from September, 1852, until the 1st of January, 1866. He assigned to Abel Gibbons on the 18th day of April, 1861, by the express authority of Mrs. C. E. Kirtley, the bond of David Armentrout to Henry M. Loffland, dated on the 4th of April, 1860, and payable on the 1st of April, 1866; and he assigned to said Gibbons on the 26th day of November, 1865, by like authority, a bond for same amount and same date, of same obligor to same obligee, and payable on the 1st of April, 1867; which bonds and the endorsements thereon are exhibited with the answer.

On the 15th day of June, 1876, the cause was again heard upon the papers formerly read, the decrees and orders before made in the said county and circuit courts,

644 *the decree of the court of appeals, the amended and supplemental bill, answers thereto and replications to the same, and the deposition last aforesaid; when it was decreed that the said executors of David Armentrout, out of the assets of their testator in their hands to be administered, do pay to S. P. Shirley and Thomas J. Shirley the sum of \$1,729.92, with interest thereon from the 3d of November, 1871, till paid; and to Abel Gibbons \$813.76, with interest thereon from the 17th of March, 1870, till paid; and the further sum of \$2,000, with interest thereon from the 1st of July, 1870, till paid, subject, however, to credit for \$200 as of the 8th of September, 1871,

and \$100 paid 1st January, 1875, and his costs. And in case of default for sixty days in making such payments, so much of the said land as may not have been sold in the chancery cause of *Collins v. Loffland, &c.*, to satisfy the Collins' lien as may be necessary to satisfy this decree, was decreed to be sold by commissioners appointed by said decree for the purpose, and in the manner and on the terms prescribed by said decree; which commissioners were directed to report their proceedings to the court.

From the said decree the said executors and devisees of David Armentrout obtained an appeal to this court.

1. The court is of opinion that the land conveyed by James M. and H. M. Loffland to David Armentrout, by deed with general warranty, bearing date the 4th day of April, 1860, being, at the time of such conveyance, subject to a vendor's lien for \$1,204.93¾, with interest thereon from the 26th day of August, 1861, due by the bond of said H. M. and J. M. Loffland, executed to Mary K. Loffland for the same land, and assigned to T. D. Collins, which bond purports to be executed on the 26th day of August, 1856, and to be secured by a lien in the deed from Mary K. Loffland to said H. M.

645 and *J. M. Loffland of the same date, the said David Armentrout was entitled to a credit on account of the purchase money due by him as vendee of the said land for the said sum of \$1,204.93¾, with interest as aforesaid.

2. The court is further of opinion, that this right of set-off of the said sum of money and interest as aforesaid could not be defeated or impaired by assignment of the bonds of the said vendee for the purchase money, at least without his consent, as such assignee would be entitled to such bonds, only subject to all defences, legal or equitable, to which the obligor was entitled against the obligee.

3. The court is further of opinion, that the liability of such assigned bonds to such right of set-off is not in the order in which said bonds are payable, but in the inverse order of their assignment (preferring such assignments as are for value to such as are not), and that if some of the said bonds were assigned and some were not, the unassigned bonds would be liable to said right of set-off before the assigned bonds, even though the former were payable before the latter.

4. The court is further of opinion, that the said land remained liable in the hands of the said vendee to the said vendor's lien for the said sum of \$1,204.93¾ and interest as aforesaid, notwithstanding the destruction of the record of the deed in which said lien was reserved, and notwithstanding the said David Armentrout, or his personal representatives, may have paid the full amount of the purchase money and interest agreed to be paid by him without actual knowledge of the existence of such lien at the time of such payment; the due recordation of the deed in which said lien was reserved being constructive notice to him and them of the existence

of such lien, and just as operative and effectual in preserving it against him and them as actual notice of its existence would have *been, or as if there had been no such destruction of the said record.

5. The court is further of opinion, that if the said David Armentrout received notice of the assignment to C. E. Kirtley of his bonds to Henry M. Loffland for \$2,000, payable on or before the first day of April, 1865; \$2,000, payable on or before the first day of April, 1866; \$2,000, payable on or before the first day of April, 1867; and \$1,666.66⅔, payable on or before the first day of April, 1868, before he paid the bonds of \$2,000 each, falling due in April, 1861, 1862, 1863, and 1864, respectively, in the proceedings mentioned, then such payment, to the extent of the said sum of \$1,204.93¾, with interest as aforesaid, was a payment in his own wrong, and there is no error in the decree appealed from; but if he received no such notice before such payment, then there is error in the said decree in not affording him relief to the extent of said last mentioned sum of money and interest, and in not decreeing against him only the balance of the purchase money due by him after giving him credit for said sum of money and interest.

6. The court is further of opinion, that the said David Armentrout did receive such notice before he made such payment. The record shows that the four bonds of David Armentrout to H. M. Loffland, dated April 4, 1860, payable, one of them, on the 1st day of April, 1865, for \$2,000, one on the 1st day of April, 1866, for \$2,000 and one on the 1st day of April, 1867, for \$2,000, and one on the 1st day of April, 1868, for \$1,666.66⅔, were all assigned by H. M. Loffland to C. E. Kirtley on the same day, to-wit: December 11, 1860, the assignment on each being in precisely the same words and figures, to-wit: "I assign the within to C. E. Kirtley, December 11, 1860. H. M. Loffland." It appears that the said C. E. Kirtley assigned the said bond for \$2,000, payable the 1st of 647 April, 1865, to Zachariah Shirley in *the latter part of the year 1860, or the early part of 1861; the said bond for \$2,000, payable the 1st of April, 1866, to Abel Gibbons, April 18, 1861; the said bond for \$2,000, payable the 1st of April, 1867, to Abel Gibbons, November 26, 1865, per assignments endorsed on the said bonds, respectively—certainly on the last three which are in the record, and no doubt on the first also, though that is not in the record, having been lost during the war and replaced afterwards by another bond executed by David Armentrout, and substituted to the place of the one which was lost. There can be no doubt but that the said David Armentrout was informed of the said assignments very soon after they were made, respectively. The assignees, for their own protection, would be apt to give such information. Besides renewing the said bond assigned to Shirley, the said David Armentrout, in his lifetime, made payments on account of that bond, and the said bonds

assigned to Gibbons, which shows that he knew of the said assignments. The said payments are credited on the said bonds, respectively. That the assignments by C. E. Kirtley to said Gibbons were made at their dates, respectively, is proved by a witness in the cause, Alfred Welsh, who lived with and acted as agent for said C. E. Kirtley, during the period of the said transaction. At the death of the said David Armentrout, to-wit: on the 3d day of August, 1867, the said bonds assigned to Shirley and Gibbons, respectively, by C. E. Kirtley, remained unpaid in the hands of said assignees; and there remained in the hands of the assignor, C. E. Kirtley, the bond for \$1,666.66 $\frac{2}{3}$, payable the 1st day of April, 1868, on account of which it appears that nothing had been paid. The amount of that bond was paid in full to C. E. Kirtley by David Armentrout's executors on the 12th of May, 1869, per receipt endorsed by her upon the bond. B. F. Armentrout, a son, and one of the exec-

648 utors of David Armentrout, *and a witness in the case on behalf of said executors, being asked: "Did you have any reason for paying the \$1,666.66 $\frac{2}{3}$ in full, while you only made small payments upon the others?" that is, upon the bonds assigned to Shirley and Gibbons, respectively, as aforesaid, answered: "Nothing more than Mrs. Kirtley seemed to stand in need of it, said she needed it, wanted it, while Mr. Gibbons and Shirley only seemed to want the interest." The defendants, the executors and devisees of David Armentrout, do not deny that the assignments of said bonds were made at the times at which they purport to have been made, or that due notice of said assignments was not given to their testator. On the contrary, they say in their answer: "Respondents believe that said bonds of \$2,000 each, falling due the 1st of April, 1866 and 1867, were assigned by H. M. Loffland to C. E. Kirtley, December 11, 1860, as was also the bond for \$1,666.66 $\frac{2}{3}$, falling due April 1, 1868, as will appear from the endorsements on said bonds, and the endorsements show that the said two bonds were assigned to the complainant, the first on the 18th of April, 1861, the other on the 26th November, 1865, but whether these endorsements are correct or not, respondents do not know or admit, and call for proof thereof. This is all the denial of the said assignments or notice thereof contained in the answers, and this is much more than weighed down by the circumstances before stated, tending to show that such assignments were in fact made as they purport to have been, and that the obligor was duly and promptly informed thereof. Certainly the bond for \$1,666.66 $\frac{2}{3}$ was subject to the set-off in question in preference to and in exoneration of the said bonds assigned to Shirley and Gibbons as aforesaid, and the amount of said bond was about equal to the amount of said set-off. The payment of that bond in full by the executors of said Armentrout, leaving the said set-off 649 unpaid, would, *therefore, of itself, subject the estate of said Armentrout to liability for the amount of said bonds

assigned to Shirley and Gibbons free from any deductions on account of said set-off, even if the payment by said Armentrout of said bonds of \$2,000 each, payable the 1st of April, 1861, '2, '3 and '4, as aforesaid, would not have that effect, as we think we have shown that it would. The executors of said Armentrout doubtless did not in fact know of the existence of said set-off when they paid said bond of \$1,666.66 $\frac{2}{3}$, or they would not have made such payment if they had supposed that they might thereby subject the estate of their testator to liability for the amount of said set-off. But their testator and themselves were chargeable with constructive notice of said set-off by reason of the recordation of the lien as aforesaid, and the liability of said estate resulted from such notice.

7. The court is therefore of opinion that there is no error in the decree appealed from, and that the same ought to be affirmed.

But it is proper to notice in this opinion another assignment of error, being the one secondly and lastly assigned in the petition for an appeal: that "the circuit court erred in decreeing a sale of the land of David Armentrout, deceased. The personal estate of said Armentrout is ample to satisfy the debts, including the amount of said decree, and should be first exhausted."

There was a decree for the payment of said amount by the executors of David Armentrout out of the assets of their testator, if any, in their hands to be administered. It was certainly not necessary that the appellees, Shirley and Gibbons, assignees of the bonds of Armentrout, should have a settlement of an account of the personal estate of said Armentrout for the purpose of exhausting

the same in the payment of his debts 650 before *they could enforce the charge reserved on the said land for the payment of the purchase money as aforesaid. There is a specific lien on said land for said purchase money in virtue of said charge, which is just as valid and effectual as would have been a deed of trust on the land to secure said purchase money. Had there been such deed of trust, certainly the land could have been sold under the deed for the payment of the purchase money without any necessity for first exhausting the personal estate in endeavoring to enforce such payment, and could have been so sold either in the lifetime of the debtor or after his death. For the same reason and on the same principle precisely may an express charge reserved upon the land, as in this case, be enforced specifically against it, without any such necessity for first exhausting the personal estate in endeavoring to obtain payment from that source of the amount of such charge. Whatever claim heirs or devisees may have against the personal estate for indemnity on account of the enforcement of such a charge against real estate, descended or devised, or even before such enforcement, and on the principle of quia timet, certainly a party in whose favor such a specific charge is expressly reserved cannot be delayed in the enforcement of such charge by being compelled first to exhaust

his remedy against the personal estate of the debtor as a general creditor to the amount of the charge. He has a specific lien on the land, but none on the personal estate, in regard to which he is only a general creditor. The advantage of his position as a specific lienor is, that he may enforce his specific lien without being necessarily involved in a settlement of the general estate of the debtor among his creditors, devisees and legatees.

The court is therefore of opinion that the circuit court did not err in regard to the matter of the second and last any more than in regard to the matter of the first

651 *assignment of error, and that the decree appealed from must be affirmed.

The following authorities may be referred to as having a material bearing upon this case, most of which were cited in the argument, and some of which have been since decided, viz: Taylor's adm'r v. Spindle. 2 Gratt. 44; McClintic v. Wise's adm'rs, 25 Id. 448; Gordon v. Fitzhugh, 27 Id. 835; Burwell's adm'r v. Fauber, 21 Id. 446; Long v. Weller's ex'ors, 29 Id. 347; Justis, &c., v. English, &c., supra, p. 565.

STAPLES, J., dissented.

Decree affirmed.

652 *Campbell v. Bowles' Adm'r & als.

September Term, 1878, Staunton.

1. **Bill in Equity—Variance.**—Though it is true that the case stated in a bill in equity must be sustained by the evidence, this rule will not forbid relief to the plaintiff where the case proved does not materially vary from the case stated; as where two deeds are charged to be without consideration, and intended to delay and hinder the plaintiff, and the proof is that the second being a deed to a trustee for the separate use of the debtor's wife, was without valuable consideration.

2. **Consideration—Wife's Earnings.**—In the case of a deed to a trustee for the separate use of a married woman, the consideration was paid by money derived from her earnings, and there was no agreement, either ante or post nuptial, that she should be entitled to her earnings, and the husband, though during the time of these earnings generally absent from home, had not deserted her. The earnings of the wife were the property of the husband, and the real estate thus purchased is subject to pay his debts.

The case is stated in the opinion of Burks, J.

Holmes Conrad and Tucker & Tucker, for the appellant.

William L. Clark, for the appellee.

BURKS, J. This is an appeal from a decree of the circuit court of Frederick county. The bill was filed by William L. Clark, as administrator of the estate of James Bowles, deceased, against Thomas K. Campbell, his wife, and others, to enforce the lien of a judgment against a house and lot in the city of Winchester. The judgment was recovered

in June, 1872, on a bond executed 653 *several years before the war, and was duly docketed on the 8th day of August, in the same year, in the county court of the county in which the lot was situated. At the time the suit was instituted in which the judgment was recovered, Campbell was the owner in fee simple of the lot aforesaid, and before judgment was recovered—indeed, within six days after the commencement of the suit, to-wit: on the 29th day of April, 1872, he, by deed of that date, conveyed the lot absolutely to one Samuel L. Larew, and the latter afterwards, by deed dated the 10th day of March, 1873, conveyed the same lot to John W. Grim, the father of Campbell's wife, subject to the following declaration of trusts:

"To have and to hold unto the said John W. Grim, trustee, in trust for sole and separate use of Mary Elizabeth, wife of T. K. Campbell, and her present or any future children she may have by her present husband, the said T. K. Campbell, not to be subject in anywise to the debt, contract or control of the said T. K. Campbell. It is understood and agreed that the said trustee may at any time, at the request of said Mary E. Campbell, sell said property and reinvest the proceeds of sale upon like trust as above stated. It is further understood that until said property is sold, it is to be a home for the said T. K. Campbell and Mary E., his wife, and the survivor of them, with remainder to be equally divided amongst the children then living of said T. K. Campbell and Mary E., his wife, and the heirs of such as may be dead; and the said S. L. Larew hereby warrants such title to said property as was conveyed to him by the deed from T. K. Campbell and wife aforesaid."

The bill, after stating the above facts, concludes with the following allegations and prayer for relief:

"Your orator denies the truth of the recitals of consideration, which are made in these deeds, and he charges that the deeds were made to prevent your orator from

654 *subjecting the real estate of the said T. K. Campbell to the payment of the bond upon which he had instituted suit against him, and thus to delay, hinder and defraud the estate of which your orator is administrator. Your orator does not know what children there are of the said Thomas K. Campbell and Mary E., his wife, who are made in part beneficiaries, under the deed of March the 10th, 1873, but will, by an amended bill, make the parties defendant hereto, so soon as their names are ascertained.

"The said Thomas K. Campbell has no property out of which your orator's claim can be paid, except the property referred to in said deeds.

"For as much, then, as your orator is remediless, save in a court of equity, he prays that the said Thomas K. Campbell and Mary Elizabeth Campbell, his wife, and the said John W. Grim, trustee, may be made defendants to this bill, and may be required to answer the same; that your orator will set aside the said deeds, and subject the property therein referred to, to the payment of your

orator's said claim, and that your honor will grant to your orator such other relief, general and special, as may be consistent with equity, and be required by the nature of the case. May it please your honor to grant to your orator the commonwealth's writ of spa."

Official copies of the two deeds were filed as exhibits with the bill.

The consideration of the deed from Campbell to Larew is thus recited therein: "The sum of twenty-five hundred dollars (\$2,500) paid as follows: twenty-three hundred and fifty dollars cash in hand, the receipt whereof is hereby acknowledged, and the balance, one hundred and fifty dollars, by rent,

received in advance by said Samuel L. 655 Larew, from the said Thomas K.*Campbell for rent for the space of one year from this date of the property herein-after to be conveyed," &c.

The deed from Larew to Grim (trustee) recites the consideration thereof as "the sum of twenty-five hundred dollars cash in hand paid, the receipt of which is hereby acknowledged," &c.

Grim, who was a party as trustee, did not answer the bill, but Campbell and his wife filed separate answers, to each of which the complainant replied generally, and the cause being brought to a hearing on the pleadings and the depositions taken, the circuit court rendered its decree that the house and lot aforesaid was liable for the payment of the complainant's debt, and should be subjected therefor.

The case is before us on an appeal from this decree allowed to Mrs. Campbell.

The first assignment of error by her counsel is set out in the petition for appeal in the following words: "The case stated in the bill is utterly overthrown by the proofs, and the relief is granted upon an entirely new case set up by the proofs, viz: that while the deed to Larew is valid, yet the property is liable in the hands of Grim, trustee, to the payment of Campbell's debts, because purchased by Mrs. Campbell with her own earnings."

The rule in equity practice, that the allegations and proofs in a cause must correspond, is too familiar to need the citation of authority for its support. Relief will not be granted on a case proved, which is materially different from the case stated in the bill. Whatever the prayer, the relief granted must be consistent, or at least not inconsistent, with the case made by the bill. A different rule would be attended oftentimes with surprise and prejudice. If, therefore, a complainant finds, in the progress of the cause, as sometimes happens, that there is a discrepancy between the facts proved and those stated in

the bill, he may, in some cases, obviate 656 the difficulty by *amendment, which is liberally allowed. While, however, the

rule is as has been stated, under the liberal spirit which inclines courts of equity to get over form in favor of substance, relief will not be denied unless the case stated and the case proven are so materially variant as to prevent a decree in favor of the plaintiff.

Chancellor Carr's opinion filed in Zane's Devisees v. Zane, 6 Munf. 406, 416.

I proceed to enquire whether there is that material variance between the statement of the bill and the facts proved, alleged in the assignment of error aforesaid. It was to facilitate this enquiry that I have copied a portion of the bill in this opinion. Recurring to this it will be seen that fraud is the gravamen of the bill. The language is, "your orator denies the truth of the recitals of consideration which are made in these deeds." This is in effect to charge that the consideration is feigned and the recitals false; and the bill further charges that the deeds were made to prevent the complainant from subjecting the real estate of the said T. K. Campbell to the payment of the bond upon which he had instituted suit against him, and thus to delay, hinder and defraud the estate of which the complainant is administrator.

The answers of Campbell and wife are singularly brief for such a case, each being embodied in about a dozen lines, and both in almost the same words.

Mrs. Campbell, after demurring to the bill for want of equity, admits the execution of the deed by Larew to her trustee, Grim, and then says: "Respondent denies that this deed was made to prevent complainant from subjecting the real estate of the said T. K. Campbell to the payment of the bond referred to in the bill. She denies that it was made to delay, hinder and defraud the estate of which complainant is the administrator. And not admitting any of the 657 allegations of said bill, save *those herein expressly admitted, she prays to be dismissed with her usual costs."

No direct reference is made in this answer, or in the answer of her husband, to the consideration of either of the deeds, nor is any explanation given or attempted. As Mrs. Campbell was a married woman and presumably without estate of her own, it might reasonably have been expected that in her answer she would have shown or attempted to show how, when, and from what source she derived the sum of twenty-five hundred dollars, stated in the deed as the consideration for the house and lot conveyed to her use. She does not, however, even allude to the matter, and contents herself with an answer which is substantially nothing more than a general plea of denial of the allegations of the bill. Such an answer under such circumstances is certainly not calculated to impress a court of equity very favorably with the respondent's case.

As the answers give us no information on the subject, let us look to the evidence and ascertain, if we can, what was the consideration, if any, of the two deeds. The evidence consists, with incidental circumstances, mainly of the depositions of Larew and Grim, the latter the father of Mrs. Campbell and her trustee.

It would seem from these depositions that Campbell had no other property than the house and lot which he conveyed to Larew, and after that conveyance was regarded as insolvent. He is represented as a man of dis-

sipated habits, and Larew testifies that "he was drinking continually and gambling all during the war." It seems he was absent from his home and family in Winchester mostly during the war, returning occasionally when the federal troops appeared. With this knowledge of Campbell, his habits and circumstances, Larew says that at Martinsburg during the war, in the fall of

659 *1863, he lent him \$1,500—not in Confederate currency, but in greenbacks—to be returned in a few days. He lent it, according to his account, knowing it was to be used in gambling. Campbell lost the money, he says, and it has never been returned to him (Larew). He never took any bond, note, or evidence of the debt. He pretends to have made repeated applications to Campbell to secure him on the house and lot; finally, but not till Bowles' administrator had brought his suit, more than eight years after the alleged loan was made, he succeeded in getting a conveyance of the property at the price stated in the deed, \$2,500. This he professes to have paid in the debt of Campbell, which he estimates at \$1,800—\$150 in rent of the property in advance, and the residue in cash. No vouchers and other evidences of the settlement are produced, and Larew is the only witness. He makes Campbell's debt at the date of the deed in April, 1872, only \$1,800, when the principal sum (\$1,500) lent in 1863, with the accumulated interest, would have amounted to more than \$2,200. He seems not to be certain as to what amount he paid Campbell in money, or whether he paid him anything, although, according to the estimated amount of Campbell's debt, he must have paid him upwards of \$500. He is asked this question:

"When you got the deed from Mr. Campbell, in which the consideration of \$2,350 paid in hand is recited, did you pay him any money or any part of that consideration?"

"Answer. I think I did; I think I paid the amount set out in the deed over and above the \$1,800. I think I can say I did—that I paid him the money."

By the terms of the deed, Campbell was left in possession of the property for at least a year. He seems never to have been out of possession. In less than twelve months afterwards, the conveyance was made to

659 *Mrs. Campbell's trustee for the alleged consideration of \$2,500. Larew's account of the transaction is that one night when the year had about elapsed, Mrs. Campbell and her father (Grim) came to his house and proposed to purchase the property and have it settled upon herself and her children. The bargain agreed upon was, that she should have it at the same price Larew had given Campbell for it, and the deed was accordingly drawn. "Then," said he, "Mr. Grim and her paid me the money. Mr. Grim counted me the money on my table in my dining room. Mr. Grim had the money and she stood by; that's just what was done. I think the amount of money I got was \$1,800; I think it was the amount that Mr. Grim counted to me; I wouldn't state positive about the amount." In the same deposition he says that

the amount he paid Campbell for the property was the amount stated in the deed, \$2,500 or \$2,350, paid partly in Campbell's debt and partly in cash, and although he was to get the same price from Mrs. Campbell, yet she only paid him \$1,800.

Mr. Grim, the father of Mrs. Campbell, was examined as a witness on behalf of the complainant the same day on which Larew was examined, but before the latter gave his deposition. He was asked to state all he knew about the execution of the deed to Mrs. Campbell. He answered, in substance, that about nine or ten months after the sale by Campbell to Larew, Mrs. Campbell informed him that she could purchase back the property from Larew, and he advised her to make the purchase, and consented to act as her trustee; that this was the only conversation he ever had on the subject, and all he knew about it.

The following questions and answers were then propounded and given:

"Third question by same. Were you present when the deed was executed?"

660 *"Answer. No, sir; I was not. You might ask me questions from now till night and I don't know no more. "Fourth by same. The deed states that the consideration upon which Mr. Larew made it was twenty-five hundred dollars, and that the said sum was paid in cash. Please state all you know about this?"

"Answer. I don't know anything in the world about it. I told you I didn't see any of the transaction.

"Fifth. Was the deed delivered to you?"

"Answer. No, sir; and I never saw it."

After Larew had testified and given the particulars before mentioned, as to the payment and counting the money in his dining room, Mr. Grim is then recalled by Mrs. Campbell's counsel, against the objection of the complainant, and the following question was put to him:

"Mr. S. L. Larew has stated in his deposition that the money paid by Mrs. Campbell to him for the property was paid through you; please state your recollection of the matter?" He answered: "It was a matter that had escaped my recollection, but when he spoke of it I remembered it very distinctly. I counted him out the money in his parlor. Mrs. Campbell was with me."

He says further on cross-examination, that his impression is that it was twenty-three hundred and fifty dollars thus paid by Mrs. Campbell. Larew states the amount to be \$1,800. Such is the confused, contradictory, unreasonable and improbable account given by these two witnesses of the alleged consideration of the two deeds. The statement that Mrs. Campbell paid to Larew for the house and lot either \$2,350, according to her father's testimony, or \$1,800, according to Larew's, is next to incredible. Grim and Larew both say she produced and paid the money; but from what source she obtained it, neither of them pretends to know. They intimate an opinion, that perhaps she might have saved it from her earnings during the

war, in the baking business, and in
 661 *boarding soldiers of both armies. But, according to their account, her husband was generally absent from home during the war, and she had to support herself and her family of three children, then small, according to the ages proved, and one would suppose that she would not be able to save anything after support. It does not appear that she had any property or estate of her own, and her husband had nothing except the house and lot which was their home. If she accumulated this money during the war, she kept it for seven years, and no one, not even her father, knew she had it. She neither put it in bank nor invested it, nor loaned it out, nor made any use of it. If she had done so, as she probably would have done if she had that amount of money, it doubtless would have been shown in evidence.

I am satisfied in my own mind, from the evidence in the cause, that there was no consideration for either of the deeds of conveyance, that both were entered into with the intent to hinder, delay and defraud the estate of Bowles, and therefore that the case made by the bill is the case made by the proofs.

But suppose I am mistaken in the conclusion that both of the deeds are fraudulent, and the proper deduction to be drawn from the evidence be, as contended, that the deed to Larew is valid, and that the consideration recited in the deed to Mrs. Campbell's trustee was actually paid by her from her own earnings, still I should not regard the case as so materially variant from the case made by the bill as to deny to the complainant the relief extended to him by the decree if this appropriation of these earnings were fraudulent. The prime object of the bill is to reach the property conveyed. The ground on which it proceeds is fraud in the parties to the conveyance. Both deeds are charged to be fraudulent. The failure of the complainant to invalidate the first deed should not preclude him

from relief as against the purchaser
 662 under *the second deed, if such deed is shown to be fraudulent as against the complainant. The relief would be precisely the same, whether both deeds were fraudulent or only the last one. In either case the property would be subjected to the complainant's judgment.

This brings me to consider the question intended to be presented, as I understand it, by the appellant's second assignment of error, and that question is whether, if the purchase money, as claimed, was paid by Mrs. Campbell out of her own earnings, she acquired a good title to the property as against the complainant's debt?

It is an undisputed principle of the common law that marriage is an absolute gift to the husband of all the personal estate of which the wife is actually and beneficially possessed in her own right at the time of marriage, and such other personal estate as comes to her during the marriage. 1 Bright's Husband and Wife, ch. 4, § 1, page 34.

The principle embraces her earnings, or the products of her skill and labor, as fully

and completely as any other personal estate which comes to her during coverture. The common law makes them as absolutely the property of the husband as his own earnings. If she desires to secure them to herself against her husband and his creditors she may do so before marriage, and in contemplation thereof, by settlement to her separate use, and she will be protected in her rights in a court of equity, and she may be thus secured, even after marriage, but such postnuptial settlement will be no protection against the creditors of the husband, existing at the time of the settlement, unless it is based on a valuable consideration.

The president of this court, in the opinion delivered in the case of Penn & als. v. Whitehead & als., 17 Gratt. 503, 527, said: "I take it to be a sound principle of law that by
 663 no agreement or arrangement between husband and *wife alone, founded on no valuable consideration, can the profits of the future labor of either of them, much less of the husband alone, be secured to the use of them, or either of them or their family, in exclusion of the claims of their creditors existing at the time such agreement or arrangement is made; and any such agreement or arrangement entered into for the purpose of having that effect would be a mere contrivance to hinder, delay and defraud creditors, and would be null and void as to such creditors, according to the true intent and meaning, if not the literal terms of the statute. Code, ch. 118, §§ 1 and 2."

It is not pretended, certainly it is not proved, in the case before us—and the burden of proof was upon the wife, (Blow v. Maynard, 2 Leigh 29; William & Mary College v. Powell & als., 12 Gratt. 372; Price v. Thrash, supra, p. 515)—that there was any agreement or arrangement, founded on valuable consideration, entered into between Campbell and his wife, by which she was to have the exclusive use and benefit of the products of her skill or labor, and the voluntary appropriation of her earnings to the purchase of the property and taking the title to the trustee for the wife's benefit, would have been a fraud on the existing creditors of the husband, and the conveyance would have been void, or a trust would have resulted which could have been enforced by such creditors to the extent of their debts. 1 Perry on Trusts, § 149, and numerous authorities cited in note. But it is contended by the learned counsel for the appellant that Campbell deserted his wife during the war, and that where the husband from drunkenness, profligacy, or other cause, shall neglect or refuse to provide for the support of his wife and children, or when he deserts her, her earnings, afterwards accruing, are in equity
 664 her separate estate; and in support of this proposition he cites *1 Bishop on Married Women, §§ 212, 213, 732, and cases from reports, most of which are not to be had here.

In the section (212) cited supra from Bishop, it is stated that it has been held in Pennsylvania, on a careful consideration of the English authorities and the legal prin-

ciples involved in the case, that if the husband has deserted the wife, her earnings afterward accruing are, in equity, her separate estate. Other decisions to the like effect in the same state are referred to by the author. I do not find any like decisions referred to in other states. But I do not deem it necessary in this case to express any opinion as to the effect of desertion by the husband on the equitable right of the wife to her earnings accruing during the period of desertion. No desertion has been proved in this case. The husband was absent from home, according to the testimony of Grim and Lawew, generally during the war, but he occasionally returned when the federal troops occupied the city of Winchester, and since the war closed, it seems, he has been constantly at home and with his family. He may have had good cause for leaving home for ought that appears, and it may have been better for himself and his family that he should leave, and his wife may have advised and consented to his leaving. She certainly makes no complaint in her answer of his abandoning her, nor, if such was the fact, does she even allude to it. Under such circumstances, his temporary absence cannot be reasonably construed to be desertion.

Upon the whole case, I am of opinion to affirm the decree of the circuit court.

The other judges concurred in the opinion of Burks, J.

Decree affirmed.

665 *Long & als. v. Hagerstown Agric. Imp. Manf. Co.

September Term, 1878, Staunton.

Statement of Case—Parol Sale of Land.*—

L owned a tract of land which he cultivated, and a younger brother and two sisters lived with him, but not as tenants. There were liens on the land, and L owed his brother and sisters money. By parol contract L sold the land to his brother and sisters, they assuming to pay the liens, and paying the balance in his bonds, which they delivered to him, and they took and held possession of the land. L afterwards conveyed the land to them, but before the deed was recorded H docketed a judgment which he had recovered against L after the parol agreement had been made and carried into effect—**Held:** The judgment is not a lien upon the land.

This was a suit in equity in the circuit court of Rockingham county, brought by The Hagerstown Agricultural Implement Manufacturing Company against J. F. and J. Y. Long, late partners, and S. G. S. Long, Sarah Long, Fannie Long and others, the object of which was to subject lands which had belonged to said partners to the payment of a judgment for \$910.12, with interest, which the plaintiff had recovered against J. F. and J. Y. Long at the January term, 1875, of said court. The case before this court referred to a tract of land of seventy-

four acres, in the county of Augusta, which had been owned by J. Y. Long, and which the defendants, S. G. S. Long and his sisters Sallie and Fannie, had purchased from their brother, J. Y. Long. The circuit court held that the judgment was a lien on the land. And thereupon the said defendants applied to a judge of this court for an appeal; *which was allowed. The case is stated by Judge Anderson in his opinion.

John E. Roller and William B. Compton, for the appellants.

John Paul, for the appellee.

ANDERSON, J., delivered the opinion of the court.

At the January term, 1875, of the Rockingham circuit court, the appellee obtained two judgments against John F. Long and John Y. Long, partners in trade under the firm name of John F. Long & Co.; which judgments on the 18th of March, 1875, it caused to be docketed in the county court of Augusta, and afterwards brought its bill in chancery to subject to the same, among other things, a tract of seventy-four acres of land, as the property of said John Y. Long, situate in the county of Augusta.

Prior to the said judgments, in the month of October or November, 1874, John Y. Long had by parol contract sold the said tract of land to the appellants, and received payment from them of about \$1,700 of the purchase money, which appears to have been all that was coming to him, the liens upon the land amounting to the balance, which they undertook to pay, and delivered to them possession of the land, which they accepted in pursuance of said agreement, and were in possession when said judgments were rendered.

On the 4th of January, 1875, John Y. Long conveyed by deed the land in question to the said purchasers, the appellants, which he had previously sold to them by parol contract, but which deed was not admitted to record until the 19th day of April, more than sixty days after its acknowledgment, and more than fifteen days after the docketing of said judgments; and the only question for our decision is, Was this tract of land subject to the appellee's judgment liens? or is the parol sale to the appellants valid as against the subsequent judgments of the appellee?

The court below held that the judgments are liens on the said tract of land, they being docketed on the judgment lien docket of the county court of Augusta county within sixty days next after the date of said judgments, and more than fifteen days before the deed of conveyance to the appellants was recorded, and that the rights of the judgment creditor are superior to the rights of the appellants "under the parol or verbal contract between them and the said John Y. Long, in the fall of 1874, under which possession of the said tract of land was then delivered and accepted, and the purchase money paid," and decreed that the said judgment liens be enforced against the said tract of land and the sale

*Parol Contracts for Sale of Land.—See *March v. Chambers*, 30 Gratt. 299 and note and *Burkholder v. Ludlam*, 30 Gratt. 255 and note.

of the same, unless the judgment liens were satisfied and paid off within ninety days from the rising of the court.

The delivery and taking possession by the purchasers under the parol contract were unequivocally in consequence of the agreement, and in execution of it; and so was the delivering to the vendor his bonds, &c., in which the payment was made. These acts of part performance were done at the time of the purchase, and in pursuance of it. The possession of the purchasers was taken at the date of purchase, and although they were living on the place at the time, they were there as the sisters and brother of the vendor and in his service. It was not a continuing possession under a former interest, as tenants or otherwise. They had no previous interest. They were in no sense tenants of the vendor, and had no sort of possession prior to their purchase; and the vendor upon their purchase immediately surrendered

to them the possession, which they continued and held at the *date of the appellee's judgments. The vendor, it is not shown, ever occupied the land or any part of it, or that he has ever set his foot upon it since the said sale. He was at that time residing in Harrisonburg and subsequently to his residence in Harrisonburg he removed to a farm belonging to his wife, where it is probable he still resides. It seems that he is now insolvent, and that if the sale which he made to the appellants was vacated they would be unable to get back their money, and that consequently his availing himself of the statute of frauds to avoid his contract would be a fraud upon his vendees. See 2 Minor's Inst. p. 775, citing 2 Stor. Eq. §§ 760, 761. But there is no question raised as to the parol contract of sale or the acts of part performance, which are clearly proved, or as to the fairness of the transaction, and the same is admitted in fact by the decree itself, and the only question is as to how it is affected by the operation of our registration laws.

It is contended that the parol contract became merged in the deed, and that the deed not having been recorded within sixty days after its acknowledgment, and not within fifteen days after the docketing of the said judgments, the liens of the judgments attached to the land and superseded the appellants' purchase. I cannot find from the record on what day of the month of January the term of the circuit court of Rockingham county, at which the judgments were rendered, commenced. If it was before the fifth of January, the judgments would date prior to the execution of the deed, and at that date and after, the debtor, John Y. Long, was neither possessed nor entitled to the land, and the judgments against him, by the terms of the statute, could not attach to the land which was not his, but which was in the possession of the appellants under a parol contract which was unaffected by the registration acts. (Code of 1873, ch. 182, § 6.)

The subsequent conveyance of the title to them *by the debtor could not be construed as an acquisition of title by him, and consequently could not, by the

terms of the statute, subject the lands to the judgment liens of his creditor.

But if the term of the court commenced subsequent to the 5th of January, so that the deed was executed prior to the judgments, it would, by the acts of registration, be void as to the judgment creditor; but the case would come within the principle of *Withers v. Carter*, 4 Gratt. 407, which is reaffirmed and applied to the case of a parol contract in *Floyd, trustee, v. Harding, &c.*, 28 Gratt. 401. In that case it was held that parol contracts for the sale and purchase of land were unaffected by the recording acts. Judge Staples, in whose opinion the other judges sitting concurred, with regard to the case where the deed is executed after the judgment is recorded, observes, that if the title of the purchaser is good against the creditor when the judgment is recovered, the bare statement of the proposition that it becomes invalid by reason of a subsequent execution of a deed by the vendor, is its own refutation. He then speaks with regard to the case of valid parol contract, so far executed as to pass the equitable title, and subsequently a deed of conveyance, which is not recorded, or if recorded at all, not until after a judgment recovered. This (he says) is the case as presented in *Withers v. Carter*, except there the contract was in writing, but the principle is the same. And he quotes Judge Baldwin as saying in that case: "No need of conveyance is necessary to confirm its validity (the executory agreement), and how an abortive attempt to obtain a valid conveyance can destroy the pre-existing title is beyond my comprehension. Nor can I conceive what merger there can be in regard to creditors of the equitable estate in the legal title by force of a deed which as to creditors is a blank piece of paper." Judge Staples also

cites the case of *Morton v. Robards*, 670 *4 Dana's R. 258, a Kentucky case, in which the same doctrine is held. And he adds, "it will not be denied that these principles apply with equal force to a pre-existing equitable estate, acquired under a valid parol contract." And in a later case, *Eidson v. Huff & al.*, 29 Gratt. 338, this court held: "When there is a parol agreement under which the purchaser is in possession, and which is valid without a writing, the subsequent execution of a writing cannot invalidate the title previously acquired without it."

For the foregoing reasons we are of opinion to reverse the decree of the circuit court, and to dismiss the plaintiff's bill as to the appellants, with costs.

The decree was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the decree aforesaid, and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the said decree of the circuit court is erroneous, so far as it held that the judgments were a lien upon the tract of seventy-four acres of land situate in the county of Augusta, which was in the possession of the appellants, and

which they held under a parol contract with John Y. Long, made anterior to said judgments, and that the rights of the judgment creditor were superior to the rights of the appellants, and that the judgment liens should be enforced against the said tract of seventy-four acres, and decreed the sale thereof, unless the judgment liens were satisfied and paid within ninety days from the rising of the court; and this court being of opinion that the purchase made by the appellants from the said John Y. Long of the said tract of seventy-four acres, in October or November, —, which has been subsequently conveyed to them by deed,

671 was *valid against the appellee's judgment, it is decreed and ordered that the said decree of the circuit court, so far as it invalidates the rights of the appellants under said purchase and subjects their land aforesaid to the satisfaction of said judgments, be and the same is hereby reversed and annulled, and that the appellants be quieted in the possession of the said tract of seventy-four acres of land. And it is ordered that the appellants recover against the appellee. The Hagerstown Agricultural Implements Manufacturing Company, their costs by them expended in the prosecution of their appeal and supersedeas aforesaid here, and also their costs by them expended in their defence in the said circuit court. It is further ordered that the plaintiff's bill, as against the appellants here, be dismissed. And this cause is remanded to the circuit court of Rockingham county, for such further proceedings to be had therein in relation to other parties as may be deemed right and proper.

Decree reversed.

672 *Martin's Ex'x v. Lewis' Ex'or.

[32 Am. Rep. 682.]

September Term, 1878, Staunton.

Absent, ANDERSON and STAPLES, J's.

1. **Equity.**—L was indebted to the firm of J, M, S & O. After the death of S, L drew a bill of exchange on O, who was largely indebted to him, for the amount of his debt to the firm, and the bill was accepted and protested for non-payment, and notice to L was given. M and L died and O and J were declared bankrupts. M's executrix filed her bill against the executors of L and S, and the assignees of J and O, to recover the amount of the bill, and to have it applied according to the interests of the parties. Upon demurrer to the bill—Held: That a court of equity had jurisdiction in the case.

2. **Evidence—Parol Agreement.***—In such a

***Evidence—Parol Agreement—Varying Written Contracts.**—In Woodward v. Foster, 18 Gratt. 200, in an action against an endorser it was attempted to set up a parol agreement varying the legal liability of the endorsement and it was contended that the general principles as to the exclusion of parol evidence did not apply to contract the terms of which are not written out in words but are implied by law as in the case of endorsements in blank. The court held that there was no just ground in principle for the distinction, and evidence of the parol agreement was excluded.

case parol evidence is not admissible to prove that at the time the bill was drawn it was expressly agreed between M, who acted for the firm, and the agent of L, who drew the bill, that if it was accepted by O, it was to be taken in full of the debt of L, and he was not to be liable further for it or his debt; and without this agreement the agent of L would not have drawn the bill.

3. **Equity—Fraud.**—It not being claimed that there was any fraud or misrepresentation in the transaction, it is not a case in which a court of equity will correct the paper so as to conform it to the alleged agreement between the parties.

In April, 1870, Martha Ann Martin, executrix of John S. Martin, deceased, filed her bill in the circuit court of Albemarle county, in which she set out that in March, 1859, James W. Mason, Thomas Staples, John S. Martin and John O. Lewis entered into a partnership under the name of Mason, Martin & Co., for carrying on a milling and mercantile business at the town of 673 Scottsville *in said county, which was continued until February, 1862, when it was dissolved by the death of Thomas Staples; that after the dissolution of the partnership, the settlement of the affairs of the firm was chiefly transacted by the said John S. Martin until his death, which occurred in August, 1867; that shortly after the dissolution of the partnership, there was a division of the assets of the firm among the surviving partners and the representative of the deceased partner; and that at the same time there was set apart and held by common consent of all the parties interested, a certain portion of the debts due to the firm, to pay their remaining debts; and one of the debts so set apart was the debt of Daniel P. Lewis. And the debts so set apart to pay the outstanding debts of the firm will probably prove to be insufficient for the purpose; and that after the death of the said John S. Martin, viz: some time in the year 1868, the said James W. Mason and John O. Lewis were each severally on his own petition declared bankrupt.

The bill further sets out that during the partnership Daniel P. Lewis became indebted to it by open accounts, for merchandise, in the sum of probably \$1,400, and the same stood upon their books in the form of an open account until the 20th of August, 1866; that at this date said Daniel P. Lewis, by his agent George C. Gilmer, acknowledged the said debt, with interest thereon up to January, 1867, amounting to the sum of \$1,805.76; and the said Lewis, by his said agent, made his bill of exchange in writing, and directed the same to a certain John O. Lewis at Scottsville, and thereby required the said John O. Lewis to pay to the said Mason, Martin & Co., on the 1st of January, 1867, the sum of \$1,805.76, that sum being in full of the account of said Daniel P. Lewis; that this bill 674 was accepted by John O. Lewis *by writing on the face thereof; and when it fell due it was duly presented for payment, and not having been paid, notice was given and protest for non-payment duly made. And she files the bill of exchange and the notary's protest with the bill.

The bill further states that Daniel P. Lewis died in 1868, having made his will, and that George C. Gilmer had qualified as his executor. And making said executor, Thomas Staples' executor, and the assignees of John O. Lewis and James W. Mason, parties defendants, she prays that Daniel P. Lewis' executor may be required, out of the goods and chattels of the said Lewis in his hands to be administered, to pay the amount of the said bill of exchange to such hand as may be proper to receive it; and for general relief.

George C. Gilmer, the executor of Daniel P. Lewis, demurred to the bill for want of equity, and also answered. He averred that before the said order was given it was distinctly understood and agreed between himself, as the agent of Daniel P. Lewis, and the said Martin, as a member of the firm of Mason, Martin & Co., that said order, when accepted by John O. Lewis, should be received and taken by said firm in full discharge of their demands against the said Daniel P. Lewis, who was to be thenceforward fully acquitted from all liability whatsoever to said firm, which was thereafter to look to said John O. Lewis only for payment, and that respondent positively refused to make said settlement or give an order upon said John O. Lewis on any other terms. And he sets out the facts which occurred at the time said order was given, substantially as they were stated in his deposition given in this case, and which are quoted in the opinion of Judge Christian. And he insists that if the paper as drawn would hold Daniel P. Lewis liable, it does not express the intention of the parties, and a court of equity would correct it, or at least will not enforce it against the estate of Daniel P. Lewis.

He further says that at the time the order was given John O. Lewis, who was the nephew of Daniel P. Lewis, was indebted to him in a much larger amount, and no doubt was then entertained of the solvency of said John O. Lewis. He denies that the paper is negotiable, and all words of negotiability were designedly omitted.

The paper referred to in the bill is in the following words and figures:

Scottsville, Aug't 20th, 1866.

\$1,805.76.

On the 1st day of January, 1867, pay to Mess. Mason, Martin & Co. eighteen hundred and five doll's 76-100, for value received, it being in full for the account of Daniel P. Lewis.

George C. Gilmer,

Agent for Dan. P. Lewis.

To John O. Lewis. Scottsville.

Accepted.—John O. Lewis.

The proof of demand, notice and protest for non-payment was all regular; and it appeared that George C. Gilmer had been, by agreement under seal between him and Daniel P. Lewis, constituted the general agent of said Daniel P. for the management of all his business.

The evidence of George C. Gilmer as to the terms of the agreement between himself and Martin, is fully corroborated by that of

William J. Duke, who was present assisting Mr. Gilmer in the settlement, and who himself wrote the paper. As to the solvency of John O. Lewis at the time there were different opinions expressed by the witnesses; with all of them it was mere conjecture; he says he considered himself solvent.

There was an amended bill, to which there was a demurrer and answer by Daniel P. Lewis' executor, but they do not introduce anything new into the case.

676 *The cause came on to be heard on the 23d of May, 1873, when the court decreed that the bills be dismissed as to George C. Gilmer, executor of Daniel P. Lewis, with costs to be paid, &c. And thereupon the plaintiff applied to a judge of this court for an appeal; which was allowed.

Sheffey & Bumgardner, for the appellant.

Wm. J. Robertson, for the appellee.

CHRISTIAN, J. This case is before us on appeal from a decree of the circuit court of Albemarle county. The foundation of the suit is a paper writing in the following words and figures, to-wit:

"Scottsville, Aug. 20, 1866.

"\$1,805.76.

"On the 1st January, 1867, pay to Messrs. Mason, Martin & Co., eighteen hundred and five 76-100 dollars for value received, it being in full for the account of Daniel P. Lewis.

(Signed)

"Geo. C. Gilmer,

"Agent for Dan. P. Lewis.

Addressed "To Jno. O. Lewis, Scottsville."

This paper is endorsed across the face thereof: "Accepted."

(Signed)

"Jno. O. Lewis."

On the 4th day of January, 1867, this writing was duly protested for non-payment by the acceptor, and notice of protest sent to George C. Gilmer, agent for Daniel P. Lewis, addressed to his proper post-office at Charlottesville.

In the year 1869 (Daniel P. Lewis having in the meantime departed this life), an 677 action at law was instituted *against Daniel P. Lewis' executor, on this writing, but upon demurrer was dismissed without prejudice to the right of any party interested to resort to a court of equity.

The present suit was brought by the executor of John S. Martin, who was a member of the late firm of Mason, Martin & Co., for the purpose of asserting the claim of the parties interested in said firm, to the sum of money due from the estate of Daniel P. Lewis, who it is claimed was responsible to said firm as drawer of the order or draft above referred to, and which was protested for non-payment by the acceptor.

The bill was dismissed by the circuit court, as to the executor of Daniel P. Lewis; and from this decree the plaintiff obtained an appeal from one of the judges of this court.

It does not appear in the decree of the circuit court upon what ground the plaintiff's bill was dismissed. The defendant both demurred and answered, and much evidence was taken in the cause; that of the de-

fendant being taken for the purpose of showing that there was a parol agreement at the time the paper writing was executed; that the firm, of which the acceptor, John O. Lewis, was a member, would receive the order of Daniel P. Lewis, when accepted by the former, in payment of the debt of \$1,805.76 due to the firm by the latter, and that he, Daniel P. Lewis, was not to be held in any way responsible for said debt, whether John O. Lewis, the acceptor, paid it or not.

It does not, however, appear from the record, whether the case was considered by the circuit court upon its merits, and dismissed for want of equity in the bill, or whether it was dismissed upon the demurrer for want of jurisdiction. But it was argued at the bar here, that the bill was properly dismissed, because the plaintiff had a full, complete and adequate remedy at law.

678 I cannot *give my assent to this view.

I think the case was plainly one for adjudication by a court of equity. It was a debt due to a partnership. Any recovery had, would have to be distributed among the partners or their representatives, or go to the payment first of the partnership debts. The rights and equities arising between the partners, and between them and their creditors, could be adjusted and enforced only in a court of equity. The firm of Mason, Martin & Co., was composed of James W. Mason, Thomas Staples, John S. Martin and John O. Lewis.

At the time of the institution of this suit, Thomas Staples and John S. Martin were dead, and James W. Mason and John O. Lewis were bankrupts. It would have been improper, and might have been impossible, to have joined the personal representatives of the dead partners and the assignees of the bankrupt partners as plaintiffs, in an action at law. I think it is clear that the proper form of proceeding was that which was adopted of bringing all the parties interested before a court of chancery, making them joint defendants with the executor of Daniel P. Lewis. The plaintiff, it seems, had once brought her action at law upon the paper writing referred to, and upon demurrer, this suit was dismissed, but without prejudice to her right to proceed to assert her claim in a court of equity. The record in that suit is not before us, but no doubt the very difficulty above suggested as to a joinder of parties was the ground of dismissal of that action. However that may be, I think the bill, upon its face, shows sufficient ground for the exercise of the jurisdiction of a court of equity, and that the plaintiff did not have a complete and adequate remedy at law, and that the demurrer, for want of jurisdiction, ought to have been overruled.

We come now to the main and important questions in the cause. First, what is the nature and legal effect of the paper writing above referred to? and, second, can

679 *the parol agreement alleged to have been made (if proved as alleged) at the time of the execution of that paper, vary or in anywise affect the legal rights and obligations which grow out of and are fixed

by law in the terms of the written paper?

It must be conceded that the paper before us is a bill of exchange. It comes within the very terms of the definition of a bill of exchange. It is an unconditional written order or request addressed by one person to another, desiring him to pay a certain sum of money to a certain person or persons.

Of this bill of exchange Daniel P. Lewis (through his agent Gilmer) is the drawer, Mason, Martin & Co. are the payees, and John O. Lewis is the acceptor. It has all the constituent elements of a bill of exchange, and was treated as such by the holders and payees. It was presented for acceptance, and was duly accepted. It was presented for payment, and upon non-payment was duly protested, and notice of protest given to the drawer. The legal rights and liabilities attaching to such a paper are definitely fixed by law. It was the right of the payees to present it for acceptance and payment, and upon non-acceptance or non-payment to have the bill protested, and look to the drawer for payment. It was the undertaking and obligation of the drawer, if the bill was not accepted and paid by the acceptor, to make it good, upon due notice, to the payees. The legal import of the paper, by its very terms, was to fix these rights and liabilities upon the parties to this written contract. Now it is proposed, as matter of defence in a court of equity, by the executor of the drawer of this bill, that although the sum of money for which the bill was drawn was justly due and never paid, and although the bill was duly presented to the acceptor and protested for non-payment, of which due notice was given, that there is no liability fixed on the drawer because of a contemporaneous

680 *parol agreement, which totally varies the terms and legal effect of the written instrument.

This parol agreement, it is attempted to show by the evidence of the defendant's witnesses, Duke and Gilmer, the agent of Daniel P. Lewis, the drawer of the bill of exchange, and who signed said bill, and who is the executor of Daniel P. Lewis. I extract from the record Gilmer's evidence, which was at the time excepted to, and which is as follows. He says:

"Soon after the surrender of General Lee, Mr. John S. Martin, of the firm of Mason, Martin & Co., came to my house to see myself and Mr. Daniel P. Lewis about the settlement of our accounts with the said firm, and proposed to take my individual note for the amount, I think upon five years' time, which, owing to the condition of the country, I positively refused, but proposed to settle those old accounts out of any debts due Mr. Daniel P. Lewis, provided that settlement was final so far as Mr. Lewis and myself were concerned, and he might select from the debts due Mr. Lewis, and I would give an accepted order for the full amount, which should relieve Mr. Lewis and myself from any further obligations, as I was unwilling to renew old debts with any new

obligations then. He looked over the accounts and selected Mr. John O. Lewis'; I agree to give it as soon as he would get Mr. John O. Lewis to agree to accept; for some year or more, I won't be positive, I think it was, he got Mr. John O. Lewis to agree to accept it; I at once wrote to Mr. John O. Lewis to know if he agreed to accept it, and he wrote he did; I then got Mr. William J. Duke to go with me down to settle with Mr. Martin; they took the papers, made settlement, I not being present; Mr. William Duke then called me to them, saying they had made the settlement, and Mr. John S. Martin then handed me the paper which he had drawn for me to sign, which I thought might

681 hold Mr. Lewis or myself *responsible, and I refused to sign it; that I would sign no paper that would hold myself or Mr. Lewis responsible, was our agreement; he then asked Mr. Duke to draw such a paper as would suit our agreement, and not hold Mr. Lewis or myself responsible; I then signed the paper which Mr. Duke drew, and took it to Mr. John O. Lewis, who accepted and then gave it to Mr. Martin, who took it and expressed himself as fully satisfied with it, and saying that we were no further bound for it."

This testimony of Gilmer is confirmed substantially, if not literally, by the witness Duke.

Now, it is, to say the least, doubtful whether Gilmer and Duke are competent witnesses under the statute. They on one side and Martin on the other were the sole actors in this transaction; i. e., the agreement which they attempt to prove. Martin is dead. It might well be said that in a certain sense this parol agreement is "the transaction under investigation," and that Martin was a party to it. It might well be questioned whether both Gilmer and Duke do not come within the exceptions of the statute, and whether they ought not to be rejected as incompetent witnesses. But suppose they are competent witnesses, and accepting as proved the facts which they state, the question is: Is such evidence of a contemporaneous parol agreement admissible to contradict or vary that which is contained in a written instrument? The parol agreement attempted to be set up in this case wholly contradicts and totally varies the terms, legal import and effect of the writing between the parties. In the one the drawer binds himself to pay in the event that the acceptors does not pay. By the terms of the parol agreement as proved, neither the drawer nor his agent was to be held responsible in any event.

I think it is clear that such evidence 682 is wholly inadmissible. *The general principle that evidence of a contemporaneous parol agreement is not admissible to vary or contradict a written instrument, is too familiar and well established to require any citation of authority. It is a principle which has now become one of the axioms of jurisprudence, and is of the last importance in the administration of justice. Without this general principle there would

be no certainty in written agreements, and no security in the most formal contracts and the most specific transactions among men. It ought not to be weakened or frittered away by nice distinctions and ingenious exceptions, to meet hardships, real or supposed, of particular cases. Where the parties have reduced their agreement to writing, that agreement cannot be overthrown by evidence of a parol agreement proved by interested witnesses, or dependent for its establishment upon the slippery memory of men; especially cannot it be done, as in this case it is attempted to be done, by the statement of parties to one side of a transaction, when the lips of the other party to that same transaction are sealed in death.

Now, the rule of exclusion of a parol agreement, above stated, applies as well to a written instrument, whose legal import is clear and definite (as to the rights and liabilities of the parties thereto), as to one where specific stipulations are fully written out. Between such instruments, distinctions which the courts have sometimes attempted to make, are not based on any just ground in principle. As was well said by Judge Joynes, in his able and exhaustive opinion in the case of *Woodward, Baldwin & Co. v. Foster*, reported in 18 Gratt. 200, 205:

"When the legal import of a contract is clear and definite, the intention of the parties is, for all substantial purposes, as distinctly and as fully expressed as if they had written out in words what the law implies. It is immaterial 683 how little or how much is expressed in words *if the law attaches to what is expressed a clear and definite import. Though the writing consists of only a signature, as in the case of an endorsement in blank, yet where the law attaches to it a clear, unequivocal and definite import, the contract imported by it can no more be varied or contradicted by evidence of a contemporaneous parol agreement than if the whole contract had been wholly written out in words. The mischiefs of admitting parol evidence would be the same in such cases as if the terms implied by law had been expressed."

This rule, while applicable to all cases of written instruments, applies especially to mercantile instruments. In *Bank of United States v. Dunn*, 6 Peters R. 51, Mr. Justice McLean, delivering the opinion of the court, said: "The liability of a party to a bill of exchange or promissory note has been fixed on certain principles which are essential to the credit and circulation of such paper. These principles originated in the convenience of commercial transactions, and cannot now be departed from."

The principles thus stated have been recognized by the whole current of authorities, English and American. Only one case is cited by the learned counsel for the appellee in support of the proposition that the parol agreement, as stated by Gilmer, can be set up against a written paper, and relied on by him as a case exactly in point, and that is the case of *Pike v. Street*, reported in 1 Mood. & Malk. 226 (22 Eng. C. L. 299). It

is sufficient to remark that the authority of that case is to a certain extent questioned in *Foster v. Jolly*, 1 Crompt. Mees. & Ros. 703, and seriously questioned by Judge Joynes in *Woodward, Baldwin & Co. v. Foster* (supra), and is reported by Mr. Bigelow in his volume of *Overruled Cases*. Whether expressly overruled or not, it is contrary to the

unbroken current of authority both in 684 *England and in this country. See cases cited by Judge Joynes in case cited (supra); also, *Brown v. Wiley*, 20 How. U. S. R. 442; *Specht v. Howard*, 16 Wall. U. S. R. 564; *Forsythe v. Kimbal*, 1 Otto U. S. R. 291; *Brown v. Spofford*, 5 Otto U. S. R. 474; *Cassidy v. Metcalf*, The Reporter, Aug. No. 1878, p. 274.

The appellee, however, in avoidance of this general rule, now so universally recognized by the courts, seeks to shelter himself under that exception to the general rule which confers upon courts of equity the power to reform or rescind a written contract made under a mistake.

In this case, if there was any mistake shown, it was a mistake of law, and not of fact. I think it may be affirmed, upon the authorities, that mistakes of law, unless accompanied with fraud, misrepresentation, concealment, surprise or some similar peculiarity of circumstances, furnish no ground of equity jurisdiction. The elementary maxim *ignorantia legis neminem excusat* prevails in the administration of civil as well as criminal law, and is as potent in a court of chancery as in a common law court. I do not deem it necessary here to enter upon any elaborate discussion of the distinctions made by the courts between mistakes of fact and mistakes of law; nor to undertake the difficult, if not impossible, task of reconciling the numerous adjudged cases on this subject. It is sufficient to refer to the opinion of Judge Staples in *Zollman v. Moore*, 21 Gratt. 313, the able review of this doctrine, and many adjudged cases by Judge Story, in the fifth chapter of his work on Equity Jurisprudence, and the notes to the leading case of *Woollam v. Hearn*, reported in *White & Tudor's Leading Cases in Equity*, pp. 920, 980, et seq., where all the cases are collected, and to deduce from them the principles which must govern courts of chancery in the exercise of their powers in this branch of equity jurisprudence.

685 *From this review of the authorities, it may be at least safely affirmed that the province of courts of chancery to correct mistakes of law is rarely exercised, and will not be exercised, unless the mistake is established beyond all reasonable doubt. The burden of proof is always on the party setting up the parol agreement, who must rebut the presumption that the writing speaks the final agreement, by the clearest and most satisfactory evidence. As was well said by Black, C. J., in *Light v. Light*, 9 Harris' R. 407: "If contracts were binding only on those who knew what construction the courts would put upon them, very few would stand. No system of jurisprudence could be administered for a year on this principle without falling to pieces. All codes have therefore

adopted the maxim *ignorantia legis neminem excusat*. It is therefore a general, though not invincible rule, that in the absence of fraud and undue influence, one who executes an instrument with an opportunity of knowing what it contains, cannot rely on an alleged misapprehension of its legal effect as a ground of equitable relief."

In the notes to the leading case of *Woollam v. Hearn*, 2 Lead. Cases in Equity (supra), the learned annotators, after a most elaborate review of the numerous adjudged cases on this question, declare that "the reformation of a writing on the ground of a mistake in law is a transcendent exercise of judicial power requiring the utmost care and deliberation. The party asks that he may not be bound by words which he has made his own, by putting his hand to the instrument. He must, therefore, show how he came to adopt language which did not express his meaning. As between two parties, one of whom maintains that a writing which they executed conveys their intention, while the other contends that it does not, the burden of proof is obviously on the latter. The explanation should be so reasonable, probable and natural, as to

satisfy the mind of the existence of the 686 mistake, and that *it can be rectified without injustice. It has been truly said that one who alleges that he understood that a note payable on demand, or in a year from date, was to be renewed indefinitely, or delivered up unpaid at the death of the promisee, ought not to be believed on any amount of testimony.

"Courts of equity do not sit for the protection of men who, having the full possession of their faculties, deliberately express themselves in language which does not convey their meaning."

In a very recent case decided last year by the supreme court of the United States, and reported in 5 Otto 480, *Brown v. Spofford*, and which is a case exactly in point, Mr. Justice Clifford, speaking for the whole court, said: "Where a bill of exchange was drawn in the usual form and was protested for non-payment, the court held twenty years ago that parol evidence of an understanding between the drawer and the party in whose favor the bill was drawn, was inadmissible to vary the terms of the instrument. * * * Certain fixed principles govern the liability of parties to a bill of exchange or promissory note, which are essential to the credit and circulation of such paper. * * * Decided cases of the most authoritative character have determined that parol evidence of an oral agreement alleged to have been made at the time of drawing, making or endorsement of a bill or note cannot be admitted to vary, qualify, contradict, or add to or subtract from the absolute terms of the written contract."

Upon principle and authority, therefore, I am clearly of opinion that the evidence appearing in the record, tending to prove the alleged parol agreement in this case, is plainly inadmissible, that it ought to have been discarded by the court, and the estate of Daniel

P. Lewis, the drawer, ought to have been held liable for the sum *of money for which the bill of exchange was drawn by him.

But there is still another ground upon which this evidence should have been excluded from any consideration by the court in this case. At the time of the alleged parol agreement the partnership of Mason, Martin & Co. had been dissolved. The debt due to the firm by Daniel P. Lewis had been set apart with other debts to meet the outstanding obligations of the firm. The claim here asserted under this parol agreement is asserted in a court of equity. It is not pretended that a dollar of this debt has been paid. It is a just debt, for which the defendant's testator received full consideration. He asserts this claim under a parol agreement with Martin, one of the firm, which if carried out would be a palpable fraud on the other members, and the creditors of the firm. It was an arrangement, if carried out, which, without the consent of the other members of the firm, and in fraud of the rights of creditors, would be an attempt to satisfy a good debt due from a solvent party by an unpaid and protested order upon a man then failing, if not insolvent, and now a declared bankrupt. As was said in *Harris v. Harris' ex'or*, 23 Gratt. 737, 746, we cannot allow a defendant to be heard in a court of equity to say that his own act is to be avoided by his own fraud. By a stern but proper policy of the law, the party who alleges his participation in a fraud is excluded from the proof which would show it. See *Harris v. Harris' ex'or*, 23 Gratt. 737, and cases there cited.

Upon the whole, I am of opinion that the decree of the circuit court dismissing the plaintiff's bill was erroneous, and must be reversed.

MONCURE, P., and BURKS, J., concurred in the opinion of CHRISTIAN, J.

688 *The decree was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the decree aforesaid and the argument of counsel, is of opinion, for reasons stated in writing and filed with the record, that the decree of the said circuit court dismissing the appellant's bills, original and amended, as to the executor of Daniel P. Lewis, was erroneous. It is therefore decreed and ordered that the said decree be to this extent reversed and annulled, and that the appellant recover of the appellee, George C. Gilmer, executor of Daniel P. Lewis, deceased, out of any assets of the estate of his testator in his hands to be administered, her costs by her expended in the prosecution of her appeal and writ of supersedeas here.

And this court now proceeding to render such decree as the said circuit court ought to have rendered, it is ordered and decreed that the appellee, George C. Gilmer, executor of Daniel P. Lewis, deceased, pay, out of any assets in his hands to be administered, to the appellant, Martha Ann Martin, executrix of John S. Martin, deceased, the

sum of one thousand eight hundred and five dollars and seventy-five cents (\$1,805.75), with lawful interest thereon from the 1st day of January, 1867, till paid, together with her costs by her expended in said circuit court up to the rendition of said decree of the 23d day of May, 1873.

Decree reversed.

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***Steptoe v. Pollard.**

September Term, 1878, Staunton.

Absent, CHRISTIAN, J.

B, who is a machinist, sells to P a steam saw-mill and fixtures, &c., and undertakes to put in good order, the price of the whole being \$1,790. S had advanced the money to P to pay for the mill, &c., and B and S go together to the place where the mill is to be delivered to P. There, the mill, &c., are delivered to P, and at the instance of B, P gives his note to B for \$145, who assigns it to S, and P gives his three bonds to S for the balance of the purchase money, and a deed of trust on the mill and other property, real and personal, to secure the bonds. B and P then take the mill to the land of F, where it is to be put up, and B sets it up. The mill and fixtures were not in fact put up in good order, and when the trustee advertises the property for sale, P enjoins the sale on the ground that B had failed to put the mill and fixtures in good order, and that it would not work, and that P had sustained loss to a large amount, which he states. The evidence being very contradictory, the court directs an issue to ascertain what amount of injury, if any, P had sustained by any breach of warranty or misrepresentations falsely and knowing their falsehood made by B as to the condition of the said mill. The jury return a verdict for \$600 damages in favor of P—Held:

1. **Novation—Set-Off.**—The giving of the bonds by P to S was not a novation of the debt of P to B, and P is entitled to have the damages sustained set off as a credit on his bonds to S.

2. **Res Gestae—Evidence.**—Statements of B as to his undertaking to put the mill and fixtures in good order, made when the mill was delivered, in the presence of S, and while he was putting it up on the farm of F, were part of the *res gestae*, and competent evidence against S.

690 *3. **Appeal—Bill of Exception.**—

Though S objected to the statements being given in evidence and excepted, yet as the exception does not state what the statements were, the appellate court cannot know that S was injured by them.

4. **Issue out of Chancery—Incompetent Evidence.**†—It being an issue out of chancery, the court might render a decree in the cause upon the proper pleadings and evidence, without regarding any improper evidence, and if the competent evidence justifies the decree it will not be reversed because incompetent evidence was admitted before the jury.

***Novation—Intention of Parties.**—See *Niday v. Harvey*, 9 Gratt. 454.

†**Power of Court—Issue Out of Chancery.**—Upon the power of the court in a trial of an issue out of chancery see *Steptoe v. Flood*, 31 Gratt. 345, citing principal case.

This case was argued at Wytheville, and decided at Staunton. It is very fully stated by Judge Moncure in his opinion.

Griffin, for appellant.

There was no counsel for the appellee.

MONCURE, P., delivered the opinion of the court.

This is an appeal from certain decrees and orders of the circuit court of Roanoke county. The facts of the case, and the pleadings and proceedings in it, so far as it is material to state them, seem to be substantially as follows:

About the 26th of March, 1872, Shepherd Pollard contracted with John M. Brosius to purchase of the latter one steam saw-mill and fixtures, one wagon, one log carrier and one extra large saw; the first at \$1,500, the second at \$145, the third at \$125, and the fourth at \$20, all aggregated together, at \$1,790 or thereabouts, all on time. The said property was to have been delivered on or before the 20th of April, 1872, but was not in fact delivered until the 11th of June, 1872, on which day the said Pollard executed his negotiable note at ninety days for \$145, and his three bonds each, for \$546.66, with interest thereon from the date thereof till paid, and payable eight, sixteen and twenty-four

691 months after date, respectively. *The said negotiable note was endorsed or assigned by said Brosius to John R. Steptoe, and the said bonds were made payable to said Steptoe—the said Brosius being, it seems, indebted to the said Steptoe on account of the said mill. On the same day on which the said property was delivered, and the said bonds were executed, to-wit: on the said 11th day of June, 1872, the said Pollard executed a deed of trust conveying the same property and a tract of land, two mares and two horses, to Robert S. Quarles, in trust to secure the payment of the said debts to the said Steptoe.

The said Pollard having, as was alleged, made default in the payment of a part of said debt, the said trustee, Quarles, on the 23d of June, 1874, in pursuance of the said deed of trust, advertised for sale the property thereby conveyed; but before it was sold, and on the day on which the sale was advertised to have been made, to-wit: the 14th of July, 1874, the said Pollard applied for and obtained an injunction of said sale from the judge of the circuit court of Roanoke county.

In the bill on which said injunction was obtained, the said Pollard, the complainant, charged, among other things, that “the said property was to be delivered on or before the 20th April, 1872, and to be delivered in good working order, all to be taken to pieces, overhauled, repaired, put in number one working order, and put up again so as to work in good condition on or before said 20th April, 1872, all whereof said Brosius guaranteed to complainant; that on the 11th June, 1872, the said property was all delivered, except a few parts of the wagons, which never were delivered; that the extra large saw never was put up and could not be got to work, but heated

and bent and got warped and limber, and would not work and was perfectly worthless, whereby complainant was damaged \$145; that

complainant wrote to said Brosius three 692 different times requesting *him to take the said extra saw back or compensate complainant in some way, so that he would not be a loser thereby, but received no answer; that the engine had never been overhauled and repaired and put in good working order, as agreed upon, before its delivery to the complainant, but only blacked up, so that one of the flues was in such condition that it had to be plugged by the said Brosius himself after its delivery, and never has been and could not be used at all since its delivery, and that in other respects it was defective and out of order, so as greatly to impair its value to the amount of at least \$350; that from the 20th April, 1872, complainant was expecting the said steam saw-mill and other property, and was induced so to expect it by frequent letters from the said Brosius promising to deliver same from week to week, and so was kept from farming and other business to his damage to the extent of at least \$200; that complainant paid a negotiable note for \$145, given on said purchase; that one bond executed by complainant for \$546.66, due 11th June, 1874, was assigned to Charles L. Cocke, to pay which complainant has already made arrangements or has actually paid the whole; that soon after the delivery of said property complainant paid \$65 in one milch cow to said Brosius; that complainant knew nothing of steam saw-mills and engines and fixtures at the time of the purchase and delivery thereof to him by said Brosius; that said Steptoe and Brosius were present together at the time of the sale of said property to complainant, but the latter was not aware of the connection of said Steptoe with the transaction until afterwards. “Complainant looked upon said Brosius as the actual owner of the said property, and gave the deed of trust as aforesaid merely to gratify him, and therefore let him have the cow at \$65; that he was induced so to look upon said Brosius by the actions of said Brosius and said Steptoe; that it 693 was not until *six months or more afterwards that complainant found out that the said Steptoe was the real owner of the said property,” &c., &c.

The said Steptoe, Quarles and Brosius were made defendants to the said bill and answered the same. The said Brosius in his answer, among other things, says: “That in March, 1872, this respondent being indebted to his co-defendant, John R. Steptoe, and desiring to make an arrangement to pay the debt by appropriating the proceeds of the sale of the property specified in the bill, met the plaintiff and said Steptoe at Salem depot some few weeks after having bargained with the plaintiff for a sale of said property, and on that day and at that place delivered the property to the plaintiff in the exact condition in which he had purchased it, and by agreement then and there between them the plaintiff executed his notes or bonds, not to this respondent, but to the said Steptoe, and to secure their payment, the plaintiff that day, in pursuance of an agreement then made at

the depot with said Steptoe, executed the deed of trust in the bill mentioned. This respondent was no party to that deed, and is in no way interested in it, the same being matter of arrangement and contract between Pollard and Steptoe to their mutual satisfaction. This respondent denies most positively that there was any warranty of the engine or any of the machinery, and affirms that he refused to warrant it, but left the plaintiff to judge of its value. He denies that there was any delay in its delivery, as charged in the bill, but that the property was delivered at Salem depot on the day the notes or bonds and deed of trust were executed, and was there and then received and hauled away by the plaintiff without objection or complaint of any kind," &c., &c. "Respondent denies that any of this property was owned by his co-defendant, Steptoe, when sold to the plaintiff, but was the bona fide property of this respondent, and Steptoe, as a creditor of *respondent, agreed to take the notes or bonds of the plaintiff, properly secured, and give respondent credit therefor. Respondent denies the allegation that the plaintiff sustained damage in his farming operations by any delay in receiving the mill, but on the contrary, told respondent if he had had it sooner than he got it, he could not have used it by reason of other engagements. Respondent denies that there was any partnership between himself and said Steptoe up to and at the time of these transactions, or in the ownership of said property." "This respondent denies in toto every allegation of the bill imputing fraud, misrepresentation, covin or deceit to him, and insists that when the plaintiff received the property he had purchased from respondent, and recognized the transfer of the price by respondent to said Steptoe, and executed his notes or bonds to said Steptoe, and a deed of trust to secure them, it terminated all interest on the part of this respondent in the subject."

The answer of Quarles is not material to be stated.

In the answer of Steptoe he says, among other things, which need not be here repeated, "that he has read the answer of his co-defendant, John M. Brosius, to the bill in this cause, and he hereby adopts the same as a part of this answer, so far as the statements thereof are applicable to his defence."

Many depositions were taken and filed in the cause on the side both of the plaintiff and defendants. They are very conflicting in their statements; those of the plaintiff tending strongly to sustain the allegations of his bill, while those of the defendants tend strongly to sustain the contrary. It is not material to repeat here the details of the testimony, which is all set out in the record.

On the 9th of October, 1875, the cause came on to be heard upon the bill and exhibits, answers, depositions and motion of defendants to dissolve the injunction, and was argued by counsel; on consideration whereof, the *court overruled, for the present, the motion to dissolve the injunction, and decreed "that a jury be sum-

moned to try, on the common law side of this court, the issue, and determine what amount of damage, if any, the complainant, Pollard, has sustained by any breach of warranty or misrepresentations falsely made by the defendant, John M. Brosius; said Brosius, at the time of making said representations, knowing them to be false as to the condition of the steam saw-mill sold by the defendant, Brosius, to the complainant, Shepherd Pollard; upon the trial of which issue, the said Pollard is to hold the affirmative and the defendant the negative."

The said issue was accordingly tried by a jury which, on the 7th day of October, 1876, found a verdict in these words: "We, the jury, find for the plaintiff and assess his damages at six hundred dollars;" which verdict was ordered to be certified to the chancery side of the court.

On the trial of the issue, the defendants excepted to an opinion of the court given upon said trial, and tendered a bill of exceptions, which was accordingly signed and sealed by the court and made a part of the record; from which it appears "that on the trial of the issues in the cause, testimony having been introduced tending to show that the defendant, Brosius, sold to plaintiff, Pollard, the mill and engine in the proceedings mentioned; that the defendant, Steptoe, who was surety for defendant, Brosius, for the purchase money for the said steam saw-mill, and who was authorized (as well as was defendant, Brosius), to sell the same, and who was anxious to sell the same, and was looking around for a purchaser of the same, accompanied the complainant, Pollard, and the defendant, Brosius, from Liberty to the place where the steam saw-mill then was, a distance of eight miles, in order to effect the sale of the same, and was present pending part of the negotiations for the sale of the same, but was not present at the conclusion of the said

sale; *that the said Brosius was the owner of the said engine, and at the time of sale agreed that he would put the engine in repair so that the same should be as good as new; that the engine and mill was to be delivered at the Salem depot on the Atlantic, Mississippi and Ohio railroad; and that the said Brosius should set and start the said steam saw-mill in good running order; that subsequently the engine and mill was brought to said depot, and that said Brosius, the defendant, Steptoe, and complainant being present, the said mill and engine was delivered to and received by the complainant, who, accompanied by said Brosius, took same to Frautz's farm, where the same was to be set up and started in good running order; but before the same was delivered, the plaintiff asked Brosius if he had put the engine in good order, and was told by him that he had not, but that he would do so; that it was then agreed between Brosius, Pollard and Steptoe that the said plaintiff (Pollard), should execute his bonds to said Steptoe, who was a creditor of said Brosius for the purchase money of said mill and engine, and a deed of trust to secure the payment of the same; that accordingly the plaintiff did execute and

deliver his bonds to the said Steptoe for the payment of the purchase money, and did execute the deed of trust to secure the payment of the same, the said Steptoe being then and there a creditor of said Brosius, who accepted said bonds and deed of trust in payment of said indebtedness of said Brosius to him. The plaintiff then asked a witness to state and detail conversations and declarations made by said Brosius at the said depot before the execution of the said bonds and deed of trust, and in the absence of said Steptoe, and on Frautz's farm whilst Brosius was engaged in setting and starting the said steam saw-mill under the said contract of sale, after the execution of the said bonds and deed of trust, and in the absence of the said

Steptoe, in respect to the condition and
 697 contract in regard to said *engine; to which testimony, giving the declarations of said Brosius after the execution of the bonds and deed of trust, and in the absence of said Steptoe, as to what were the terms of said contract, and how far said contract had been performed, the defendant, Steptoe, by counsel, objected; but the court overruled the objection and permitted said testimony to be given to the jury; to which opinion of the court the defendant, Steptoe, excepted."

A verdict having been found for the plaintiff on the issue as aforesaid, the defendant, Steptoe, moved for a new trial of said issue, because:—

1. The verdict was contrary to the law and the evidence.
2. The court admitted improper and illegal testimony to go to the jury, in this, that the admissions and statements of John M. Brosius as to the terms of sale, and his failure to comply with his part of the contract made after the execution of the bonds and deed of trust, were allowed to be given in evidence to affect the rights of said Steptoe.
3. The verdict is not responsive to the issues directed.
4. The damages are excessive.

On the 14th of October, 1876, the cause came on again to be heard upon the papers formerly read and the certified verdict of the jury upon the issue aforesaid and the said motion for a new trial of said issue, and was argued by counsel; upon consideration whereof the court overruled said motion and decreed that one of the commissioners of the court should take an account of the payments made by the complainant, or any one for him, in discharge of his indebtedness for the steam saw-mill aforesaid, and the balance due upon said purchase, and make report, &c. And by consent of parties the court further decreed that the sheriff of the county should

be appointed receiver in the cause to
 698 take charge of the steam saw-mill *and sell the same, either privately or by public auction, as in his judgment would best promote the interests of all concerned, upon a credit of twelve months, except as to so much as was necessary to defray the expenses of sale which might be required in cash; and said receiver was directed to advertise the sale and report his proceedings

to the court. And exception being taken by the defendants to the opinion of the court overruling their motion for a new trial of the issue by a jury as aforesaid, and a certificate of the facts asked for, the court declined to give such certificate because the evidence was conflicting, but certified the evidence to have been as set forth in the certificate contained in the record, marked "certificate of evidence."

Commissioner Palmer made a report in pursuance of said decree of the 14th of October, 1876, to which report sundry exceptions were taken by the plaintiff; and the receiver appointed by said decree also made his report in pursuance thereof, showing that after advertising the said steam saw-mill in the Salem Register for sixty days, and no bidders appearing to buy at the public sale so advertised, he sold the same to John R. Steptoe privately, by and with the consent of Shepherd Pollard, for the sum of \$350, of which sum \$28 was paid in cash, and for the balance (\$322) bond was taken from said Steptoe, with surety on twelve months' time.

On the 20th of June, 1877, the cause came on to be heard upon the papers formerly read, the report of Commissioner Palmer and the exceptions thereto, on consideration whereof the court decreed that the said verdict be approved and confirmed, that the plaintiff's first exception to said report be sustained, and his other exceptions thereto overruled. "And the court being of opinion that the damages found by the jury are for breach of warranty or misrepresentation at

the time of the contract, the amount
 699 found by the jury should be *entered as a credit to the complainant as of the date of the contract, and the court having the report of Commissioner Palmer corrected by said commissioner in accordance with this opinion, as appears by statement marked 'A,' filed as part of the decree; and it appearing from said corrected statement that the amount due and unpaid by complainant to said Steptoe for said saw-mill, &c., was the sum of \$602.06, as of April 1st, 1877, with interest on \$524.62, part thereof from said date, which sum is to be reduced by \$307.16, the worth at the time of the bond for \$322 executed 19th January, 1877, by said Steptoe as purchaser of the said steam saw-mill, and payable at twelve months, shows as follows: An indebtedness of \$602.06 less \$307.16, or \$294.90 as the balance remaining unpaid from the said complainant to the said Steptoe, as to which amount the injunction heretofore granted is dissolved, and as to the residue of the claim of the said Steptoe, said injunction is perpetuated; and it is decreed that the said Steptoe do recover of the complainant the said sum of \$294.90, with interest thereon from the 1st day of April, 1877, till paid; and it is further decreed that unless the sum of \$294.90, with its interest aforesaid, be paid by the complainant to the said Steptoe within sixty days from this date, then said Quarles, as trustee as aforesaid, shall proceed to enforce the deed of trust in the bill and pro-

ceedings mentioned as to the property in said deed mentioned (besides the steam saw-mill), so far as it may be necessary to pay the said sum of \$294.90, with its interest and the cost and expenses of sale. And the bond of \$322 executed by Steptoe having been directed to be credited on his claim against the complainant, Special Receiver W. W. Brand is directed to cancel said bond and deliver it to said Steptoe." And there was then a decree for the complainant's

costs against the defendant Steptoe, and that *they may be set off against the said sum of \$294.90, and its interest aforesaid, so far as the same may extend.

The appellant complains of being aggrieved by the orders and decrees made in this case, and especially the decree of the 20th day of June, 1877, and assigns the following errors in the same, which will be noticed in their order of assignment:

"1. The injunction should have been dissolved upon the motion first made, because it appeared that said complainant executed the bonds to your petitioner and the deed of trust to secure their payment, and thereby promised to pay said sums to your petitioner after said steam saw-mill had been received, and without informing your petitioner of any warranty or representation made by said Brosius, and without making known to him any claim, contingent or otherwise, against said Brosius, to be set off by said complainant against said bonds, and said complainant is thereby estopped from setting up any such claim against your petitioner." 2 Rob. Prac. p. 267 (old ed.), and cases cited.

The court below did not err in this respect. The case is palpably different from the cases cited and relied on by counsel in support of this assignment of error. In those cases there was a manifest intention on the part of the debtor, in becoming bound to the third party, to waive any defences, legal or equitable, he may have had against the original creditor. The transaction with the new creditor, was, in effect, a novation of the debt. whereas in this case there was no intention of the parties to novate the debt, nor that any right of either of the original contracting parties, inter se, should be surrendered. Shepherd Pollard was willing, and he so declared, to pay any debt he might owe in the transaction to John M. Brosius, or any other person he might designate. It was

immaterial to him to whom he paid it. He *might have given his bonds to Brosius, who might have assigned them to Steptoe. Had he done so, he would in the absence of a special agreement to the contrary, certainly not have surrendered any of his defences, legal or equitable, to the assignee. The actual transaction was in effect the same thing. Instead of giving his bonds to Brosius to be assigned to Steptoe, he gave them directly to Steptoe. He derived no benefit whatever from that mode of settlement, while Steptoe was thereby himself greatly benefited. Instead of having Brosius alone for his debtor without any security for the debt, he ac-

quired the bonds of Pollard secured by deed of trust, not only on the saw-mill and fixtures, but also on a large additional estate, real and personal, and Brosius himself remained still bound for the debt, but not as assignor. The negotiable note for \$145 was payable to Brosius, who endorsed it to Steptoe, and the bonds would no doubt have been payable and assigned in the same way, but that the course actually pursued was more direct and simple. Pollard says that he considered Brosius as still the owner of the debt, notwithstanding the bonds were payable to Steptoe; which he supposed was induced by a purpose which he named. But whether that be true or not, the effect is the same, in the absence of a clear intention to the contrary. Instead of which, it is manifest from all the surrounding facts and circumstances, that Pollard intended by the form of the transaction to surrender no defence, legal or equitable.

The distinction between this case and the cases cited on this branch of the subject by the counsel for Steptoe is manifest. Those cases are *Buckner, &c., v. Smith*, 1 Wash. 296; *Hoomes, ex'or of Elliott, v. Smock*, Id. 389; *Davis' adm'r v. Thomas, &c.*, 5 Leigh 1; *Pettit v. Jennings, &c.*, 2 Rob. R. 676. But it is needless to state and review these cases, and we will proceed to consider the next assignment of error, which is:

*"2. It was error to direct an issue in said cause, because it was clear from the evidence that the mill had been delivered in good order, and that the complainant was fully satisfied with it and made repeated promises to comply with his contract to pay off his bonds long after he received said mill."

The grounds of defence relied on in the injunction bill were palpable, if true. Had they been confessed by the answers, they would certainly have entitled Pollard to the relief which he claimed. They were denied by the answers of Brosius and Steptoe, to which the plaintiff replied generally. The evidence on each side was conflicting. The evidence of the plaintiff fully sustained the allegations of his bill, while that of the defendants, Brosius and Steptoe, was to the contrary. What, in such a state of doubt and difficulty, was the court to do but to direct an issue to be tried by a jury? which was accordingly ordered. That it was proper so to order, is manifest, and such propriety is shown by the cases cited by the counsel for the appellees, if any citation of authority can be necessary on such a question. Those cases are *Isler, &c., v. Grove, &c.*, 8 Gratt. 257; *Mettert v. Hagan*, 18 Id. 231; *Hord's adm'r v. Colbert*, 28 Id. 49. The complainant's repeated promises to make payment, referred to in this assignment of error, no doubt had reference to what he actually owed after deducting all the discounts to which he was entitled. But even if they referred to the whole original debt they would not estop him from making any defence to which he might otherwise have been entitled, as such promises were made without consideration. We think the court did not err in ordering an issue.

"3. If an issue was proper, your petitioner should not have been made a party defendant, and required to defend the same for the reason that the issue to be tried was solely a matter between the said complainant and the *said Brosius, as by his contract the said Pollard, in effect, agreed to look to said Brosius alone for reparation in case he was injured, and your petitioner agreed to look to said complainant alone for the amount of said bonds, and said Brosius was relieved from his indebtedness to your petitioner to the amount of said bonds."

We think this assignment of error is wholly unfounded in fact, as plainly appears from what we have already said in regard to the first and second assignments of error, and nothing more need therefore be said in regard to it. The next assignment of error is—

"4. If your petitioner was to be affected by said verdict found upon said trial, then it was error in said court to allow to go to the jury as evidence the declarations made by said Brosius after said contract was entered into, and in the absence of your petitioner."

There are several reasons why we think this assignment of error is not well founded. In the first place, Brosius and Steptoe were both interested in the sale made by Brosius to Pollard. But Brosius was the vendor and made the contract of sale for the benefit of himself and Steptoe. Steptoe was sometimes present and sometimes absent, pending the negotiation between vendor and vendee, and before and at the execution of the bonds and deed of trust. The transaction was not concluded on the last-mentioned occasion; after the delivery of the property and the execution of the bonds, note and deed of trust, something still remained to be done by Brosius and Pollard in execution of the contract. The mill was to be set up and set in motion under the superintendence and direction of Brosius, who was a machinist and had full experience in the matter, while Pollard was ignorant and knew nothing on the subject, as he declared to Brosius. Immediately after the delivery of the property and the execution of the bonds and deed of trust at Salem, Brosius

and Pollard went together to Frazt's *farm with the saw-mill to set it up and start it, under the said contract of sale. The "declarations of said Brosius, at the said depot, before the execution of the said bonds and deed of trust, and in the absence of said Steptoe, and on Frazt's farm, whilst Brosius was engaged in setting up and starting the said steam saw-mill, under the said contract of sale, after the execution of the said bonds and deed of trust, and in the absence of said Steptoe, in respect to the condition and contract in regard to said engine," were parts of the *res gestæ*, and as such were admissible evidence. Steptoe trusted to Brosius to make and execute the contract, and in effect made him his agent for that purpose. Pollard supposed that Brosius alone, and not Steptoe also, was interested in it, notwithstanding the form of the bonds and deed of trust. But even if he knew what was the interest of

Steptoe in the transaction, he was yet warranted in dealing with Brosius as he did till the transaction was closed by setting up and starting the saw-mill as aforesaid. In the second place, it does not appear what were the declarations of Brosius which were objected to, and therefore it does not appear that they were material, or that Steptoe could have been injured by admitting them as evidence. And in the third place, the question arose upon the trial of an issue out of chancery, and it devolved on the court to render a decree upon the proper pleadings and proofs in the case, which it might do without regard to any improper evidence introduced on the trial of the issue, or even to the verdict itself, the only object of which is to inform the conscience of the court, which may be otherwise sufficiently informed. In this case we think the decree is fully sustained by the evidence, even if the portion which was objected to had been excluded. Indeed, that portion seems to be only cumulative.

This court had occasion in *Brockenbrough's ex'ors v. Spindle's adm'rs*, 17 Gratt. 21, 27, 28, and in *Powell & *wife v. Manson*, 22 Id. 177, 191, 192, to comment on the nature of an issue directed by a court of chancery in an ordinary suit, and the effect of the verdict on such an issue. In the latter case, in which one of the questions was whether the court below erred in refusing to grant a new trial of an issue out of chancery, upon the ground that the verdict was contrary to law and the evidence, which was set out in a bill of exceptions, Judge Staples, in an opinion in which the other judges concurred, said: "This court having before it this evidence, all the depositions and exhibits read at the hearing, is competent to decide whether the purposes of justice required another trial to be had. The rule in such cases is well settled. The court will consider not merely whether the evidence adduced before the jury warrants the verdict, but also whether, having regard to the whole case, further investigation is necessary to attain the ends of justice. And although there may have been a misdirection, or evidence may have been improperly rejected, it will not grant a new trial if the verdict appears to be right upon a consideration of all the evidence, including that which was rejected." And among other references which he made was one to *Barker v. Ray*, 2 Russ. R. 63, in which Lord Eldon's language is very pertinent to the present subject. In *George & als. v. Pilcher & als.*, 28 Gratt. 299, this court reversed the decree of the court below on the ground that the court erred in not ordering a new trial of the issue which had been directed and tried in the case, on the ground of the improper exclusion of evidence offered on the said trial. But in that case the evidence introduced on the trial was not certified in the record, and it was impossible for this court to say that the party complaining was not injured by the exclusion of evidence aforesaid.

We are therefore of opinion that the court below did *not err, at least to the prejudice of the appellant, in re-

spect to the matter of the fourth assignment of error; and now as to the fifth.

"5. The court erred in overruling the motion of your petitioner for a new trial, for the reason assigned in the fourth assignment of error; and further, because the verdict was not responsive to the issue, being too general and indefinite, and because the damages were excessive. All the evidence as to damages was of so general and indefinite a nature that the jury could arrive at no sum but by guessing it, except as to damage arising from the defects in the property, and the complainant himself does not claim in his bill on this account more than \$350, nor is it anywhere proven to have been over \$500; and moreover the issue by its terms confines the enquiry to damages arising from defects of the property."

We are of opinion that the court below did not err in this respect. The certificate is of evidence only, and not the facts proved. If the evidence in favor of the appellee when in conflict with that in favor of the appellant be credited in deciding the case in the appellate court, which is the true rule on the subject, we think there can be no room for doubt on the question, and that though the evidence objected to on the issue be excluded, is as shown in considering the fourth assignment of error. We think the verdict was responsible to the issue, and was not too general or indefinite, and that according to the evidence, especially that in favor of Pollard, the damages were not excessive. And now in regard to the last assignment of error.

"6. It was error to allow the sum found by the jury to be set off against the demand of your petitioner, for the reason that it was admitted by the complainant and proven by other witnesses, that before he executed the bonds and deeds he was told by said Brosius that

he had not done all he promised as to repairing the said steam saw-mill, but that he would do whatever might be necessary to put it in good running order; and relying upon this promise, complainant afterwards executed his bond to your petitioner and promised to pay them as they became due, said complainant well knowing at the time that your petitioner by receiving said bonds released said Brosius from his indebtedness to him to the full amount of said bonds."

We have already fully shown that this assignment of error is groundless, by what we have said in regard to the other assignments of error, and therefore think the court below did not err in this respect. And upon the whole, we think there is no error in any of the orders and decrees complained of, and that they ought to be affirmed.

Decree affirmed.

708 *Wood & al. v. Krebbs & als.

September Term, 1878, Staunton.

Constructive Notice—Innocent Purchasers.—In 1854 C conveyed a tract of land to B in

*Constructive Notice—Innocent Purchasers.—The Virginia court has in numerous cases

trust to secure, first, debts due to P, and, second, a debt due to K. B being required by K to sell the land, C enjoined the sale, making only B and K parties defendants, and filing the deed as an exhibit with his bill. In this suit there was a decree appointing B a special commissioner to sell the land, and at the sale K purchased it. This sale was confirmed, and B was directed to convey the land to K, and take a deed of trust upon it to secure the purchase money. B conveyed the land to K, referring to it as the land in the bill, &c., mentioned in the suit, but instead of taking the deed of trust upon this land, took it upon another tract of K, which proved to have been conveyed by other prior liens to its full value. In 1862 K sold and conveyed the land bought under the decree to W and S, the deed referring to it as the land purchased under the said decree. J, as assignee of P, filed his bill against W and S and others to enforce the lien of the deed of 1854 to satisfy his debt, and W and S answered, claiming that they were *bona fide* purchasers without notice, and they averred that, living some distance from the court-house of the county in which the land lay, and which was difficult of access by reason of the war, they refused to purchase unless K would bring the certificate of the clerk of the court that there were no liens or incumbrances on the land; and that the clerk did examine the records in his office, and did give the certificate that so far as the records of his office showed, there was no lien or incumbrance on this land. And they then purchased and paid all the purchase money and received the deed—Held: That W and S were bound to know all that the said suit disclosed, and that the certificate of the clerk was not sufficient to entitle them to the defence of *bona fide* purchasers without notice.

This case is fully stated in the opinion of Judge Christian.

709 *Richard Parker, for the appellants.

S. J. C. Moore & Son, McDonald & Moore, and Byrd & Huck, for the appellees.

CHRISTIAN, J., delivered the opinion of the court.

This is an appeal from a decree of the circuit court of Clarke county.

A transcript of the record, presented with the petition for appeal, discloses the following facts:

In the year 1854, one Peter Cain conveyed to Bowen, trustee, a tract of land in the county of Clarke, containing about 258 acres, in trust to secure to John Pierce, Jr., executor of Samuel Stipe, deceased, the payment of certain notes held by him as assignee of Hardesty, and to William F. Knight certain bonds executed by said Cain, and payable to said Knight.

sustained the rule laid down in the principal case in regard to the binding effect of the constructive notice afforded by public records even as to *bona fide* purchasers for value. See Wood v. Krebbs, 33 Gratt. 685 and note. See also Long v. Weller, 29 Gratt. 347; Burwell v. Fauber, 21 Gratt. 446; Jameson v. Rixey, 94 Va. 342; Lamar v. Hale, 79 Va. 147; Robinson v. Crenshaw, 84 Va. 348; Iron Co. v. Trout, 83 Va. 412; Morgan v. Fisher, 82 Va. 417; Stout v. Mercantile Co., 41 W. Va. 339; Williamson v. Jones, 43 W. Va. 575.

Afterwards, Barnett was substituted trustee in place of Bowen. Barnett, the substituted trustee, being required by Knight, one of the parties secured by said deed, to make sale of the land, advertised the sale thereof as required by the terms of said deed, but was enjoined from making said sale by order of the circuit court of Clarke or the judge thereof, upon a bill filed by Peter Cain, to which William F. Knight and Neill Barnett, the trustee, alone were made parties.

Upon the hearing, the circuit court directed a sale of the land, and appointed Barnett a special commissioner to execute this decree of sale. At this sale Knight became the purchaser; and upon being reported to the court, the sale was approved and confirmed.

This decree of confirmation contains the following provision: "And said Barnett is further directed to take said Knight's bond for the deferred payments of said purchase money, and thereupon execute and de-

710 liver to said *Knight a good and sufficient deed for said land so purchased by him, in said report mentioned, taking from said Knight at the same time a deed of trust to secure the payment of said deferred payments."

It is further shown by the record, that on the 1st November, 1862, Barnett, the special commissioner, conveyed by deed executed on that day, the said tract of 258 acres to the purchaser, Knight, describing said land as the tract of land in the bill and proceedings mentioned in the suit between Peter Cain, plaintiff, and Neill Barnett and William F. Knight, defendants, in the circuit court of Clarke county. In the same month, if not on the same day, Knight conveyed this land to Wood and Smith, the appellants in this suit. In that deed the land is described as the same land which was conveyed to said Knight by Neill Barnett, special commissioner.

It further appears that Commissioner Barnett, for some reason not stated in the record, instead of taking a deed of trust from Knight on this land to secure the deferred payments at the same time (as directed by the court) that he conveyed it to Knight, took from Knight a deed of trust on another tract of land known as the George Knight tract, of which William Knight was then seized and possessed as the devisee of said George Knight, his father.

It was this unauthorized act of Special Commissioner Barnett, that produces all the difficulty in the case, and from which has arisen harrassing and expensive litigation.

It turns out that this tract of land was charged in the hands of the devisee with certain legacies, which together with certain debts of William F. Knight, so encumbered it with liens prior to the deed of trust aforesaid, that it cannot be considered as any security whatever for the deferred payments due on the land sold by said special commissioner.

711 *There is a deed filed with the record, proper to be noticed here, before we proceed further. It is a deed executed by William F. Knight conveying the land pur-

chased by him of Barnett, special commissioner, at the judicial sale above referred to, to Moore, trustee, to secure the deferred payments due from said Knight. But how this paper comes to be in the record, by whom it was produced and filed, or for what purpose, does not appear. It is noted by the clerk that "no acknowledgment or certificate thereof, or certificate of recordation, appears upon this paper." If, as it may be, this deed was intended originally as the security for the deferred payments, it is plain this intention was never carried out. It was not filed with the record in the case of Cain v. Barnett and Knight, nor was it returned by Special Commissioner Barnett with his report. It was never acknowledged and never recorded, and may be regarded as out of the case. Certain it is, that both the commissioner and the purchaser, Knight, regarded the deed of trust on the George Knight land as the security given and taken for the deferred payments due on the land sold by said special commissioner.

Now, it will be remembered that in the deed of trust of April, 1854, which originally created a lien upon the tract of land sold by Commissioner Barnett in the suit of Cain v. Barnett and Knight, that deed secured first of all a debt due from Peter Cain to John Pierce, Jr., executor of Samuel Stipe, who was assignee of one Hardesty. This debt, thus secured, was assigned to Isaac Krebs, the appellee in this suit. Not a dollar of this debt has ever been paid.

Krebs filed his bill in the circuit court of Clarke to enforce his lien against the land (conveyed to secure his assignor in 1854), and of record in the clerk's office of the county court of Clarke. To this bill the executors of Special Commissioner Barnett 712 (he being dead), William *F. Knight, Wood and Smith, the appellants, and purchasers from Knight, are made parties. The bill sets forth the facts above detailed, and insists that the land purchased by Wood and Smith of William F. Knight, no matter to whom conveyed, is liable for the debt of which Krebs is the owner, secured by the trust deed of 1854. To this bill Barnett's executors demurred. The court sustained their demurrer, and put the plaintiff to his election, whether he would proceed against the executors of Barnett or against the purchasers, Wood and Smith. Barnett's executant electing to proceed against the purchasers' Wood and Smith, Barnett's executors were dismissed from the suit.

Wood and Smith answered the bill. In said answer they affirm "that they have no knowledge or information (other than the statement in said bill) respecting the indebtedness of Peter Cain, deceased, to James M. Hardesty, or as to the former giving his bond for \$400, or for any other sum to the latter, or as to the assignment of such bond to John Pierce, Jr., executor of Samuel Stipe, deceased, or as to its subsequent assignment by said John Pierce, Jr., to the plaintiff—or as to what payments have been made thereon, either for principal or interest, or what

was the consideration of said bond, or that it or any other debts of said Peter Cain were secured by a deed of trust to Archibald Bowen, trustee, upon the tract of land mentioned in said bill; or that Neill Barnett was at any time substituted as a trustee in the place of said Archibald Bowen, or that as such substituted trustee he ever advertised the said land for sale; or that he had been restrained by any injunction from making such sale; or that any such injunction suit had at any time been instituted in this court; of what orders or decrees were made, or proceedings had in such suit; or who were, or were not parties to such suit, save that as they aver, these defendants were not, 713 nor was either *of them, parties thereto. They, and each of them, are wholly ignorant as to the said matter, and as to all the other statements made in said bill of complaint, except such as they shall hereinafter plainly make answer to, and have no information in respect thereto, save what they have obtained from said bill of complaint. Further answering, these defendants say that some little while before the 3d day of November, 1862, William F. Knight offered to sell them the tract of land in said bill mentioned, of which they had understood and believed that he was seized in absolute right, but they declined to make the purchase without having the records examined to ascertain if said land was free from all incumbrances and liens; that at that time, it being during the progress of the late civil war, it was not the habit of either of them to visit Berryville, the county seat of the county in which said land was situated, and neither of them did go there at that time, or about this matter of business; they therefore refused to buy unless he would obtain and produce to them a certificate of the clerk of the county court of said county of Clarke, showing that said land was wholly unencumbered, so that they might safely buy and safely pay the purchase money thereon. These defendants further say that the said clerk did examine the records of his office, and did give a certificate that, so far as the records of his office showed, the only lien or incumbrance upon the lands proposed to be sold to them by said William F. Knight, was one in favor of the heirs of Francis O. Byrd, upon the small tract of twenty-nine acres, sixteen poles (embraced in said Knight's deed to them, and which parcel is entirely distinct from the tract of land in the plaintiff's bill of complaint mentioned), and that with this exception the said lands were entirely free from all lien or incumbrance."

They affirm that such certificate of 714 the clerk was produced *by Knight, and that they relying thereon, and with the full belief that the land was free from claim or incumbrance of any sort, concluded the purchase, received from Knight his deed, and paid to him the whole of the purchase money. Their claim, therefore, is that they are bona fide purchasers without notice of any prior lien, and that having paid all the purchase money, they are en-

titled to the land free from the lien asserted by the plaintiff, Krebbs.

They admit that they did not make any examination of the records of Clarke county, either by themselves or through their counsel, but living at some distance from the court-house, then quite inaccessible to them, they relied upon and acted upon the certificate of the clerk that there was on record no lien or incumbrance on said land.

The circuit court held, by its decree entered at its November term, 1876, that the land in the bill and proceedings mentioned is subject in the hands of the purchaser, "to the lien of the deed of trust executed by Peter Cain on the 3d day of April, 1854, to secure the several bonds therein named, payable to James M. Hardesty, one of which bonds is that due complainant, and filed as an exhibit with his bill." From this decree Wood and Smith applied for and obtained an appeal from one of the judges of this court.

The court is of opinion that there is no error in this decree. We think that this case must be governed by the principles declared in *Burwell's ex'ors v. Fauber & als.*, 21 Gratt. 446, and *Long et al. v. Weller's ex'or et als.*, 29 Gratt. 347. In the former case the president of this court, with whom all the judges concurred on this point, said: "The purchaser (as in the case before us), claims to be entitled as a bona fide purchaser. Certainly a bona fide purchaser for value, and without notice, is a great favorite of a court of equity, and that court will not 715 *disarm such purchaser of a legal advantage. But we must not permit ourselves to be mislead by words or maxims in this matter. Other persons are entitled to the protection and the favor of a court of equity, as well as purchasers. Creditors are such persons. * * * Purchasers are bound to use a due degree of caution in making their purchasers, or they will not be entitled to protection. Caveat emptor is one of the best settled maxims of the law, and applies exclusively to a purchaser. He must take care to make due enquiries or he may not be a bona fide purchaser. He is bound not only by actual, but also by constructive notice, which is the same in effect as actual notice. He must look to the title papers under which he buys, and is charged with notice of all the facts appearing upon their face, or to the knowledge of which anything there appearing will conduct him. He has no right to shut his eyes or his ears to the inlet of information, and then say he is a bona fide purchaser without notice." And in *Long et als. v. Weller's ex'or (supra)*, Judge Burks, in discussing the doctrine of constructive notice, says: "Wherever enquiry is a duty, the party bound to make it is affected with knowledge of all, which he would have discovered had he performed the duty." And he quotes from Mr. Justice Strong in *Cardova v. Hood*, 17 Wall. U. S. R. 1, in which that eminent judge thus tersely and concisely states the same principle: "Means of knowledge, with the duty of using them, are, in equity, equivalent to knowledge it-

self." See also *Brush v. Ware*, 15 Peters 93, 114, and *Le Neve v. Le Neve*, and notes thereon; 2 Lead Cases, pt. 1, 109, 127, top 23 (Marg.).

Now, applying the doctrines of these cases to the case before us, I think it is plain that the appellants, Wood and Smith, had constructive notice of the complainant's lien.

The deed from Knight to them refers in terms to the *deed from Barnett, special commissioner, to Knight, and the latter refers directly to the proceedings in the suit of *Cain v. Knight and Barnett*. The proceedings in that suit pointed directly to the deed of trust from Peter Cain to Bowen, trustee, for whom Barnett was substituted, conveying this very tract of land, first to secure a debt of which Krebbs was the remote assignee, and second to secure a debt to Knight. This very deed was filed as an exhibit with that bill. An inspection of that record, to which their title deed unerringly pointed, would have informed them that the first lien on this land was in favor of Hardesty's assignee, who was not made a party to that suit, Knight and Barnett, trustee, being the sole defendants. They would further have discovered that the special commissioner, Barnett, was directed, when he delivered a deed conveying it to Knight, at the same time to take a deed of trust on this land (we say upon this land, for upon no just construction of the decree could any other land have been referred to), to secure the deferred payments. Upon looking to the records they would have found that no such deed was taken, but a deed, unauthorized by the decree, was taken on other land already covered by pre-existing lien, and that the deed by the special commissioner having been delivered without authority, was void.

Knowledge of all these facts would have been brought home to them, if they had used ordinary diligence in seeking that knowledge which was pointed to by the very title papers under which they held the land from Knight. It is insisted, however, that the appellants did refuse to receive the conveyance from Knight, or to pay the purchase money until Knight had produced a certificate of the clerk that there was no lien or incumbrance, and that they had thus used due diligence in enquiring into the state of the title. But this was not sufficient to release

them as bona fide purchasers without notice. The *certificate of the clerk is not of itself sufficient; for a clerk may be careless, or ignorant, or even corrupt, or he may give an erroneous opinion as to whether there be liens or not existing. We mean, of course, to cast no reflections on the clerk in this case, but we speak generally, and simply affirm that of itself such a certificate of a clerk, as the one produced, does not excuse the parties from further enquiry. The same sources of information and knowledge were open to them or their counsel, through the public records, as were open to the clerk. If they did not choose to examine into the sources of their title either themselves, or through counsel, they have sustained loss

by their own negligence, from which a court of equity will not relieve them. As was said by Mr. Justice McLean in *Brush v. Ware* (supra): "No principle is better established than that a purchaser must look to every part of the title which is essential to its validity. The law requires reasonable diligence in a purchaser to ascertain any defect of title. But when such defect is brought to his knowledge" (as in this case it would have been done if the records to which his deed pointed had been properly examined), "no inconvenience will excuse him from the strictest scrutiny."

Upon the whole case, we are of opinion that there is no error in the decree of the circuit court, and that the same be affirmed.

Decree affirmed.

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**Long v. Ryan & al.*

September Term, 1878, Staunton.

1. **Domicile—Residence—Distinction.**—There is wide distinction between domicile and a residence. To constitute a domicile two things must concur: First, residence; second, the intention to remain there for an unlimited time. Residence is to have a permanent abode for the time being, as contradistinguished from a mere temporary locality of existence.

2. **Residence—Construction of Statute.**—What is the meaning of the word residence as used in any particular statute, must be decided upon its particular circumstances. The word is often used to express a different meaning according to the subject matter.

3. **Attachments—Residence Construed.***—The word residence, in the statute in relation to attachments, is to be construed as meaning the act of abiding or dwelling in a place for some continuance of time.

4. **Same—Same—Intention.**—While on the one hand the casual or temporary sojourn of a person in the state, whether on business or pleasure, does not make him a resident of the state within the meaning

***Attachment Laws—Residence.**—In *Didier v. Patterson*, 93 Va. 534, the court, citing the principal case held that one who has dwelt in the state for a year or more and is still dwelling here and is working under a contract that will occupy him an indefinite period is not a non-resident of the state within the meaning of the attachment laws although his family lives out of the state. In *Starke v. Scott*, 78 Va. 180, it was held that residence, once established is presumed to continue until proved to have been changed and that where a debtor is a fugitive from justice, leaving his wife and family, he as a fugitive and wanderer, though outside of the state, could acquire no residence which would make him a nonresident under the attachment laws. But in *Moore v. Holt*, 10 Gratt. 284, it was held that where a debtor has actually left his usual place of residence intending to reside in a distant state an attachment sued out after his departure might be sustained although he had not actually passed the state line at the time the subpoena issued. See also *Clark v. Ward*, 12 Gratt. 440; *Andrews v. Munday*, 36 W. Va. 22; *Dean v. Cannon*, 37 W. Va. 128; 4 Min. Inst. (2nd Ed.) 368, 3 Am. & Eng. Enc. Law (2nd Ed.) 198.

of the attachment law, especially if his personal domicile is elsewhere, so on the other hand, it is not essential that he should come into the state with the intention to remain here permanently, to constitute him a resident.

5. **Statement of Case.**—R, domiciled in Washington, obtains a contract upon the W. & S. railroad to construct three sections of the road, and he may be employed to build culverts and bridges in such time as the engineer of the road may fix. He rents out his house in Washington, removes his family to a place on the route of the road, and keeps house. Before the work is finished or the time for completing it has arrived, an attachment is sued out against his effects—**Held:** He was a resident of the state, and the attachment quashed.

In June, 1869, R. H. Long brought an action of assumpsit in the circuit court of 719 Frederick county, against *P. M. Ryan, to recover the sum of \$621.67, with interest on \$470.35, a part thereof, from June 14th, 1869; and at the same time he sued out an attachment against the estate and debts of Ryan as an absent defendant. This attachment was served on the Winchester and Strasburg railroad company as garnishee. It is unnecessary to state the proceedings in the cause, as the only question considered by this court, was whether at the time of the suing out of the attachment Ryan was a non-resident of the state in the meaning of the statute. The court below dismissed the attachment, and Long obtained a writ of error and supersedeas. The facts are stated by Judge Staples in his opinion.

E. P. Dandridge and Barton & Boyd, for the appellant.

A. R. Pendleton and Andrew Hunter, for the appellee.

STAPLES, J. The books abound with discussions and decisions upon the subject of domicile, habitation, and residence.

In *Thorndike v. City of Boston*, 1 Metc. R. 242, Shaw, C. J., said, "that the questions of residence, inhabitancy, or domicile, for although not in all respects precisely the same, they are nearly so, and depend much upon the same evidence, are attended with more difficulty than almost any other which are presented for adjudication."

There is, however, a wide distinction between domicile and residence, recognized by the most approved authorities everywhere. Domicile is defined to be a residence at a particular place, accompanied with positive or presumptive proof of an intention to remain there for an unlimited time. To constitute a domicile, two things must concur—first, residence; secondly, the intention to remain there. *Pilson, trustee, v. Bushong*, 720 29 Gratt. 229; **Mitchell v. United States*, 21 Wall. U. S. R. 350. Domicile, therefore, means more than residence. A man may be a resident of a particular locality without having his domicile there. He can have but one domicile at one and the same time, at least for the same purpose, although he may have several residences. According to the most approved writers and lex-

icographers, residence is defined to be the place of abode, a dwelling, a habitation, the act of abiding or dwelling in a place for some continuance of time. To reside in a place is to abide, to sojourn, to dwell there permanently or for a length of time. It is to have a permanent abode for the time being, as contradistinguished from a mere temporary locality of existence. In the matter of *Wrigby*, 8 Wend. R. 134, 140; 1 Amer Lead. Cases, 899, 953.

Notwithstanding these definitions it is extremely difficult to say what is meant by the word residence as used in particular statutes, or to lay down any particular rules on the subject. All the authorities agree that each case must be decided on its own particular circumstances, and that general definitions are calculated to perplex and mislead.

It is apparent that the word residence, like that of domicile, is often used to express different meanings, according to the subject matter. In statutes relating to taxation, settlements, right of suffrage, and qualification for office, it may have a very different construction from that which belongs to it in the statutes relating to attachments. In the latter actual residence is contemplated, as distinguished from legal residence. The word is to be construed in its popular sense, according to the definition already given, as the act of abiding or dwelling in a place for some continuance of time. *Crawford v. Wilson*, 4 Barb. R. 504, 523; *Isham v. Gibbons*, 1 Bradf. R. 69, 84; *Drake on Attachment*, §§ 61-2.

While on the one hand the casual 721 or temporary sojourn *of a person in this state, whether on business or pleasure, does not make him a resident of this state within the meaning of the attachment laws, especially if his personal domicile be elsewhere, so on the other hand it is not essential he should come into this state with the intention to remain here permanently to constitute him a resident. In the matter of *Fitzgerald*, 2 Caine's R. 318; *Jackson v. Peery*, 13 Mon. R. 231; *Rayness v. Tayloe*, 10 Louis. R. 726.

Whatever doubt or ambiguity there may have been in former laws on the subject, it is clear that since the revisal of 1849, a party cannot be proceeded against under the foreign attachment law unless he be actually a non-resident of the state at the time. *Kelso v. Blackburn*, 3 Leigh 299; *Daniel on Attachments*, p. 242. The question is not as to the place of his domicile, but his place of abode—his dwelling place. This branch of the attachment law is based upon the idea that a debtor is living—dwelling—beyond the limits of the state, but has effects or debts due him within the state. As he cannot be served with process, there is no mode of reaching his property according to the course of the common law; or if coming into the state temporarily on business or pleasure, he should be served with process, he may, at any time, depart, taking with him his effects, before execution can be had against him. When, however, the debtor is within the state amenable to process and doing business here,

the proceeding against him by foreign attachment ought to be carefully watched by the courts, because the proceeding is not merely ruinous to the debtor, but tends to give one creditor undue preference over the others. This is no hardship upon the creditor, because, if after suit is brought and process served, or before suit is brought, the debtor attempts to remove his effects, the most ample remedy is afforded the creditor by the second 722 *and third sections of chapter 151,

Code of 1860, which authorizes attachments where the debtor intends to remove or is removing his effects out of the state. The provisions of these two sections relieve us of the necessity of giving any strained construction to the first section of the same chapter, where the proceeding is against one within the state, and amenable to process here.

Applying these principles to the case in hand, I think the circuit court did not err in holding that the defendant, Ryan, was, at the time of suing out the attachment, a resident of the state of Virginia, and that the attachment against him was sued out on false suggestion. The defendant having demurred to the plaintiff's evidence, upon familiar principles, must be held to have waived all evidence on his part which conflict with that of the plaintiff, and to admit all inferences of fact that may be fairly deduced from that of his adversary. *Trout v. Va. & Tenn. R. R. Co.*, 23 Gratt. 619; *Barton's Law Prac.* 222. Looking then to the testimony of the plaintiff, and such of the defendant's as is not in conflict with it, it appears that Ryan had his domicile and residence in Washington city from 1855 to 1868. In December, 1868, he obtained a contract from the Winchester and Strasburg railroad company to construct three sections of their road in this state, the work to be completed by the first of September, 1869. The defendant, however, agreed to do any additional work in the way of masonry, bridges, culverts and the like, the company might require, within such extended time as the chief engineer might allow. The defendant commenced his work the first of January, 1869, and proceeded with it until arrested by the attachments against him. In April he brought his family to Newtown, Virginia, consisting of his wife, two daughters and two sons. Another daughter was left in Washington, being an employee in the treasury department. Shortly after the removal of 723 the family to Virginia, the *house in

Washington, belonging to the wife, was rented out. The two sons worked with the father on the railroad, and the two daughters assisted the mother in keeping a boarding house in Newtown. In the month of June, while the defendant was thus engaged, these attachments were sued out and levied upon his effects, and his work arrested and never resumed.

It was proved that during the time the defendant was engaged in his work, he always claimed Washington city as his place of residence, and declared he intended to return to that place so soon as his contract was completed, unless he could get work

elsewhere, and that he expected to get a contract on a Pennsylvania or a Maryland road. These are substantially the facts about which there is no controversy.

In the first place, I cannot think that the declarations of the defendant, so much relied on, are entitled to much consideration. Such declarations are not of much weight, unless they accompany and are explanatory of acts done at the time. They are often loosely and carelessly made, and as often misunderstood or misconstrued by the hearer. It is very probable the defendant did consider Washington city as his domicile, as his wife's property was there; for he might have a domicile in Washington and still be a resident of Virginia.

As already stated, the house in Washington had been rented, the family brought to Virginia with all the means of the defendant. It was impossible to say how long he would remain in Virginia, for although he was under obligations to complete his work by the 1st of September, 1879, it was by no means certain he would do so, and at all events he had undertaken to do other work, if required by the company, which would extend his contract indefinitely. It seems that the excavation on section eight, part of defendant's work, was not completed until

April, 1870. So that the stay of the de- 724 fendant in *the state was wholly uncertain and indefinite. His family were here; his business and means were here; his dwelling was here, and I think it is impossible to resist the conclusion that his residence, for the time being was here.

From the earliest period the proceeding by attachment has been carefully watched by the courts. *Barnett v. Darnielle*, 3 Call 416. In *Mantz v. Henley*, 2 Hen. & Munf. 308, Judge Fleming said, that the attachment law, though sound in principle and salutary in operation when properly administered, had been, in the course of his experience and observation, oftener perverted and more abused than any law in our whole statutory Code; that instead of promoting justice it was often made the engine of injustice and oppression, and that being a summary proceeding unknown to the common law, the strict letter of the statute ought to be adhered to in all cases. The same view was taken by Judge Carr in *Jones & Ford v. Anderson*, 7 Leigh 308. In *Claffin & Co. v. Steinbock & Co.*, 18 Gratt. 842, Judge Joynes said: "This extraordinary remedy is not only harsh towards the defendant himself, but its operation is harsh towards the other creditors of the defendant, over whom the attachment creditors obtain priority. It is susceptible of great abuse, and has often been greatly abused. It is therefore closely watched, and will never be sustained unless all the requirements of the law have been complied with." Daniel on Attachments, 24-5. The wisdom of these remarks is, I think, shown in the present case. Whether the defendant would in any event have completed his contract is a mere matter of conjecture. One thing is certain: his work was suspended and his business destroyed by

the levy of these attachments. There was no difficulty at any time serving him with process, and as little difficulty in obtaining judgment and execution while he was in the state. If he had attempted to remove
725 his effect *the remedy of the plaintiff was ample under the second and third sections already adverted to. For these reasons I think the judgment of the circuit court should be affirmed.

The other judges concurred in the opinion of STAPLES, J.

Decree affirmed.

726 *Nulton & als. v. Isaacs & als.

September Term, 1878, Staunton.

1. **Multifariousness.***—I files his bill claiming to be a judgment creditor of N, deceased, seeking to subject to the satisfaction of his judgments a tract of land conveyed by N, in trust, for the separate use of his wife, and two other tracts conveyed by N to his son. He charges that the deeds were without consideration, and were fraudulent. He states that N and his son were partners, and asks that if it is necessary to show the true consideration of the deeds to the son, that his account as late partner of N may be settled—HELD: The bill is not multifarious.

2. **Judgments—Jurisdiction.**†—Three of the judgments of I were judgments of the United States court, rendered in a cause in which citizens of Maryland were plaintiffs and the Bank of the Valley of Virginia was defendant, brought to have the assets of the bank administered, and upon petition and no-

***Multifariousness—What Constitutes.**—In *Alexander v. Alexander*, 85 Va. 363, the court citing the principal case in its opinion lays down the following cardinal rules in regard to multifariousness: "a bill will always be deemed multifarious, where several matters joined in the bill against one defendant are so entirely distinct and independent of each other that the defendant will be compelled to unite, in his answer and defense, different matters wholly unconnected with each other and as a consequence the proofs applicable to each would be apt to be confounded with each other, and great delays might be occasioned respecting matters ripe for hearing by waiting for proofs as to some other matter not ready for hearing; or again where there is a demand of several matters of a distinct and independent nature, in the same bill, rendering the proceeding oppressive because it would tend to load each defendant with an unnecessary burden of costs by swelling the pleadings with the statement of the several claims of the other defendants with which he has no connection. A bill will not ordinarily be regarded as multifarious, where the matters joined in the bill, though distinct, are not absolutely independent of each other, and it will be more convenient to dispose of them in one suit." See also *Wells v. Guano Co.*, 89 Va. 708; *Segar v. Parish*, 20 Gratt. 679; *Hill v. Hill*, 79 Va. 592; *Huff v. Thrast*, 75 Va. 550; *Almond v. Wilson*, 75 Va. 613; *Commonwealth v. Drake*, 81 Va. 305; *Withers v. Sims*, 80 Va. 657; *Walters v. Bank*, 76 Va. 16; *Thomas v. Sellman*, 87 Va. 687; 4 Min. Inst. (2nd Ed.) 1284; 14 Enc. Pl. & Pr. 196.

†**Judgments—Invalidity.**—Though the court may possess jurisdiction of a cause, of the subject

tice, the judgments were rendered against N as a debtor of the bank—HELD: That N being a citizen of Virginia, the United States court had no jurisdiction in the case to render the judgments against N, and they were invalid as judgments.

3. **Consideration—Fraudulent Conveyance.**

—The deeds to the son having been on valuable consideration, the land sold and conveyed to him is not liable for the debts of N; but the deed in favor of the wife having been without consideration, this land is liable to pay the debt due I.

In 1873, William B. Isaacs & Co. filed their bill in the circuit court of Frederick county, stating therein, substantially, that they were holders of a large amount of notes of the old Bank of the Valley in Virginia, and of the Farmers Bank of Virginia; that their claims as such note holders were audited, reported and confirmed against the said banks in the circuit court of the United States for the eastern district of Virginia, in the
727 chancery *causes therein pending, in which the debts of the said banks have been audited and their assets disbursed, and complainants having waited in vain, with the hope of being permitted to participate in the distribution of the cash assets of the said bank, were compelled to accept certain claims which the receiver of the court held as the custodian of the assets of the bank against certain persons in that section of the state. Among the claims thus assigned to complainants, are three judgments which were rendered in the circuit court of the United States for the district of Virginia on the 12th day of December, 1868, in the chancery cause therein depending, in which the Merchants National Bank of Baltimore and al. were plaintiff's, and the Bank of the Valley in Virginia and als. were defendants; the said judgments being in the name of said plaintiffs (for the use of H. G. Fant, the receiver of the court), against J. S. Carson, treasurer, A. Nulton and J. R. Bowen, official copies of which judgments, marked A, B and C., were filed with said bill, one of them being for \$1,450, with interest from the 20th day of April, 1862, and costs, \$32.05; another for \$900, with interest from the 4th day of April, 1862, and costs, \$30.25; and the other for \$300, with interest from the 21st day of March, 1862, and costs, \$30.20. In addition to these judgments, there was also assigned to complainants, on account of their claims which had been audited against the Farmers Bank, the negotiable note of Abraham Nulton, endorsed by J. S. Carson and Samuel R. Atwell, for the sum of \$600, which note had been protested for non-payment on the 3d day of July, 1862. Suit was brought upon said note in the county court of Frederick county in the name of complainants, as assignees of said receiver, on the 19th day of July, 1870, against Abraham Nulton, the

matter and of the parties it is still limited in its modes of procedure and in the extent and character of its judgment. A departure from established modes of procedure will often render the judgment void. *Anthony v. Kasey*, 83 Va. 341; *Thurman v. Morman*, 79 Va. 367; *Ogden v. Davidson*, 81 Va. 762, citing principal case and *Windsor v. McVeigh*, 93 U. S. 282.

maker of the note, and judgment was recovered in said suit at the following December term of said court for the full amount of said *note, interest and costs, of which judgment an official copy, marked D, was filed with the bill. Official copies of the decrees of the circuit court of the United States under which the three judgments of said court, and negotiable note aforesaid were assigned to complainants, were marked E and F, and also filed with the bill. And an official copy of the assignments of the said three judgments of the United States circuit court was marked G, and also filed with the bill.

It is charged in the said bill, that the said Abraham Nulton was possessed, at the time said judgments of the United States circuit court were rendered, of very valuable real estate situated in the town of Winchester, and particularly described in the bill; and that the said three judgments of the United States circuit court became liens upon said real estate as of the first day of November term, 1868, of said court; and the said judgment of the county court of Frederick county became a lien upon the same as of the first day of the December term, 1870, of the said court.

It is further charged in said bill that after the said three judgments of the United States circuit court were rendered, said Abraham Nulton made conveyances of said real estate, which were and are ineffectual to withdraw the same from its responsibility for the said judgments, and also for the said judgment of the county court, both because of the then existing lien of the said judgment of the United States circuit court, and because said conveyances were not based upon adequate consideration, and were therefore void so far as any of the debts of said Nulton then existing were concerned. The first of said conveyances was made on the 24th day of June, 1869, and was recorded in the corporation court of Winchester on the 13th day of December of the same year, of which an official copy, marked H, is filed with the bill.

This deed purports to be a conveyance of the *brick dwelling, store-room and lot before described in the bill, and the conveyance of it is made to Joseph A. Nulton, who is a son of said Abraham, and was in trust for the sole and separate use of Sarah Nulton, who was then the wife of said Abraham, and is expressed to have been in consideration of the said Sarah having united theretofore with said Abraham in conveyances of large quantities of real estate lying in said county; the said deed alleging that her uniting in said conveyances had been in consideration of an express promise and agreement of her husband that he would convey to her the real estate described in the deed so soon as he should receive from the proper parties a good deed for it.

Complainants alleged that they have had all the deeds examined which are on record in the clerk's office of the county court of said county and of the corporation court of Winchester, which have been made by the said Nulton, and in which his wife, Sarah, had

united, from the date of said deed, June 24th, 1869, to the 1st day of January, 1820, and they have found no such promise, express or implied, referred to in any of said deeds, and they deny that there ever was any such promise. They allege that the lot conveyed by said Nulton for the separate use of his wife as aforesaid, was first acquired by him on the 1st day of December, 1854, as will be seen by exhibits K and L, filed with the bill. And as the consideration for this settlement is in the settlement impliedly recited to have been for conveyances made between the acquiring of this property by the said Nulton and the date of the settlement, the promise of the said Nulton being therein recited to have been to settle this identical property upon the said Sarah, so soon as he should receive from the proper parties a deed for it, which was not accomplished until the 24th day of June, 1860; yet complainants allege that the total fee simple value of all the property *in respect to which the said Sarah relinquished her title of dower during this interval, did not equal one-third of the value of the property which the said Nulton thus attempted to settle upon her. And if an error has been committed by the parties in the recital in the deed of settlement of the time during which these alleged promises were made, still complainants aver that the value of the property so conveyed to his wife was equal to one-half the fee simple value of all the property which ever had been conveyed by said Nulton and wife to any one, embracing all the deeds which are on record in the said two offices at any time previous to the said settlement. In addition to the facts thus set forth, complainants further show that said Sarah was the senior in years of the said Abraham, that she was in very delicate health at the time said settlement was made upon her, viz: the 24th of June, 1869, and that she died on the 7th of December following, leaving her husband surviving her. The deed of settlement was then wholly without consideration, and was illegal and void as respects the debts of said Abraham Nulton which existed at the time of the settlement, and especially the several judgments of the United States circuit court aforesaid, and the claim by negotiable note for \$600, upon which judgment has been rendered in the county court of said county as aforesaid, the said note having been a debt of the said Nulton long pre-existing the date of said settlement, having been protested for non-payment the 3d of April, 1862.

Complainants further say that under the pretended powers derived to her from the said settlement, the said Sarah Nulton made her will, which is dated in December, 1869, and was admitted to probate in the corporation court of Winchester at the February term, 1870, of which an official copy, marked M, is filed with the bill; by which will she devised the whole of the property to her said husband and to their unmarried daughter,

*Georgiana Nulton, jointly, during the life of the said Abraham, with remainder in fee upon the death of said Abraham to the said Georgiana and the two

other daughters of said testatrix, viz: Harriet Haines, the wife of George E. or George H. Haines, and Catherine Herbert, then the wife of Joseph Herbert. Abraham Nulton survived his wife, Sarah, two years, and died on the 7th of December, 1871; he died intestate, and administration on his estate was granted to Holmes Conrad by an order of the county court of said county in 1872. The personal estate left by said Abraham was very small, and wholly inadequate to pay even the judgment for \$600 recovered in the county court as aforesaid, thus rendering a resort to the real estate unavoidable upon the part of complainants.

They further show that in addition to the property thus conveyed by said Abraham Nulton to his wife, he also conveyed to his son, Joseph A. Nulton, two other valuable pieces of property in said town described in the bill, constituting, with the property settled on his wife, as aforesaid, all the real estate which he owned at the time said judgments were rendered. Official copies of the deeds whereby the said two pieces of property were conveyed are marked N and O, and filed with the bill.

Complainants charge that the said Joseph A. Nulton was without means to any amount at the time said conveyances were made to him; that he was a young man who had only reached his majority either during or shortly before the commencement of the war; that at the close of the war he commenced business as a partner with his father in the tinning and stove selling business, but there was comparatively little profit attending the business in Winchester during this period, or indeed since; that all the stock in their store, including the tools, remained in possession of said Joseph A. Nulton when his father

withdrew from the business, and also, as **732** complainants *supposed, the unsettled accounts. They claim that all these should be accounted for by the said Joseph A. Nulton, and that he should exhibit a full settlement of the said partnership accounts, and a discovery of the settlement which is referred to in the said deed, by which the consideration cited in said deed, viz: the sum of \$4,804.49, was paid by him. They charge that upon such an investigation being made, it will be found that no adequate consideration has been given by him, either for the property conveyed to him by the deed of November 10th, 1869, or by that of February 23d, 1870, and that the operation of said deeds is to withdraw from complainants' claims property of said Abraham Nulton, which is legally responsible for their payment.

They therefore pray that Joseph A. Nulton, in his own right, and as trustee for Georgiana Nulton, Harriet Haines, the wife of George E. or George H. Haines, Catherine Herbert the wife of Joseph Herbert, and Holmes Conrad, administrator of Abraham Nulton, deceased, may be made defendants to the bill and required to answer the same; that the personal estate of said Abraham may be applied to the discharge of complainants' judgments, and that the lien of

said judgments upon the real estate may be enforced for the satisfaction of the same so far as the personal estate may be insufficient for that purpose; that the said deeds of Abraham Nulton may be set aside, so far as necessary to satisfy complainants' claims, and that the real estate embraced in them may be subjected to the payment of the same; and to this end that all necessary accounts of administration, of liens and of debts, may be taken; that the defendant, Joseph A. Nulton, may make a complete discovery of the considerations upon which the two deeds to him were based, and if essential to the proper understanding of the same, that his account as late partner with the

decendent may be settled, and that complainants may have *such other relief as may be consistent with equity and be required by the nature of the case.

In April, 1873, Joseph A. Nulton filed his answer to the said bill, in which he demurs to it for want of equity on its face, and because the same is multifarious in confounding subjects that are distinct and in no wise related to each other. And not waiving the benefit of said demurrer, but insisting thereon, he proceeds to answer the same by saying in substance as follows: He denies that any right and lawful judgments have been rendered in the circuit court of the United States for the district of Virginia, against his father, Abraham Nulton, as complainants in their bill pretend. He admits the allegation of the bill, that the note upon which the judgment of which a copy marked D and filed with the bill was rendered, was executed by said Abraham Nulton, Joseph S. Carson and Samuel R. Atwell as representing the Methodist Episcopal church of Winchester, and had been discounted at bank and the proceeds applied as stated in the bill; he avers that the understanding in this and all like transactions between these parties, was that their liability on such paper was joint and not successive; that in pursuance of this understanding, one of the parties, Mr. Atwell, obtained, long prior to the assignment made by the bank, a sufficient sum of the notes of the bank to meet and satisfy this claim; that those notes were obtained by Mr. Atwell as one of the official body of said church, and are yet retained by him as an endorser to pay off this note, and respondent pleads said notes as a set-off to said judgment.

Respondent admits that Abraham Nulton conveyed to him the property mentioned in the bill in trust for the separate use of Sarah, wife of the said Abraham, and mother of respondent, as therein mentioned. He denies that this conveyance was voluntary and without consideration, but avers that it **734** was in pursuance of an agreement *made between his father and mother long prior to the date of said conveyance, the consideration of said agreement being, as recited in the deed, viz: the relinquishment by his mother of her dower interest in several pieces of property sold by his father. He does not admit the allegation of the bill as to the value of the property thus settled upon his mother as

compared with the value of that in which she relinquished her dower, but demands proof thereof.

He admits that Abraham Nulton did sell and convey to him two pieces of property as mentioned in the bill, but denies that said conveyance was without consideration, and that he was without means as stated in the bill. In response to the discovery asked for, he says: "That for shop, store-house and lot on Loudoun street, conveyed to him by his father, he paid the sum of \$4,804.47, an amount ascertained to be due respondent from the said Abraham Nulton upon a full settlement made for an between them by Joseph S. Carson, the life-long friend and counsellor of the said Abraham Nulton, and in whose integrity the complainants express the most abounding and justly merited confidence." Said settlement is exhibited as part of the answer. He further states that he has, since the date of said settlement, discovered that there had been omitted from the account presented by him, through his own inadvertence, a large debt of his father's which he had at that time paid off, amounting to the sum of \$1,500, which debt is described in the answer. He challenges the fullest investigation of these transactions, and closes his answer with other remarks which need not be here mentioned.

About the same time answers were filed by Georgiana Nulton and Catherine Herbert, wife of Joseph Herbert, and by George H. Haines and Harriet A. R., his wife, in which they deny that the conveyances impeached by the bill were fraudulent or
735 without consideration, and *affirm their validity; but it is unnecessary to state, in detail, the contents of said answers.

The three judgments of the United States court were rendered upon petitions filed by the plaintiffs in a suit in equity in that court, they being citizens of Maryland, against the Bank of the Valley of Virginia, and H. M. Brent, trustee, to have the assets of the bank administered by the court, and upon notice to Nulton and the other parties to the notes, all of them living in Virginia, and the notes having been discounted by the bank. And without stating here any other portions of the record, except the substance of the decree appealed from, it is sufficient to say that on the 30th day of June, 1876, the cause came on to be heard upon the bill and the exhibits filed therewith; the answers of Joseph A. Nulton, in his own right and as trustee; of George H. Haines and Harriet A. R., his wife; of Georgiana Nulton, and of Catherine, the wife of Joseph Herbert; the general replication to said answers; the depositions taken in the cause, and those which it had been agreed by the parties should be read in the cause as set forth in the agreement of facts filed in the papers; the act of the Virginia convention; the decrees and other record evidence from the circuit court of the United States; the said agreement of facts; the admissions in open court made by the defendant, Holmes Conrad, administrator of Abraham Nulton, deceased, that the personal estate of said Abraham is inconsiderable and will pay but a small per cent., if any, of

the complainants' claim, and the other papers filed in the cause, and was argued by counsel. On consideration whereof, the court overruled the several demurrers to the bill, and being of opinion that the judgments of the circuit court of the United States, referred to in the bill, are not valid liens upon the real estate of said Abraham Nulton, and that there was no fraud in the conveyances from said Abraham to Joseph A. Nul-
736 ton, in his own *right, which are filed as exhibits N and O with the bill, decreed that the property conveyed in said deeds is not liable to the payment of the complainants' claims. But the court being of opinion that the conveyance from Abraham Nulton to Joseph A. Nulton, as trustee for Sarah Nulton, which is filed as exhibit H with the bill, was voluntary and without consideration, decreed that the said conveyance be set aside, so far as the claims of the complainants are concerned, and that the said property be subjected to the payment of the same; and as preliminary thereto, the court directed that one of its commissioners should ascertain and report to the court the amount due to the complainants from the estate of Abraham Nulton, deceased, and should settle the account of the said Holmes Conrad, administrator of said Abraham Nulton, deceased, and report what portion of the said claims the personal estate of said Nulton will pay.

From the said decree the said Georgiana Nulton, George H. Haines and Harriet Haines, Joseph Herbert and Catharine Herbert, and Joseph A. Nulton applied to a judge of this court for an appeal; which was accordingly allowed.

Holmes Conrad and Tucker & Tucker, for the appellants.

William L. Clark, for the appellees.

MONCURE, P., delivered the opinion of the court. After stating the case he proceeded:

There is but a single assignment of error in the petition for an appeal in this case, which is in these words:

"The single error complained of is in overruling the demurrer to the bill of the complainants, and thereby permitting the complainants to proceed in one bill
737 against *several persons in regard to matters entirely distinct and independent, and as to which the defendants had no common or related interest."

And the petitioners proceed as follows in their said petition:

"The bill charges (page 5) that Abraham Nulton, by deed of 24th June, 1869, conveyed to Joseph A. Nulton, one of the petitioners, certain real estate in trust for Sarah Nulton. And that this deed was wholly without consideration, and was illegal and void; that on the 10th of November, 1869, and on the 23d February, 1870, the said Abraham Nulton conveyed to Joseph A. Nulton certain other pieces of real property 'for which no adequate consideration hath been given him;' and the said Joseph A. Nulton is required to make discovery of the settlement referred to

in the deeds to him, and to exhibit a full settlement of his partnership accounts with his father, the said Abraham Nulton.

"And the prayer of the bill is, that the deed to Sarah Nulton and the two deeds to Joseph A. Nulton may be set aside, and that he be required to settle his accounts as partner of his father.

"Petitioners are advised that this bill is decidedly multifarious—Joseph A. Nulton protesting that he has nothing to do with the property conveyed to Sarah Nulton, and by her devised to his co-petitioners, and the other petitioners protesting that they have no interest or concern in the two deeds to Joseph A. Nulton, or in the settlement of his partnership account with his father. 1 Daniel, Ch'y Pr. p. 334; Story's Eq. Pl. § 271; Dunn v. Dunn & als., 26 Gratt. 291; Sawyer v. Noble, 55 Maine 227."

The court is of opinion that the circuit court did not err in overruling the demurrer to the bill, and that the same is not multifarious. This, we think, plainly ap-

738 pears from *the authorities referred to in the petition and the notes of argument. Story's Eq. Pl. §§ 271, 285-6; Segar, &c., v. Parish, &c., 20 Gratt. 672; Jones' ex'ors v. Clark & als., 25 Id. 662, 676; Dunn v. Dunn & als., 26 Id. 291; Brenkerhoff v. Brown, 6 Johns. Ch. R. 139; Fellows v. Fellows, 4 Cow. R. 682. It is true, as was said by Lord Cottenham in Campbell v. Mackey, 1 My. & Cr. 603, in the passage quoted from his opinion in that case by the counsel for the appellants: "To lay down any rule applicable universally, or to say what constitutes multifariousness as an abstract proposition is, upon the authorities, utterly impossible. The cases upon the subject are extremely various, and the court in deciding them, seems to have considered what was convenient in particular circumstances, rather than to have attempted to lay down any absolute rule." Yet, in most cases there is little or no difficulty in deciding the question whether or not multifariousness exists in the particular case, and such, in our opinion, is this case.

The complainants, William B. Isaacs & Co., claimed to be creditors of Abraham Nulton, under assignments to them of several of his notes by the Bank of the Valley in Virginia and the Farmers Bank of Virginia; and they brought their suit to enforce the payment of their claim out of the estate of their debtor. He had little or no personal estate, and all his real estate he had conveyed to and for the use of his wife, Sarah Nulton, and his son, Joseph A. Nulton, which conveyances were charged by the said creditors to be voluntary and fraudulent and void as to his creditors, and especially the complainants. They, therefore, sought by their said suit to remove these obstructions out of their way, without which they could not possibly obtain satisfaction of their claims, and for that purpose they had, necessarily, to make not only the administrator of Abraham Nulton, but also the claimants under the said 739 alleged fraudulent conveyances, *defendants to the bill; and as Joseph A.

Nulton claimed to have become the purchaser of the property conveyed to him by his father, the said Abraham Nulton, by means of a balance alleged to have been due to him on a settlement of a partnership account between them, the complainants prayed in their bill that the defendant, Joseph A. Nulton, might "make a complete discovery of the consideration upon which the two deeds to him were based, and if essential to the proper understanding of the same, that his account as late partner of the decedent may be settled." We think that all the persons made defendants to the suit were proper and necessary parties, and that the conditional prayer for a settlement of the partnership account was proper and unobjectionable, if not necessary. We have said so much on this subject, not because we had any difficulty about it, but because the learned counsel for the appellants made it the chief, if not the only ground of complaint, at least in the petition for an appeal. We will now proceed to consider whether there be any error in any other portion of the decree, which was complained of as being erroneous, though in different respects, in the arguments of the counsel, both of the appellants and appellees.

The court is further of opinion, that the circuit court did not err in decreeing that the property conveyed by Abraham Nulton to Joseph A. Nulton, in his own right by the two deeds, of which copies marked N and O, are filed as exhibits with the bill, is not liable for the payment of the complainants' claims.

If the orders of the circuit court of the United States in the record mentioned for the payment of three out of the four claims of the complainants had been valid judgments, and liens as such on the real estate of the debtor, Abraham Nulton, notwithstanding they were never registered, then the said property would have been liable 740 *for the payment, at least of the said three claims, whether the said two deeds were voluntary and fraudulent or not.

But the court is of opinion, that the said orders of the circuit court of the United States were not valid judgments against the said Abraham Nulton. The said court would have had no jurisdiction to render such judgments, even if actions of debt had been brought in the said court by the Bank of the Valley in Virginia against the said Abraham Nulton for the recovery of the said claims, as both parties, plaintiffs and defendants, resided in the state. We do not mean to say that judgments rendered in such actions would have been regarded as void in any collateral proceeding. But we are of opinion that where, as in this case, the creditors, instead of proceeding by the common law action of debt to recover their claims, obtain an order for their payment on a mere summary rule to show cause—such order, though no defence be made to the rule, has not the force and effect of a judgment, and is not a lien on real estate, whether registered or not. The order is void on its face as a judgment. The defendant is entitled to the benefit of a

common law action in which he can regularly make his defence, and have the benefit of a trial by jury; and he is entitled to be sued in the courts of his own state, and is not suable in the federal courts, even in an action brought against him alone. Much less can he be proceeded against by a mere summary rule and order in a suit brought in one of the federal courts against his creditor by another person or corporation. An order might, no doubt, have been made in that suit for the collection of debts due the defendant and liable to the claim of the plaintiff. But such collection, if it could not be made without legal proceedings, would have to be made by action at common law in a court of competent jurisdiction, just as if such debts

741 *due to the original creditor. The debtor would lose none of his rights of defence by the assignment.

The true doctrine of the law on this subject is, in our opinion, correctly laid down in the opinion of the supreme court of the United States, delivered by Mr. Justice Field in *Windsor v. McVeigh*, 3 Otto R. 274. "The doctrine invoked by counsel," said the court in that case, page 282, "that where a court has once acquired jurisdiction, it has a right to decide every question which arises in the cause, and its judgment, however erroneous, cannot be collaterally assailed, is undoubtedly correct as a general proposition; but like all general propositions, is subject to many qualifications in its application. All courts, even the highest, are more or less limited in their jurisdiction; they are limited to particular classes of actions, such as civil or criminal, or to particular modes of administering relief, such as legal or equitable," &c. "Though the court may possess jurisdiction of a cause, of the subject matter and of the parties, it is still limited in its mode of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. If, for instance, the action be for a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order in that case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. Instances of this kind show that the general doctrine stated by counsel is subject to many qualifications. The judgments mentioned, given in the cases supposed, would not be merely erroneous, they would be absolutely void, because the court in rendering them would transcend the limits of its authority in those

742 *cases." "So a departure from established modes of procedure will often render the judgment void; thus the sentence of a person charged with felony, upon conviction by the court, without the intervention of a jury, would be invalid for any purpose. The decree of a court of equity upon oral

allegations, without written pleadings, would be an idle act of no force beyond that of an advisory proceeding of the chancellor; and the reason is, that the courts are not authorized to exert their power in that way."

According to the principles thus laid down, the orders in question have not the force and effect of judgments. There is nothing in those principles at all in conflict with the opinion of this court, delivered by Judge Christian, in the case of *Lancaster v. Wilson*, 27 Gratt. 624. The distinction between the two is sufficiently obvious without any comment upon them here.

If the orders aforesaid were judgments, a very interesting question would arise, whether registration of those orders would have been necessary to make them liens on the real estate of the debtor; but as they are not judgments, it is unnecessary to consider that question.

It follows, therefore, from what has been said, that the property conveyed to the said Joseph A. Nulton, as aforesaid, is not liable for the payment of the complainants' claims. His answer in response to an allegation of the bill positively denied that the deeds were executed with fraudulent intent, and set out the valuable consideration on which he alleged that they were founded, and there is no proof on the other side. The court, therefore, rightly considered that there was no fraud in the said deeds, and decreed accordingly.

The court is further of opinion that the circuit court did not err in the opinion that from the evidence the conveyance from Abraham Nulton to Joseph A. Nulton, as trustee for Sarah Nulton, which is 743 filed as exhibit H *with the complainants' bill, was voluntary and without consideration, and in, therefore, decreeing that the said conveyance be set aside so far as the claims of the complainants are concerned, and that the property thereby conveyed be subjected to the payment of said claims. *Blow v. Maynard*, 2 Leigh 29.

The court is further of opinion that there is no error in the said decree, and that the same ought therefore to be affirmed, which is ordered accordingly.

Decree affirmed.

744 **Miller & als. v. Blose's Ex'or & als.*

September Term, 1878, Staunton.

Absent, BURKS, J.

In 1831 S sold and conveyed to K and his son-in-law M, a tract of land for \$7,884. M lived on this land. K, who was a man of wealth, died in 1838, leaving a widow and seven children, one of them a minor, and his widow died in January, 1843. Soon after her death the heirs of K made a division of his land, and five of the six who were of age united in deeds conveying to the other seventh, or her husband, a parcel of land. M and wife united in the deeds to the other parties, and the other parties united in a deed conveying to M the whole land conveyed by S to K and M. This was in form an absolute conveyance of the land to M in con-

sideration of \$8,000 paid by him, the receipt of which was thereby acknowledged. Both the deed of 1831 and that of 1843 were recorded. M lived on the land during his life. He died in 1863; his wife died some years after him. In 1870 a bill was filed by the creditors of M, to subject the land to the payment of his debts. His heirs claim that K and his executors paid for the whole of the land to S, and that it was treated as a part of the estate of K in the division, and the deed to him by the other heirs was only to relieve the land from any claim by them, and that there was a resulting trust in favor of the wife of M and her children, which they endeavored to maintain by parol evidence—**Held:**

1. Resulting Trusts—Parol Evidence.*—

Though a resulting trust may be established by parol evidence, yet in the face of M's possession under two deeds, one in 1831 and the other in 1843, conveying to M absolutely, for so great a length of time without question, the parol evidence must be clear and explicit, such as to leave no doubt of the character of the transaction.

2. Same—Payment of Purchase Money.

—Where the trust does not arise on the face of the deed, but is raised upon the payment of the purchase money, *which creates a trust, which is to override the deed, the proof must be very clear, and mere parol evidence ought to be received with great caution.

3. Same—Time of Arising.—

A resulting trust must arise at the time of the execution of the conveyance. Payment or advance of the purchase money before or at the time of the purchase is indispensable. A subsequent payment will not, by relation, attach a trust to the original purchase, for the trust arises out of the circumstance that the moneys of the real and not the nominal purchaser formed at the time the consideration of that purchase, and became converted into land.

4. Same—Payment by One in Loco Parentis.—

The mere fact of payment of the purchase money will not always be sufficient to raise a clear presumption of a trust, but evidence of intention must often enter into the fact whether that payment is such an equity under the circumstances. The payment by a father of purchase money of land conveyed to a son, or nephew, or son-in-law, or any one to whom he stood in *loco parentis*, would not of itself create a resulting trust.

***Resulting Trusts—Parol Evidence.**—There is a long line of decisions of the Virginia court sustaining the rule laid down in the principal case to the effect that though a resulting trust may be established by parol evidence the facts in all such cases must be proved with great clearness and certainty. *Throckmorton v. Throckmorton*, 91 Va. 42; *Sinclair v. Sinclair*, 79 Va. 42; *Donaghe v. Tams*, 81 Va. 142; *M'Devitt v. Frantz*, 85 Va. 753; *Bank v. Carrington*, 7 Leigh 581; *Kane v. O'Connors*, 78 Va. 76; *Phelps v. Seely*, 22 Gratt. 573; 2 Min. Inst. (3rd Ed.) 2180; *Troll v. Carter*, 15 W. Va. 582; *Smith v. Turley*, 32 W. Va. 17; *Bright v. Knight*, 35 W. Va. 40.

Same—Time of Arising.—As holding that resulting trust must arise at the time of the execution of the conveyance see *Smith v. Turley*, 32 W. Va. 17; *Murray v. Sells*, 23 W. Va. 480; *M'Devitt v. Frantz*, 85 Va. 755. See *Jennings v. Shacklett*, 30 Gratt. 765 for further discussion of matters pertaining to this case with lengthy dissenting opinion by **ANDERSON, J.**

5. Decision in the Case.—In this case the evidence fails to prove satisfactorily either that the purchase money of the land was paid by K and his executors, or that on the division in 1843, it was considered and treated as a part of K's real estate, and conveyed as such to M by the other heirs without any other consideration.

This case was decided in September, 1876, but there was a motion for a rehearing of the decree, which was overruled at the present term of the court. It was a creditor's suit in equity, instituted in March, 1870, in the circuit court of Rockingham county, by the executor of Jacob Blose, deceased, against the administrators and heirs of Jacob Miller, deceased, to subject the lands of said Miller to the payment of his debts. The only question in the cause is, whether a tract of land of seven hundred and thirty-two acres was the land of said Miller, or whether there was a resulting trust in favor of his children. The facts, as they were viewed by this court.

746 *are stated by Judge Christian in his opinion. There was a decree in the court below in favor of the plaintiffs as to thirteen-fourteenths of the land. And the heirs of Miller obtained an appeal to this court.

William Green, J. G. Newman and John E. Roller, for the appellants.

J. S. Harnsberger, for the appellees.

CHRISTIAN, J. This case is brought up by appeal from a decree of the circuit court of Rockingham.

The original bill was filed by the executor of J. W. Blose, who sued for himself and all other creditors of Jacob Miller who might make themselves parties to the suit.

Its object was to subject the real estate in the hands of the heirs of Jacob Miller to the payment of his debts. The bill sets out certain judgments recovered against his administrator after his death, and the executions issued thereon, returned by the sheriff, "no assets in the hands of administrator"; and after alleging that the said Jacob Miller died seized of considerable real estate, now in the hands of his heirs, and that the rents and profits of the real estate for five years will not pay these judgments, asks that the same may be sold and the proceeds applied to the payment of these judgments. The bill further charges that the administrators have never settled any account of their administration on the estate of said Jacob Miller, and asks for a decree compelling a settlement of such account, and that an account may also be taken of the debts of the decedent. The heirs and administrators are made parties to this suit.

The heirs of Jacob Miller were his son, William H. Miller, and his daughter, Mary, who intermarried with John C. Walker.

William H. Miller and Walker had **747** *qualified as administrators of Jacob Miller. They answered the bill. They allege in their answers that they had settled up the personal estate of their intestate, and

that there was not enough of the personal estate to pay his debts; that the personal effects which came into their hands were sold in October, 1863, for Confederate currency, and that in many instances the creditors refused to receive that currency. They admit that Jacob Miller left a tract of land containing 732 acres, but affirm that the rents and profits would be sufficient to pay his debts in five years. This was the only issue made by the original bill and answers thereto. The circuit court, at its September term, 1870, rendered a decree directing one of its commissioners to "take an account of the outstanding liabilities of the estate of Jacob Miller, deceased, and their priorities, if any, and also to settle the administration accounts of the defendants, Walker and Miller, as administrators aforesaid, and to ascertain the real and personal assets belonging to said estate."

A commissioner of the court duly proceeded to execute this decree, and upon the return of this report, it was excepted to by the defendants, Miller and Walker, by various exceptions filed by them. The only one now necessary to notice, is that which relates to the report as to the real estate of the decedent. This is excepted to upon the ground that the tract of 732 acres was not, in whole, the property of the said Jacob Miller; but that he was the owner of only one-half thereof. The defendants filed with their exceptions a deed from Stevens and wife, conveying the said tract of land to Jacob Miller and one William Kite, jointly, bearing date August, 1831. Upon this report and exceptions thereto, the circuit court, at its May term, 1871, directed a partition of said land, and appointed commissioners to make division and allotment of said land—one-half to the heirs of Sarah Miller (who

748 was the daughter of William Kite, and wife of Jacob *Miller), and the other to the creditors of Jacob Miller. But before the action of these commissioners had been confirmed, the cause, "for reasons appearing to the court," was remanded to rules, and leave given to complainant to file an amended and supplemental bill.

The amended and supplemental bill was accordingly filed at December rules, 1871. In this bill it was alleged by way of supplement and amendment, that in the year 1843, the heirs of William Kite (of whom Sarah Miller, the wife of Jacob Miller, was one), made partition of all of the real estate of said William Kite among themselves, and executed and delivered to each other various deeds to carry out this partition. These several deeds are all made exhibits with this amended bill. Among them is a deed executed by all the heirs of Kite (six in number), except Mrs. Sarah Miller, conveying the 732 acre tract in fee to Jacob Miller for the consideration expressed on the face of the deed, of \$8,000. The bill charges that the whole of this tract, instead of one-half thereof, as charged in the original bill, is subject to the debts of said Jacob Miller, and that the rents and profits of the same for five years will not be sufficient to pay the debts. This

amended bill is answered by the heirs and administrators of Jacob Miller. The respondents, although they had admitted in their answer to the original bill that the 732 acre tract was the property of Jacob Miller, and in their amended answer to said original, they admit that one-half of said land was owned in fee by said Jacob Miller, they now, in answer to the amended bill, deny that he was ever seized in fee of any part of the 732 acre tract; they deny that he ever paid any part of the purchase money of said land during the lifetime of William Kite or afterwards; they aver that the greater part of the purchase money was paid by William Kite in his lifetime, and the residue thereof by his administrators after his death;

749 they allege that the equitable *title to said land never was vested in said Miller, and that the legal title which vested in him, was a trust for the benefit of his wife and children; they insist that as Jacob Miller paid no part (as they allege) of the purchase money, the 732 acre tract was a part of the real estate of William Kite, and was so treated in the partition of that estate among his heirs; they admit the execution of the deeds exhibited with the amended bill by the heirs of William Kite, but insist that Mrs. Miller still held an equitable estate in the 732 acre tract; and that although the deeds of the Kites conveyed to Jacob Miller the legal title, he held the land subject to a trust in favor of his wife and her heirs, and that therefore the land is not subject to his debts.

Depositions were taken by the defendants to sustain these averments of the answer to the amended bill; and the cause coming on to be heard at the October term, 1873, the court held "that the children of Sarah Miller, wife of Jacob Miller, deceased, are entitled by descent from their mother, Sarah Miller, deceased, to a one-fourteenth interest in the said 732 acre tract of land in the bill and proceedings mentioned, and that the remainder thereof is subject to be sold to pay the debts of said Jacob Miller, deceased; that he died seized and possessed of the remainder (thirteen-fourteenths) of said land in fee simple, and that there was no resulting trust in said land for the benefit of said children of Sarah Miller." And the decree then directs commissioners appointed for that purpose to make partition of said land, assigning one-fourteenth thereof to the heirs of said Sarah Miller, as and for their inheritance in said land, free from all demands of whatever nature against Jacob Miller, deceased, and the residue thereof to said children of Sarah Miller as and for their inheritance and interest in said lands through their father, the said Jacob Miller,

subject to be sold to meet and pay off 750 all just demands against his *estate.

The commissioners were directed to report their proceedings under this decree to the court for its further order.

From this decree an appeal was allowed by one of the judges of this court on partition of the heirs of Mrs. Sarah Miller.

I am of opinion that there is no error in the decree of the circuit court.

Jacob Miller and his heirs had been in possession of the tract of land now claimed as the trust property of Mrs. Miller, for forty years and upwards. That possession was held under two deeds, one recorded in 1831, and the other in 1843. By both deeds the title is conveyed to Jacob Miller. Upon the face of these deeds no trust is created in favor of Mrs. Miller or any one else. They are absolute, and convey the property to Miller without condition or reservation. The deed executed and recorded in the year 1831, is a deed from Stevens and wife, conveying 732 acres of land to William Kite and Jacob Miller, jointly, "in consideration of the sum of seven thousand eight hundred and eighty-four dollars, to them in hand paid by the said William Kite and Jacob Miller." The deed executed and recorded in 1843, was executed by the heirs of William Kite, by which they conveyed their interest in said land "for the consideration of eight thousand dollars, to them in hand paid by said Jacob Miller," "to the only proper use and behoof of him the said Jacob Miller, his heirs and assigns forever."

Now, after the lapse of nearly forty-five years, it is claimed that this land, though held by Jacob Miller for this great length of time, under deeds absolute on their face, and which have been on record nearly half a century, informing his creditors and the world who chose to deal with him that the property was absolutely his, it is now claimed that he simply held the naked legal title, and that he was but a trustee for his wife
751 and children, *and that his creditors cannot subject it to the payment of their debts.

The evidence to establish such a claim in the face of absolute deeds so long of record, must be very clear and explicit, and such as to leave no doubt as to the character of the transaction. The basis of the claim of the appellants, that Miller held the land in trust for his wife and her heirs, is that the whole of the purchase money was paid by Kite in his lifetime, and by his administrators after his death.

Where the trust does not arise upon the face of the deed, but is raised upon the payment of the purchase money, which creates a trust which is to override the deed, the proof must be very clear, and mere parol evidence ought to be received with great caution. *Bank of U. S. v. Carrington*, 7 Leigh 581.

A resulting trust must arise at the time of the execution of the conveyance. Payment or advance of the purchase money before or at the time of the purchase, is indispensable; a subsequent payment will not by relation attach a trust to the original purchase, for the trust arises out of the circumstances that the moneys of the real and not the nominal purchaser formed at the time the consideration of that purchase, and became converted into land. See 1 Lead. Cases in Eq. p. 177, and cases there cited. In *Botsford v. Burr*, 2 John. Ch. R.

405, 414, Chancellor Kent said: "The trust must have been coeval with the deeds, or it cannot exist at all. * * * The trust results from the original transaction at the time it takes place, and at no other time; and it is founded on the actual payment of money, and on no other ground. It cannot be mingled or confounded with any subsequent dealing whatever." Now, the ground of a resulting trust is, that payment of the purchase money is an equity to have the land. But the mere fact of payment will not always be sufficient to raise

752 a clear presumption of a *trust. But evidence of intention must often enter into the fact whether that payment is such an equity under the circumstances. The payment by the father of purchase money of land conveyed to his son, or to his nephew, or to his son-in-law, or to any one else towards whom the party stands in loco parentis, would not, of itself, create a resulting trust. See 1 Lead. Cas. Eq. 179, and cases there cited. So that if William Kite had paid the whole of the purchase money for the whole tract of 732 acres, and the whole tract had been conveyed in fee to Jacob Miller, who had married his daughter, this would not of itself have created a trust in favor of William Kite and his heirs. It would have been regarded only as a gift to one towards whom the grantor stood in loco parentis.

But there is no proof in the record to show either that the whole of the purchase money was paid by Kite, or that if so paid, it was under such circumstances as would create a resulting trust at the time of the execution of the conveyance. Indeed, the only evidence as to how or by whom the purchase money was paid, (except the deed itself, which acknowledges payment of the whole of the purchase money in cash by Kite and Miller), is a receipt endorsed on the back of a \$600 bond showing that a balance of \$200 on that bond was paid by the administrators. How, when, or by whom, the balance of the purchase money was paid, there is literally no evidence to contradict the receipt set out in the deed.

It is true there are in the record the depositions of two witnesses taken more than forty years after the execution of the deed, but they utterly fail to prove anything as to the payment of the purchase money. Neither of these witnesses knew anything, nor do they say anything, about the payment of the purchase money by Kite. One of them expresses the opinion that he did not think

753 that from Miller's pecuniary condition he could *have paid for any considerable amount of real estate; though he said he made considerable money, and he knew of his borrowing money about that time from witness' father. He says of Kite that he was a punctual man, and competent to pay such contracts as he made; and he estimates his property as worth \$60,000. He does not pretend to say that Kite paid the whole of the purchase money, or what part he paid, or what part Miller paid; he knew nothing about it. The other witness does not even

speak of the pecuniary condition of Miller, and is totally ignorant of any facts tending to show how and by whom the purchase money was paid. Surely upon this vague testimony, taken forty years after the transaction, this court will not assume without proof, and in the face of the deed of the parties, that Kite paid all the purchase money, and raise upon such evidence as this a resulting trust in favor of the heirs of Kite, to the exclusion of the creditors of Jacob Miller, who held this land for forty years under a deed of record ever since October, 1831. If a resulting trust can be set up under these circumstances, there would be no security of title to any lands in this commonwealth.

But it is insisted that whatever may have been the interest of Jacob Miller, under the deed of 1831, from Stevens and wife to Kite and Miller, in the 732 acre tract, yet that in a petition of the real estate of William Kite, made among his heirs in 1843, one moiety of this tract was regarded by Jacob Miller and his wife and the other heirs of William Kite, as an advancement by said Kite in his lifetime to his daughter Sarah Miller; and that the same was surrendered and thrown into hotchpot with the rest of the estate of said William Kite, and the said Sarah Miller thereby came in for equal distribution of said estate with the other heirs of said Kite; and it is argued that although the deed executed by the

754 heirs of *William Kite conveys this land in fee to Jacob Miller for a consideration paid by him, as expressed by the deed, that he in fact held it under the deed of 1843 in trust for his wife, it being her land descended from her father, and of which she never divested herself.

Now, all this is mere theory and conjecture, not supported by any reliable or certain testimony, but contradicted by the terms of the deed under which for forty years Jacob Miller has held this land. Much stress is laid by the learned counsel for the appellants upon the answers of the defendants. These answers, as to the transactions alleged with reference to the partition of the real estate of William Kite, are not responsive to the bill, but in this respect are merely affirmative allegations, which they must prove.

It must be remembered that these answers are the answers of the personal representatives of Jacob Miller, the one a son-in-law, who, at the time of the transaction in 1843, was a stranger to the family, the other a son, who was then an infant, if, indeed, he was then in being at all. Their averments were of matters of which they could have no possible personal knowledge, and to which they were not called upon to answer or make discovery; but were affirmative, not responsive, and must be regarded only as making up issues, but not as evidence in themselves. *Lyons v. Miller*, 6 Gratt. 427. Now, looking to the record, we find that the deed of 1843 is a deed of bargain and sale between the heirs of Kite and Jacob Miller, by which the said heirs convey the land therein described to Jacob Miller for and

"in consideration of the sum of \$8,000 lawful money in hand paid them by the said Jacob Miller, to the only proper use and behoof of him, the said Jacob Miller, his heirs and assigns forever." The answers allege that the expressed consideration was not the true consideration, and that this conveyance was intended to convey the land to Jacob

755 Miller in trust for *Mrs. Sarah Miller.

This allegation is not sustained by any sufficient proof in the cause. There is only one witness who speaks at all upon the subject. After stating that there was a partition and allotment of the real estate of William Kite, shortly after his death, and that Jacob Miller and all the heirs treated the 732 acre tract as part of the real estate of William Kite, he makes the following answer to the following leading questions put to him by counsel:

Question. "At said partition and division did Jacob Miller set up a claim to any other interest in said lands, except through his wife, as one of the heirs of said Kite, and did not he receive and accept said 732 acre tract of land as his wife's interest in William Kite's estate?"

Answer. "He did not claim any more than that; that was allotted to him at that time. He claimed this piece of land; when they divided they agreed that he should take this piece of land; he received and accepted it as his wife's interest in William Kite's estate; he had it in his possession until his death."

Now, this is all the evidence on the subject. If this evidence was in direct contradiction of the terms of the deed, it would certainly not be sufficient to prove a different consideration from that stated in the deed, or to create a trust estate in favor of Mrs. Miller, and divert the title from Jacob Miller and his heirs, which the plain terms of the deed convey to him absolutely. But in point of fact this evidence is perfectly consistent with the deed. Miller, no doubt, did not claim any more land than the witness says was allotted to him. No doubt he was satisfied to receive the moiety of the 732 acres as the full share of his wife in Kite's estate, but the deed was made to him by the heirs because he had relinquished to them his life estate in four tracts of land, and it may be his whole interest in the personalty, which was larger.

Taking every word of this witness,
756 spoken upwards of thirty *years after the transaction took place, as true, his evidence is not inconsistent with the deeds exhibited by the plaintiff. The consideration named in the deed is \$8,000. This \$8,000, it may be, consisted of the estimated value of the life estate of Miller in the seventh of the balance of the real estate, and the right to have assigned to him in fee one-seventh of the personal estate. The personal estate must have been very large. Kite's whole estate is estimated by appellants' witness at sixty thousand dollars, and the appellants estimate in their answer the real estate at \$35,000. This would leave \$25,000 of personalty to one-seventh of which Miller was entitled. Mrs. Miller was entitled to one-seventh of each of the four tracts in which

she united in deeds of her husband to the other heirs. The estimated value of all these interests might have well made up the sum of \$8,000. But the appellants claim that this 732 acre tract was the inheritance of Mrs. Miller, derived from her father, and that she never divested herself of her title therein by any act of hers, and that the title conveyed to her husband was intended for her benefit, and that though in form it conveyed the fee, it was intended by the parties to the partition that it should be held by Jacob Miller in trust for his wife. This claim of the appellants is founded on a total misconception of the record evidence in the case, as well as of the effect of the decree of the court below. That decree does secure to the heirs of Mrs. Miller all of the real estate which she inherited from her father, and which she had not conveyed in her lifetime in the mode prescribed by law, to-wit: by deed and privy examination.

Mrs. Miller was entitled to one-seventh of the real estate of her father, William Kite. This consisted of four tracts of land, besides a moiety of the 732 acre tract. She surrendered her interest in all these lands, and united with her husband in deeds to the other heirs. These deeds are all in the record, and in each there is certified, *in regular form, her privy examination. There is no proof, nor even charge, that any fraud or misrepresentation was practiced upon her by her husband or her co-heirs, who were her brothers and sisters. We cannot presume that she did not understand the legal effect of her uniting in these deeds. On the contrary, we must presume, in the absence of all evidence to the contrary, that these deeds were fully explained to her, and that she executed them with a full knowledge of their legal effect. No doubt she would have united with the other heirs in the deed to Jacob Miller, but that Jacob Miller was her husband, and she could make no conveyance to him. She, no doubt, was perfectly willing that the legal title to the whole 732 acre tract should be conveyed to her husband instead of to herself. There might have been the strongest considerations why this should be done. For aught we know, he might have promised, or did actually settle upon her the personal estate, or other real estate. After thirty years have elapsed, and the records destroyed, it is impossible to say what were the motives or considerations which induced her to enter into this arrangement. It is all left now to mere conjecture. There might have been cogent reasons and the best consideration why she should have consented that her co-heirs should convey their interest to her husband instead of to her sole use and benefit. But however this may be, she did divest herself, in the mode prescribed by the statute, of her title to all the real estate she inherited from her father, except her interest in the 732 acre tract. She made no objection, so far as this record shows, to the conveyance of the land to her husband. These deeds have been of record for upwards of thirty years, and no question in all these years has been made as to the title or possession under them. It is too late now to assail

them. Whatever may be our sympathies, in a controversy between creditors and the heirs of a married woman *who has permitted her inheritance to be conveyed to her husband, it would be dangerous to the last degree to establish a principle, upon which, on the vague and uncertain testimony of witnesses, taken thirty years after the transaction, the recorded titles of over a quarter of a century are to be overthrown.

The decree of the court below carefully secures to Mrs. Miller so much of the land as she did not convey away in the mode prescribed by law. In doing this, it has done all that can be legitimately asked for her and her heirs.

It is a noteworthy fact, and one of great significance, that the claim now asserted by her heirs, was never asserted by Mrs. Miller in her lifetime, though she lived years after the death of her husband. It was not even asserted by the heirs in their answer to the original bill. It is now asserted to defeat the just demands of creditors.

Upon the whole case, I am of opinion that there is no error in the decree of the circuit court, and that the same should be affirmed.

ANDERSON, J. The appellee, Jacob Blose's executor, in 1870, brought a creditor's bill against John C. Walker and William H. Miller, administrators of Jacob Miller, deceased, and John C. Walker and Mary C., his wife, and William H. Miller, the said Mary C. and William H. being the children and heirs of Jacob Miller, deceased, for the settlement of the administration accounts and an account of the intestate's debts, and to subject the personal estate, if any, and also the tract of seven hundred and thirty-two acres of land in controversy, to the payment of said debts.

Jacob C. Walker first answered the bill. Then J. C. Walker and William H. Miller filed an amended answer. The plaintiff then filed an amended bill. And J. C. Walker and Mary C., his wife, and William H. Miller, *in their own right, and J. C. Walker and W. H. Miller, as administrators of Jacob Miller, filed an answer to the original and amended bills. This last answer, which is the only one in which Mary C. Walker joined, sets forth clearly, and I think the evidence shows, with substantial correctness, the true history and material facts of the case; and it seems to me that the said Mary C. nor her brother should be held responsible for any statements which are made in the previous answers in conflict with it, which were evidently made by J. C. Walker in ignorance of what was the true state of the case.

The tract of seven hundred and thirty-two acres of land in controversy was conveyed by Edward Stevens jointly to William Kite and Jacob Miller, his son-in-law, for the consideration of \$7,884. There is no evidence that any part of it was intended by William Kite as an advancement to his son-in-law. On the contrary, the idea of an advancement to him is inconsistent with the transaction itself. It was their joint pur-

chase, and Jacob Miller was equally bound with William Kite for the purchase money. William Kite may have intended to give his daughter, Mrs. Miller, his moiety of the land as an advancement, which is most probable, but expected Jacob Miller to pay for the other moiety, as he bound himself to do. He was entitled to the other moiety, not as a gift or advancement from his father-in-law, but by purchase from Stevens, if he paid for it, which he did not do.

The evidence, direct and circumstantial, shows satisfactorily and conclusively to my mind, that Miller failed to pay his part of the purchase money, and that all that had been paid in the lifetime of William Kite, or at least nearly all, was paid by him, and the residue after his death was paid by his personal representatives, as is evidenced in part by the bonds which fell due after the death of William Kite, and were paid by his administrators. *Miller's undivided

moiety of the land was bound for his part of the purchase money, so that in the partition of the land and negroes belonging to the estate of William Kite, in 1839, soon after his death, he and S. B. Jennings, who had intermarried with Annie Kite, another daughter of William Kite, and to whom other lands (five hundred and fifty-nine acres) had been conveyed jointly with William Kite, about a year before his death, and for which he paid no part of the purchase money, agreed that said lands in their entirety might be treated as lands belonging to the estate of William Kite, and be taken into the partition. And if any amount had been paid by Jacob Miller on the purchase in the lifetime of William Kite, which it would seem must have been very inconsiderable, if any, it evidently was accounted for to him out of the estate of which he was one of the administrators.

The real estate of William Kite as valued by his heirs for partition, was worth a little over \$35,000, and his whole estate, real and personal, at least \$60,000, which would give to each of his seven children a fraction over \$8,571, after the death of the widow. She died on the 1st of January, 1843, and shortly after her death a final partition of the real and personal estate was made, and deeds were mutually executed by the heirs to each other of the lands which had been allotted to them respectively, in the parol partition of 1839, except that the lands allotted to Mrs. Miller were conveyed by the heirs to her husband, in which neither she nor Joseph H. Kite, who was a minor, united; and the lands which were allotted to Mrs. Jennings were conveyed to her husband, in which she and the said minor did not join. As will be seen the share of each heir in the real estate, if it had been equally divided amongst them, would have been of the value of \$5,000. But it was a partition and division

of real and personal estate together, as is *authorized by the statute, and the lands allotted to Mrs. Miller being valued at \$8,000, it exceeded her aliquot portion of the real estate \$3,000, and was a charge on her interest in the personal es-

tate to that amount, which left, however, a balance due her of over \$500 in the personal estate.

The personal as well as the real estate is the property of the wife, but the personal estate of the wife becomes the absolute property of the husband after he has reduced it to actual possession. The only doubt I have, is whether the sum of \$3,000, which was charged upon her interest in the personal estate to be used in equalizing the other heirs with her, who had received no land, or less land, was a reduction pro tanto of so much of her personal estate by her husband into possession. The conclusion least favorable to Mrs. Miller and her heirs which I have reached is, that she was entitled to at least five-eighths of the seven hundred and thirty-two acres of land in question.

Has she ever parted with that right? It is true that she might have done so. She might have united with her husband in a deed, and conveyed it to a trustee for his benefit. We held in a recent case, *Sayers & als. v. Wall & als.*, 26 Gratt. 354, that a direct bona fide conveyance from a husband to a wife might be supported in favor of the heirs of the wife against subsequent creditors of the husband.

But there is no evidence that she ever parted with her right to the said land, or any part of it. Her uniting with her husband and her co-heirs in deeds of conveyance of other portions of the land which descended to the heirs of William Kite, really in consideration of their allotment to her of the land in question, could not divest her of her title thereto. Nor could the conveyance of it to

her husband by the other heirs after it had been *allotted to her in the parol partition, and thereby giving her a right to it in severalty, divest her title. It is said that we may presume that she consented to the conveyance; but the statute has prescribed the mode, and the only mode, by which a married woman can convey her freehold estate, or consent to be divested of it. Much has been said about security of titles: what security is there to the title of a married woman, if it can be taken from her upon a mere presumption of her consent to it?

But all the foregoing positions are vindicated, in my opinion, in *Jennings v. Shacklett*, post, p. 765, to which I beg leave to refer. I will only add a few remarks in relation to the staleness of the demand, and the effect of maintaining it upon the rights of creditors, and the argument that Mrs. Miller and her heirs have lost their rights, because of the long lapse of time since Jacob Miller took possession and held it till his death.

The possession of Jacob Miller was lawful, and not inconsistent with the title asserted by the heirs of his wife. The wife being the owner in fee, he was entitled to possession by the marital right; and having had issue by her, he was tenant by the curtesy initiate. And if he had survived her, tenant by the curtesy, and invested with an estate for life, and with the right to the possession of the whole. He died in 1863. Up to that time his possession was lawful and perfectly con-

sistent with an estate in his wife in fee. And immediately upon his death, his wife surviving, she was in possession of the whole as her fee, if she was entitled to a fee in the whole; if only to five-eighths, she was in possession thereof as of her fee, and of the residue as dower until her dower therein was assigned her. She lived until 1868, and it was not until after her death that her children, the appellants, became invested with her title.

What laches are they chargeable with? They have *been in the quiet and undisturbed possession of their property. It is true under an ancient title, but that I imagine is not to its disparagement. What more could they do than they have done to assert and protect their title, which was unassailed? If there has been any laches it has been by the assailants, who have lain by and made no attempt to overturn this ancient title of Mrs. Miller, which she has enjoyed uninterruptedly and peacefully through her husband while he lived, and after his decease, through her own direct agency, as her own property, until her death in 1868, and which she transmitted to her children and heirs at law. This suit to subject the lands to the plaintiffs' debt, though it had accrued in 1860, was not brought until after the death of Jacob Miller in 1863, and not until after the death of Mrs. Miller in 1868. During that long period in the lifetime of Jacob Miller and of his wife, we hear of no claim of right by creditors to subject this land to the payment of their debts, and not until most of those who were familiar with these transactions had gone down to their graves.

It is true, there were two deeds of record which vested title in these lands in Jacob Miller—one of them as far back as in 1831, which conveyed to him the lands jointly with William Kite, his father-in-law, and the other in 1843, which conveyed the whole to him, but in which his wife did not unite. If notice to creditors were necessary that those lands were not held by Jacob Miller in absolute right, there was enough on the face of the deeds themselves and the known facts to have awakened enquiry, and to have charged creditors with constructive notice. But such notice was not necessary. With as much reason could a mortgage be resisted upon the ground that the deed was absolute on its face. Yet every day are parties permitted to prove, even by parol evidence, that a deed, though absolute on its face, was intended to

*be a mortgage. And in the recent case of *Snively v. Pickle*, 29 Gratt. 27, this court established a deed to be a mortgage by parol evidence, though the party in whom the legal title was vested on the face of the deed had been in possession since 1845. From the best considerations I have been able to give this case, I cannot concur in the opinion of the majority, and am constrained to dissent.

MONCURE, P., and STAPLES, J., concurred in the opinion of CHRISTIAN, J.

Decree affirmed.

765 *Jennings & als. v. Shacklett & als.

September Term, 1878, Staunton.

Absent, BURKS, J.

I. In 1837, C sold and conveyed land to K and his son-in-law, J, jointly, and this deed was recorded and J lived on the land. K died in 1838, and his widow died in January, 1843. K left seven children, six of them of age. On the death of the widow the heirs of K made partition of his real estate, five of the six of age conveying to the other seventh or her husband a parcel of land. J and wife united in the deeds to the other parties, and the other heirs united in a deed conveying to J the lands conveyed to K and S by C. This deed was in form an absolute deed to J in consideration of \$7,000 in hand paid, the receipt of which was thereby acknowledged. The wife of J died in 1865, and J lived on the land until 1870, when S filed a creditor's bill to subject this land to the payment of judgments against J. The heirs of Mrs. J were made parties by an amended bill, and they answered insisting that the land was, in the partition of K's estate, considered as a part of K's estate, and that the deed to J was for the benefit of Mrs. J and her heirs; and they introduced parol evidence to sustain the resulting trust—HELD:

1. Resulting Trust—Parol Evidence.*—

Though a resulting trust may be established by parol evidence, yet in the face of J's possession under the two deeds conveying to him absolutely, for so great a length of time without question, the parol evidence must be clear and explicit, such as to leave no doubt of the character of the transaction. And the evidence in this case is not sufficient to establish the resulting trust.

This was a creditor's suit in equity instituted in March, 1870, in the circuit court of Rockingham county, by Samuel Shacklett against S. B. Jennings and his children, *to subject the lands of said Jennings to satisfy judgments recovered against him. The only question in this case was whether certain lands in the possession of Jennings were his own, or whether there was a resulting trust in favor of his children. The facts in this and the previous case of *Miller & als. v. Blose's ex'or & als.*, are very much the same, and the question in both cases arose out of the same transaction. The case is stated by Judge Christian in his opinion. There was a decree in the court below in favor of the plaintiffs for thirteen-fourteenths of the land; and the children of S. B. Jennings obtained an appeal to this court.

John E. Roller, for the appellants.

J. S. Harnsberger, Robert Johnston and William B. Compton, for the appellees.

CHRISTIAN, J. The principles affirmed in the case of *Miller & als. v. Blose's ex'or & als.*, in which a motion for a rehearing has to-day been overruled, must govern the case before us. It arose out of the same transactions, and the nature of the evidence is

*Resulting Trust—Parol Evidence.—See *Miller v. Blose*, 30 Gratt. 744 and note.

almost precisely the same. In both cases an effort is made by the defendants to set up a resulting trust, by parol testimony, against a deed absolute on its face. In both cases the evidence is of so vague, uncertain and unsatisfactory a character as cannot, after so long a lapse of time, upon the principles which govern courts of equity, convert deeds absolute on their face into mere trusts, depriving the grantees, and those who claim under them, of all beneficial interest in the estates conveyed, and transferring it to others not named in the conveyances.

It is not necessary to repeat, in this case, a discussion and application of these principles and the authorities upon which they are founded. It is sufficient to refer

767 to the *opinion in the case of *Miller & als. v. Blose's ex'or*, delivered at the September term, 1876, of this court, and reaffirmed to-day by overruling the motion for a rehearing.

A brief reference to the facts of this case before us will show that it must be determined upon the principles declared in the former case.

William Kite died intestate in the year 1839, possessed of a large real and personal estate. He left surviving him a widow (who died in 1843,) and seven children—four sons and three daughters. Among several tracts of land of which the said William Kite died seized, was one which was conveyed to William Kite and Jacob Miller, jointly, by Stevens and wife in 1831, and one conveyed by Jacob Conrad to William Kite and S. B. Jennings, jointly, in the year 1837. The consideration expressed on the face of the deeds was in the one case \$7,000, and in the other \$8,000.

These deeds were duly recorded shortly after their execution, and copies of the same are filed with the record. Sarah, daughter of William Kite, intermarried with Jacob Miller, and Ann, another of his daughters (and the mother of the appellants in this case), intermarried with S. B. Jennings.

It is admitted by the heirs of Mrs. Jennings in their answer that after the death of William Kite's widow, to-wit: in 1843, there was a partition of his real estate among his heirs—whether made by the heirs, or by commissioners appointed by the court, does not appear. It must be taken, however, as a conceded fact, proved if not admitted, that in 1843 an arrangement was made by which Jacob Miller was to have assigned to him in the division of the said real estate, that portion which had been conveyed to him and William Kite jointly by Stevens and wife in 1831, and that S. B. Jennings was to have assigned to him that portion of the

768 real estate *which had been conveyed to him and William Kite jointly by Jacob Conrad, in 1837. In pursuance of this arrangement, and to carry out the partition then agreed upon, deeds were executed by Jacob Miller and wife and the other heirs at law of William Kite (except Joseph, who was a minor), conveying all their interest in the tract of land of which Kite and Jennings were the joint owners to S. B. Jennings,

and a similar deed was executed by Jennings and wife and the other heirs of William Kite (except Joseph Kite, who was a minor), conveying all their interest in the lands of which William Kite and Miller were the joint owners to Jacob Miller. In these deeds both Mrs. Miller and Mrs. Jennings united. There was a privy examination of both duly made and certified, and the deeds duly recorded. Under these deeds Jacob Miller and S. B. Jennings took possession of said lands and held the same under this recorded title for more than forty years.

It is now claimed, after the lapse of forty years, that these deeds thus executed and recorded did not convey an absolute title to Miller and Jennings, but that they took the title in the same as trustees for their wives, and that though the real estate so conveyed by said deeds was conveyed to them absolutely, yet being the real estate descended to their wives from their father, it was held by their husbands in trust for the benefit of their wives and their heirs. Now, the evidence mainly relied on in the case before us to establish this trust is that of S. B. Jennings, the father of appellants, given in a suit in which his creditors are seeking to assert the lien of their judgments against land which he has held under a recorded title and possession for forty years. It must be noted here that the answers of his children, the defendants, to the bill of his creditors, are not responsive to the bill, but set up, by affirmative allegations, the defence upon which they rely. These answers **769** are entitled to no *weight, and their allegations, unless sustained by proof clear and certain, can have no effect in determining the existence of the trust which they now assert.

The whole evidence relied upon by the appellants to establish a resulting trust in the face of deeds absolute upon their face, are the depositions of their father, S. B. Jennings, and their mother's brother, Hiram A. Kite.

As to the deposition of the former, leaving out of view and without comment the interest which an insolvent father would have in securing his estate to his children instead of his creditors, it is to be noted that it is the deposition of an old man in feeble health, who says his "memory is not clear," testifying as to transactions which occurred more than thirty years before. His deposition shows, not only that his memory is not clear, but totally defective when tested as to very recent and important events. He does not remember statements made in his answer filed in a suit in the county court just three years before he was examined, nor does he remember the facts that he ever signed or swore to such an answer. He has no recollection of having ever seen an important paper which he filed as an exhibit with his answer, and which shows the basis of the division of the real estate of William Kite among his heirs, and which paper, itself, shows that the theory now advanced after thirty years, that Miller and Jennings were to hold the land conveyed to them in such division, in trust for their

wives and children, had no existence at that time.

So much for the evidence of Jennings, the father. The only remaining evidence to support this so-called resulting trust, is that of Hiram Kite, a brother of Mrs. Jennings. He proves literally nothing in support of this claim. On the contrary, his evidence is in favor of the claim of the appellees. He proves that there was a partition of the real estate among the heirs after assigning 770 dower to his mother, and that *the deeds executed by their heirs of Jennings and to Miller were made after that partition, and to carry it out. He says, whether this partition was made by commissioners of the court or the adult heirs, he does not remember.

In answer to a question very suggestive and leading in its character, to-wit: "Were these tracts of land valued and allotted to S. B. Jennings and Jacob Miller on account of the interest which their wives held in the estate of William Kite?" he says, "in part. I suppose." In answer to another question, to-wit: "You say that S. B. Jennings got the land mentioned in the deed to him (Exhibit A); how did he get these lands?" he says: "There was a price set upon all the lands at the time, and all over what was coming to him on the divide he bought from the heirs."

These are the depositions upon which the defendants alone rely to maintain the claims set up in their answer. I think they fall very far short of proving a resulting trust. Indeed, the evidence of Hiram Kite, taken in connection with the admissions in the answers of the defendants, strongly supports the claim of the appellants, that the lands they seek to subject to their liens were held, as they purport on the face of the deed to be held, as the absolute property of S. B. Jennings. It is admitted that the real estate of William Kite was sufficient to give to each of his heirs between four and five thousand dollars, and that the personal estate was large enough to give each between two thousand five hundred and three thousand dollars. They were each entitled, after the death of their mother, to real estate valued at \$6,800. Now, when they came to divide the real estate, it was natural that they should pursue that mode indicated by the old paper writing marked X, produced and filed by Jennings, and no doubt written as a memorandum of that partition, and assign to

Jacob Miller that portion of the real 771 estate *upon which he resided, and which was conveyed to him and William Kite, jointly, in 1831, and to S. B. Jennings that portion of the land on which he resided, and which had been conveyed to him and William Kite, jointly, by Conrad, in 1837.

No doubt these parties made up out of the personal estate coming to their wives, and of which this appropriation was a reduction into possession, the shares of the other heirs equal. This is indicated by the fact that in this very suit is filed a bond of Jennings to Malinda Kite, which he admits was given to equalize the division of Kite's estate. At any rate, these all united (except one who was

not of age) in conveying their interests in these two tracts of land respectively, to Jacob Miller and S. B. Jennings. In the deed to Miller Mrs. Jennings united with her husband, and in the deed to Jennings Mrs. Miller united with her husband. Both deeds are duly recorded with certificates, in due form, of the privy examination of the wife in each case.

These deeds, absolute on their face, will not be converted into trusts in favor of the wife, except upon the most clear, positive and satisfactory proof. No such proof is furnished in this case, but on the contrary, the evidence is, in my opinion, as above shown, so vague, contradictory and uncertain, as to furnish no foundation upon which a court of equity can erect a resulting trust.

In *Phelps v. Seely*, 22 Gratt. 573, Judge Bouldin delivering the opinion of the court, said: "A resulting trust may be set up by parol testimony against the letter of a deed, and a deed absolute on its face may be like testimony be proved to be only a mortgage. But the testimony, to produce these results, must in each case be clear and unquestionable. Vague and indefinite declarations, made long after the fact, have always been regarded, with good reason, as unsatisfactory and insufficient." The same principles, 772 enforced by numerous *authorities, were reaffirmed in *Blose's ex'or v. Miller*, decided upon facts growing out of the same transaction, and almost entirely similar (certainly no stronger) with those in this case.

It would be grossly inequitable and subversive of all security of rights, if upon the vague and uncertain testimony of witnesses taken thirty years after the transaction, the recorded titles of over a quarter of a century are to be overthrown.

The court below has confirmed to Mrs. Jennings' heirs all the real estate to which she was entitled. She was one of seven children of William Kite, and entitled to one-seventh of the tract of land which the other heirs conveyed to her husband by the deed filed with the record. That has been secured to them by the decree appealed from.

Upon the whole, I am of opinion that there is no error in said decree, and that the same ought to be affirmed.

ANDERSON, J. This record throws light upon the case of *Miller v. Blose's ex'or*, and the two causes ought to have been heard together. I had not looked into it until after that case was decided; and I find much in it to strengthen and confirm the views I had taken of that case.

William Kite was the owner of a very considerable estate in land and slaves and other personal property, in the county of Rockingham. He died in the year 1838, intestate, and Conrad, his son, and Jacob Miller, his son-in-law, qualified as administrators of his estate. He left a widow, Elizabeth Kite, and seven children; Sarah, wife of Jacob Miller; Malinda Kite; Anne Jennings, wife of Dr. Simeon Jennings; William C. Kite, Conrad H. Kite, Hiram A. Kite, and Joseph H. Kite, the latter a minor.

The appellants, the heirs of Mrs. Jennings, aver that *soon after the death of William Kite, a partition was made of his estate. In proof thereof, Hiram A. Kite testifies that soon after the death of William Kite the heirs made a division of the land and negroes amongst themselves. He thinks it was in January, 1839. He says another partition was made in 1843, after the death of the widow, when they executed deeds to each other severally, for the lands which had been allotted to them in the partition. The heirs of Mrs. Anne Jennings allege that the real estate of William Kite was composed of a number of different tracts, and was valued by his children and heirs at law preparatory to a partition of the same; and they set out specifically the valuation which was put on each tract, amounting in the aggregate to thirty-five thousand and sixteen dollars. His personal estate they say was valuable, and his whole estate was said to be worth not less than \$60,000. He was not indebted (if at all, very inconsiderably), beyond what he was still owing for lands purchased from one Stephens in 1831, and conveyed jointly to him and his son-in-law, Jacob Miller; and for lands purchased in 1837, and conveyed jointly to himself and his son-in-law, Simeon B. Jennings. According to this valuation, Mrs. Jennings and each of his children were entitled to a share in the same, of not less value than \$5,000.

In the first partition all the lands were parcelled out and disposed of. Seven hundred and thirty-two acres were allotted to Mrs. Miller, valued at \$8,000; four hundred and fifty-eight acres to Conrad Kite, valued at \$8,000; five hundred and fifty-nine acres allotted to Mrs. Jennings, and valued at \$7,000; two tracts to William C. Kite, the value not expressed in the deed, but proved by Hiram Kite to be \$800; and two tracts to Hiram Kite, for which a deed was doubtless executed, but which I do not find in the record, which he testifies were valued together at about \$3,720; and the residue of the lands *were assigned to the widow as dower, and were valued at \$7,666, and after her death were sold to Conrad and Hiram Kite at that price, doubtless to raise a fund to be used with the personal estate in equalizing the heirs in partition—the whole real estate aggregating \$35,186.

This evidence conclusively shows that the lands were valued by the heirs, as alleged in the appellants' answer, at \$35,016, at least, and there is no ground for the imputation that it was manufactured for the occasion. It is then an established fact in this cause that the real estate of William Kite, of which he died seized, and which descended to his heirs subject to the widow's dower, was estimated by the heirs, amongst themselves, to be worth \$35,000, which would give to each of them in severalty lands to the value of \$5,000. Whether they were worth so much or not, is immaterial, if, in the partition, the heirs agreed to this valuation. But they do not appear to have been overestimated, for Conrad sold to Price the lot which had been allotted to him for \$8,000, the

price at which it had been allotted to him; and the price at which Conrad and Hiram, after the death of the widow, purchased the land which had been assigned for dower, was, as is proved, the price fixed by the heirs.

Mrs. Elizabeth Kite, the widow of William Kite, deceased, died on the 1st of January, 1843, and a deed from the heirs of William Kite, except Sarah Miller, and Joseph Kite, a minor, conveying to Jacob Miller seven hundred and thirty-two acres, was acknowledged before William B. Yancey and Jacob Rush, justices of the peace for the county of Rockingham. A similar deed was executed by the heirs of William Kite, deceased, except Anne Jennings and Joseph Kite, a minor, conveying three tracts of land, containing together five hundred and fifty-nine acres, to Simeon B. Jennings, for the consideration expressed on the face of the deed of \$7,000, which bears date on the 21st of January, 1843, and is *acknowledged the same day. A similar conveyance is made by deed bearing date 18th of January, 1843, by all the other heirs, except Joseph, conveying lands to William C. Kite. And on the 18th of January, 1843—the same day—a deed of conveyance was made by the other heirs, except Joseph, to Conrad H. Kite and Hiram A. Kite, of the lands which had been assigned to the widow, now deceased, for her dower, which deed was acknowledged before the same justices on the 21st of January, 1843, before whom, on the same day, all the foregoing deeds were acknowledged.

Where the lands conveyed by the foregoing deeds allotted to the parties respectively to whom they are conveyed in the partition of the estate, real and personal, of William Kite, deceased, or were they acquired by purchase? Were the deeds executed as the results of a partition of the decedent's lands and personal estate amongst his heirs, or were they executed to the grantees as purchasers? To narrow the enquiry and to bring it home to the case in hand, did Jennings acquire the land conveyed to him by virtue of a contract of sale and purchase, the consideration moving from him, or was there a parol partition of the lands and negroes of the decedent amongst his heirs and distributees? And in such partition were the lands which were subsequently conveyed to Jennings allotted to his wife? I propose briefly to pursue these enquiries.

And first, there was a parol partition made of the lands and negroes, and probably a partial division of other personal property, in 1839, which was not completed until after the death of the widow, on the 1st of January, 1843. Such a parol partition was valid. Deeds of partition between parceners are not absolutely necessary. They may mark and establish the dividing line between them, and prove it by other competent evidence, and will, from the time of establishing the line, be seized *in severalty. *Coles v. Wooding*, 2 Pat. & Heath, 189; *Lomax Digest*, 134; 2 Min. Inst. 2d ed. 707; Va. Code, ch. 112, § 1; *Jones' devisees, v. Carter*, 4 Hen. & Munf. 184; *Bryan*

v. Stump, 8 Gratt. 241; 2 Min. Inst. 488; 2 Bl. Com. 188-9; see 9 Gratt. 1; 4 Kent's Com. 4th ed. 366-7. And where there are several tracts, as in this case, each heir is not entitled to have his share laid off in each tract. Litt. § 251; *Earl of Clarendon & als. v. Hornby*, 1 P. Wms. 446; *Hagar v. Wiswall*, 10 Pick. R. 152. But the real estate at \$35,000, and Mrs. Jennings' share would be \$5,000, and the lands allotted to her were consequently valued at \$2,000 above her aliquot share of the real estate.

But was there a partition? Hiram Kite, who has no interest in this controversy, testifies that they made a division soon after his father's death of the land and negroes, there having been a sale of the personal estate. He is asked if the division was made at the time the deeds were made, January 21st, 1843? He answers: "They made a division of the land and negroes soon after my father's death, I think in January, 1839."

There are several other witnesses who testify to the same effect, but there is other evidence which does not depend on slippery memory, which it seems to me ought to be conclusive of this question. It is the deed of all the heirs of William Kite, except the minor, to George W. Price, which purports to bear date on the 1st of January, 1843, but is acknowledged on the same day (the 21st of January) the other deeds are acknowledged, and before the same justices. The certificate of acknowledgment describes it as bearing date the 18th of January, and either that, or the date of the deed as it appears in the copy in the printed record, must be a mistake. Be that as it may, it is not material to the purpose for which I refer to it. The deed is a conveyance by all the heirs of William Kite, deceased, to

777 the said George *W. Price, in the following language: "A certain tract or

parcel of land containing four hundred and fifty-eight and a half acres, be the same more or less, lying, &c., * * it being the tract that was allotted to the said Conrad H. Kite by the legatees of William Kite, deceased, and bounded as follows." &c. The consideration is "the sum of \$8,000, current money of Virginia, to them in hand paid by the said George W. Price," &c.; also the interest, (fifteen-sixteenths, it is presumed to be, the last syllable having been obliterated by the burning,) which all the heirs of William Kite held in "Swift Run turnpike, it being also allotted to him, the said Conrad H. Kite (evidently the words 'said Conrad' being obliterated by the burning), by the legatees of William Kite, deceased." It appears then, that previous to the date of this deed, there had been a partition of the lands of William Kite, deceased, and that lands to the value of \$8,000 had been allotted to Conrad Kite, and that in addition to the lands, fifteen-sixteenths of his interest in the Swift Run turnpike, the value of which does not appear, had also been allotted to him. The deed does not state when the partition and allotment was made, but it was evidently anterior to the deeds, and it is corroboratory of the parol proof, that it was made in January, 1839,

soon after the death of William Kite. This was a partition in fact, though incomplete, of the real and personal estate, estimated to have been worth not less than \$60,000, making each share worth \$8,571 and a fraction. It was not completed until January, 1843, after the death of the widow.

It is true that the lands conveyed to Jacob Miller were conveyed in 1831 by one Stevens, from whom they were purchased, to William Kite and Jacob Miller jointly, and possession was given to Miller and wife, and the lands conveyed by the heirs to S. B.

778 Jennings had been *conveyed by one

Conrad, from whom they were purchased in 1837, the year before the death of William Kite, to William Kite and Jennings jointly, and possession was given to Jennings and his wife. Yet the proof is that in the partition, Miller and Jennings both being present, those lands were treated as lands belonging to the estate of William Kite. Jennings, in answer to an interrogatory propounded to him by the plaintiffs in that suit (appellees here), testifies with regard to the lands conveyed to him and William Kite jointly, that all the purchase money was paid by William Kite, and by his administrators since his death; and in the division of William Kite's estate, which occurred in 1839, the said lands being held and considered as a part and parcel of his real estate, were allotted (he says). "to my wife, the daughter of said Kite, as her interest in the real estate of her father. And the deed from Jacob Miller, &c., as legatees of William Kite, was made to me in consideration of my wife's said interest—all of the legatees making deeds of exchange to those to whom lands were allotted in said division." I have not a doubt that this is a truthful representation of the case. It is in perfect harmony with the whole transaction, and with the testimony in this case, and in the case of *Blose v. Miller*. Why would Miller be charged in the partition with \$8,000, the value of the entire tract, if the half of it was his? And why would Jennings be charged with \$7,000, the value of the entire tract allotted to him in the partition of William Kite's estate, if the half of it was his, whilst Conrad was charged with just the lands he got from the estate, valued at \$8,000? That it was a partition of William Kite's estate is shown by the deed from the heirs to George W. Price, and Miller and Jennings were charged with the value of the entire lands conveyed to them severally, just as Conrad Kite was charged with the value of the entire lands

which were conveyed by the heirs to

779 George *W. Price, his vendee. The lands conveyed to the two former, in their entirety, were treated as parcels of the estate of the decedent, just as the lands were which were allotted to Conrad Kite. And why would the heirs have undertaken to convey lands in their entirety, and Miller and Jennings have consented to take a conveyance from them, if half the lands were theirs truly and justly and beneficially, by the conveyances of 1831 and 1837 respectively?

The conveyances made by the heirs to them is an assertion by the deeds, that the lands were, in their entirety, a part of the estate of William Kite, and their acceptance of the conveyances is an acknowledgment by deed on their part, that they were, and more especially as they are not charged with only a moiety of the price of them respectively, but with the entire price. I am of opinion, therefore, that the transaction, as evidenced by the deeds, fully sustains the testimony of Dr. Jennings, which is also in harmony with the testimony of Hiram Kite, a disinterested witness. But there is nothing in this record to impeach Dr. Jennings' veracity, if it were competent for the appellees to impeach their own witness, and upon whose testimony they rely for another purpose, to-wit: to prove the consideration of Malinda Kite's bond. He is not even an interested witness. If he has any pecuniary interest it is with the appellees, for it is the interest of a debtor to pay his debts. Unless it is right to hold that a man is not to be credited because his testimony will benefit his children, there is no ground to discredit this witness. There is not a particle of testimony in this cause tending to impeach the character of Dr. Jennings. It is his misfortune to be unable to pay his debts—a misfortune, I regret to say,—that has befallen many of our most upright citizens. He seems to be desirous that whatever

property is rightly and lawfully his, shall
 780 he subject to *the payment of his debts, but is unwilling to appropriate the property of his children, which they justly and lawfully derived from their deceased mother and not from him, to the payment of his debts. I do not hesitate to say that I can perceive no cause in that to discredit him.

But it is said that his deposition taken by the plaintiffs (the appellees here), on the 29th of August, 1873, nearly four months after his answer to the plaintiffs' interrogatories, shows such a failure of memory as to divest his testimony of moral weight. The defendants' counsel objected to the plaintiff retaking this witness' deposition without leave of the court, on the ground that his deposition had been taken on two previous occasions. But the plaintiffs persisted in retaking his deposition, and I am free to admit that it exhibits a melancholy failure, if not wreck of memory, since his previous depositions were taken, and I do not rely upon it at all in the investigations which I have made of the cause, and in the opinion I have formed.

The plaintiffs, in the examination of their witness, call his attention to a paper which he exhibited with his answer to the bill of Annie E. Jennings and others against him, designated by the letter X, and ask him if it is in his handwriting, and when it was made. He answers that he thinks it is in his handwriting, but is not positive, but has no idea when it was made. He seems to have no recollection of it, and to know nothing in relation to it now. In his answer to the appellants' bill against him in the county court, filed on the 4th day of September, 1871, nearly two years before, he refers to this paper as an old memorandum in his

handwriting, which he exhibits as a part of his answer for a pretty correct setting forth of the matter. This paper is in these words: "Jacob Miller, Jr., and S. B. Jennings, have this day had the following propositions made to them (it relates to the time of the partition 'this day')": Jacob Miller is *to take the land on which he now lives at \$8,000, the half he now holds at \$4,000, and he (and all the rest of the legatees who shall have received \$4,000 in hand, either in land or other effects,) shall pay to the rest of the legatees, who shall be deficient, the lawful interest on the deficiency until all are made equal in the sum of \$4,000. Then he shall, twelve months thereafter, pay \$800 down, and \$800 annually to the estate, until the sum of \$4,000 is paid. S. B. Jennings is to take the land on which he lives at \$7,000, and paid in the same manner of Jacob Miller's, with this difference, that he is to pay \$600 annually."

This paper seems to be greatly relied on by the appellees, but it is no evidence against the appellants. It is exhibited with the answer of the defendant, S. B. Jennings, to the plaintiffs' bill, with the affirmative allegation that it is an old memorandum in his handwriting, and he exhibits it as "a pretty correct setting forth of the matter." It was no evidence against the plaintiffs in that suit, and was entitled to no weight against them, unless proved; and the plaintiffs in this suit could not make it evidence against them by transferring the record of that case to this suit, and making it a part of their bill. But if said paper had been signed by Dr. Jennings, or had been proved to have been a proposition made to Jacob Miller himself by the other heirs and accepted by them, it falls far short of sustaining the appellees' pretensions. I beg to make the following comments on it:

First. It implies in the offer by the heirs that he may take the land on which he lives at \$8,000, that no part of it rightfully belongs to him, but that it all belongs to the estate, although half he holds.

Second. But that half which he holds he is to take at \$4,000, as so much of the real estate of William Kite as is then apportioned to him, but shall pay interest, as all the other legatees who shall have re-
 782 ceived \$4,000 in *hand, either in land or other effects, shall be required to do, to the legatees who have not received \$4,000, on the amount they are deficient, until all are made equal in the sum of \$4,000.

Third. And for the other half of the land which is apportioned to him, he shall, after twelve months, pay to the estate \$800 down and \$800 annually until the sum of \$4,000 is paid, which covers the value put upon the entire tract—\$8,000, the exact value of lands Conrad received.

Fourth. The payment of interest to the heirs who have not received \$4,000, on what they are deficient, until all are made equal in the sum of \$4,000, is an assertion that the moiety of the land which he holds is an apportionment from the estate of \$4,000, and that he holds it, not by virtue of the deed

from Stevens to the decedent and himself jointly, but in right of his wife's interest in the real estate of her father; and

Fifth. The payment by him of \$800 annually to the estate until he has paid \$4,000 for the remaining moiety of the land, is to raise a fund for further distribution or partition, it being required to be paid to the estate. And his wife's interest in the whole estate, real and personal, being at least \$8,000, there need be no actual transfer of money, as it would be to pay it to the estate just to be paid back to him. The whole paper shows, as to Miller, that he had no beneficial interest in the seven hundred and thirty-two acres of land on which he lived, in his own right, but that he got it in the right of his wife, for her interest in her father's estate. And the provision made for Jennings is liable to exactly the same construction and the same results. And this paper, which is introduced by the plaintiffs in this suit, and relied upon by them, and consequently may be accepted by the appellants as evidence, in my opinion fully sustains the testimony of Jennings and the pretensions of the appellants.

783 *But it is contended that the deeds show upon their face (except, I presume, the deed to Price) that it was a sale and purchase, by which the grantees became severally invested with these lands, and not a partition, because, first, they purport to be deeds of bargain and sale, and do not purport to be deeds of partition, and secondly, because they purport expressly to be for a monied consideration. It must be considered that these deeds were evidently not prepared by a lawyer, for they designate the heirs as legatees, which no lawyer would have done. But to ascertain what was the intention of the parties to them, they should be read together, and in the light of the surrounding circumstances. They are all made by heirs of William Kite, and dispose of all the real estate which they inherited from him by conveying it in parcels to heirs and to the husbands of two of his heirs. No part of it is conveyed to a stranger, except in one instance, and all the heirs except the one who was in his minority, unite in a deed conveying to him, George W. Price, not lands then belonging to the estate, but the lot which had been allotted to Conrad Kite, and which had become his property in severalty by virtue of the parol partition which is proved to have been made in 1839, doubtless because he had sold the lot to Price and desired the heirs to convey directly to his grantee, instead of to himself, and these facts appear on the face of the deed, and cannot, I think, be reconciled with any hypothesis which negatives the fact of a partition. It was not only a partition of real estate, but also of the valuable personal estate, together, which our statute authorizes; and not only no stranger gets land in the disposition of it by the heirs, but no grantee gets more land than the value of each heir's share in the real and personal estate. If it had been intended to be a sale, and not a partition, it is fair to presume that some parcels of the land would have been sold to strangers outside of the

784 *family, and that the grantees would not have been limited not to exceed in any instance the value of each heir's share in the real and personal estate. It being a partition of real and personal estate, it is very natural that some of the heirs would be willing to take their whole interest in real estate, some of them part in real and part in personal, and others altogether in personal; and it is not important for us to know how or when they were equalized. The presumption is that the partition was completed at the time these deeds were executed, which was more than five years after the death of the intestate, and his administrators were present and participated in the partition. But how or when that was done it is not material for us to enquire. That it was done, and to the satisfaction of all, we may well presume, for we hear of no complaint; all have acquiesced in what was done, even Joseph Kite, who was then in his minority, as appears from his answer in this cause.

It seems that one of them, and only one, Malinda, has not received all that was due to her. It seems that she chose to take the bond of Dr. Jennings for what she was entitled to receive from his wife's share of the personal estate with which it was chargeable (\$540.47), to equalize her with the rest of the heirs, instead of receiving it in money from the personal representatives. Great stress has been laid upon this circumstance to show that Dr. Jennings was the purchaser of the lands allotted to his wife, valued at \$7,000. I think the conclusion is not a logical one. The bond was executed on the 19th of March, 1830, long before the deed was executed, and being a charge upon the land which Mrs. Jennings got, as the amount she was to contribute for the equalization of Malinda with the rest of the heirs, the partition must have been made prior to the date of the bond; and it strongly confirms the testimony of Jennings

and Hiram Kite that it was made in January, 1839, and the logical *inference is, not that Dr. Jennings purchased the whole of his wife's interest, worth \$7,000, but that he had used \$540.47 of his wife's personal estate, and had reduced that much of it to possession, and gave his bond for it to Malinda Kite, which he never paid.

But now to return. In the light of all the circumstances surrounding the execution of these deeds, can we say that they show upon their face that they were executed to carry into effect contracts of sale and purchase, and not in pursuance of a partition made between the heirs themselves, because they are not written as a lawyer would have prepared them, setting out the partition in terms, but are written as deeds of bargain and sale are ordinarily written? It is probable the draftsman would not have known how to draft a formal deed of partition. The object of the deeds was to vest in each of the grantees in severalty, title to a specific parcel of all the lands which they had before held in common, or coparcenary. And this was as effectually done by the deeds as they were framed, as if they had been most formally worded as deeds of partition. These deeds are as effectual to

carry into effect the partition as they would be to carry into effect a sale and purchase. We cannot logically or reasonably conclude, therefore, that they are incompatible with the fact of a partition, especially when all the surroundings show that it was a partition and not a sale and purchase.

Nor, secondly, is the circumstance that they express the value in money in each case except one, as the consideration of the conveyance that the heirs had agreed should be the valuation of the land conveyed, incompatible with the fact that they were executed to carry into effect the parol partition. It is no contradiction of the face of the deed to say, that the consideration

which passed from Dr. Jennings to the heirs, his grantors, *was five thousand dollars, the value of his wife's undivided interest in the real estate of her father, which she contemporaneously conveyed to other heirs, and two thousand dollars of her interest in the personal estate, which the administrators, being present and parties to the partition, were authorized to pay over to such of the heirs as it was determined and agreed should be entitled to receive it. And the bond to Malinda for \$540.47, is a very strong circumstance to show that the definite amount which each one was to pay, and who was to receive it, was determined. And the administrators were bound to pay these several sums to the heirs and distributees, who were entitled, respectively, to receive them, as was determined in the settlement and partition amongst the heirs themselves. And the fact that Malinda chose to take Dr. Jennings' bond for the amount that was coming to her from his wife, would operate as a release to the administrators from their obligation to pay it to her, and would authorize them to pay it to Dr. Jennings, and so would be a reduction to his possession, or rather a purchase of that much of his wife's personal estate. It would be a very slight circumstance from which to infer that he had purchased and paid \$7,000 for the five hundred and fifty-nine acres allotted to his wife. Such an hypothesis also involves other insuperable difficulties. His wife was entitled to \$5,000 of the \$7,000 in real estate. He might become the absolute owner of her personal estate by reducing it to possession, but could not of her real estate. Well, she had, by uniting in the deeds, conveyed her undivided interest in the real estate worth \$5,000, in part consideration for the five hundred and fifty-nine acres which had been allotted to her, and for the balance of the consideration had surrendered \$2,000 of her interest in the personal estate. Now, suppose her husband, by reducing to possession her personal estate, could pay two thousand dollars of the consideration *for the land conveyed to him, how did he pay the \$5,000, the residue, if he did not pay it in his wife's land? He would hardly have paid it out of his own pocket if he had had the money, which it seems he had not, when his wife was entitled to it in land. And if he had, to whom would it have been due but to his wife? It is not pretended that he paid

\$5,000 to her. But if he could have lawfully made a contract with her for the purchase of her land which she inherited from her father, where is the evidence of such contract of purchase? I have always been under the impression that a married woman could only part with her real estate in the mode prescribed by the statute, upon a privy examination; and that her consent to its transfer could not be shown by her declarations in any other mode, much less be inferred or presumed from her acquiescence in the claim of her husband, for however long a period. Here there is no evidence that she ever parted with her inheritance to her husband in the only mode under the statute by which she could have parted with it; or, in fact, that she in any way consented to or acquiesced in the claim to her land now set up by her husband's creditors.

She united, it is true, in the deeds conveying to her co-heirs the parcel of the real estate set apart to them respectively, which had descended from her father; and that she did, in consideration of the parcels of land which had been allotted to her. The consideration of the deed made of her land to her husband, is stated in the deed to be \$7,000. It does not say in money, and the heirs—the grantors—acknowledge the receipt of it. That is not inconsistent with the fact. They had received it in Mrs. Jennings' undivided interest in the lands, valued at \$5,000, which, by contemporaneous deeds she had conveyed to her co-heirs, and in \$2,000 of her interest in the personal estate which she had surrendered for equalizing the heirs with her who had received less land *and those who had received no land. The consideration for the land which was allotted to her, and which was conveyed to her husband, was her interest in the real estate of her father, and so much of her interest in the personal estate as would make it \$7,000. I don't think there ought to be a doubt of that.

The evidence in this record, documentary and oral, I think, plainly shows that Mrs. Jennings was entitled to at least five-sevenths of the land which was conveyed to her husband, and to the whole of it, unless her husband had reduced to his possession her interest in the personal estate, which was the consideration of the remaining two-sevenths. The evidence does not establish satisfactorily that Jennings ever reduced to possession his wife's interest in the personal estate with which he paid partly for the land conveyed to him. There is some ground for the assumption in the deposition of Hiram Kite in answer to the question how S. B. Jennings got the lands conveyed to him. He says, "there was a price set upon the lands at the time, and all over what was coming to him in the divide he bought from the heirs." Well, five-sevenths was coming to him, or rather to his wife, in the divisions of the real estate. It could not be coming to him in any sense, except in the right of his wife, and the excess, which was two-sevenths, he bought, according to this witness; and as it was doubtless paid for out of his wife's

personal estate, it may be considered as evidence of the reduction of his wife's personal estate to his possession. But whether so or not, if he bought it and paid for it, two-sevenths would be liable to the debts of his creditors. And upon this theory, that he bought the two-sevenths, we may conclude that he gave his bond to Malinda in part payment of it. The most, I think, that can be claimed for the creditors of Dr. Jennings is the two-sevenths of the five hundred and fifty-nine acres of land, and his life

estate, by the curtesy, in the five-sevenths
789 and *the fifty acres which are no part of the aforesaid tracts, and are not claimed by the heirs of Mrs. Jennings. This, I think, is a most liberal disposition of the case for the creditors of Dr. Jennings. I have not a doubt as to the right of the heirs of Mrs. Jennings to five-sevenths of the lands in controversy, subject to their father's life estate by the curtesy. Upon what just principle it is reduced by the decree to an undivided fourteenth interest in the five hundred and fifty-nine acres, I cannot comprehend. Mrs. Jennings was undoubtedly entitled to one-seventh of the whole real estate of which her father died seized. She has been induced to unite in deeds, with the other heirs, in conveying her interest, which was an undivided one-seventh in all the other lands, to the heirs to whom they were parcelled out in the partition or settlement, in consideration that five-sevenths of the lands in question, which would be her proportion according to the value of her undivided interest in the real estate, should be allotted to her in severalty; and to hold now, that she is entitled to only one-seventh in the five hundred and fifty-nine acres, valued at \$8,000, would be to give her only one-seventh in the five hundred and fifty-nine acres for the one-seventh which she was clearly entitled to by inheritance in all the lands which descended from her father, estimated to have been worth at least thirty-five thousand dollars. She has parted with all her interest in the other lands to other heirs, upon consideration that she was to have her whole interest concentrated and vested in the lands in question. And the decree holds her to the conveyances of her undivided interest in the lands worth \$5,000, but takes from her or her heirs the consideration on which alone she united in those conveyances. The decree makes it one-fourteenth instead of one-seventh, of course upon the idea that her husband was a joint owner with her father in the said land, a claim

which her husband had not the con-
790 science *to make for himself when the lands were partitioned, when it would have been made, one would think, if it could have honestly been made, the joint conveyance having been made to him and his father-in-law not two years before this partition, and when the whole transaction was known to all the heirs and fresh in their recollection. No such claim was then made by Dr. Jennings, but absolutely renounced by him and disclaimed to this day, and yet this decree gives it to him.

It was contended that a moiety of the lands was an advancement by the father to the husband of his daughter. But I do not think that can be maintained. He did not take it as an advancement from his wife's father; but he took it as a joint purchaser with him from Jacob Conrad, the grantor. There is nothing in the transaction or the proofs to show an intention of the father to advance him with a moiety of the land. On the contrary, there is everything to repel such a presumption; it was his intention that Dr. Jennings should pay for a moiety of the land, which he admits and testifies that he failed to pay any part of it. And the same having been paid by William Kite, or his representatives, it was a charge upon his moiety of the land. And being so, it is very reasonable, as he and Hiram Kite both testify is the fact, that when the lands were partitioned he consented that the entire lands so conveyed to him and William Kite jointly, should be valued and partitioned as lands of William Kite's estate.

If these transactions had occurred shortly before the death of Mrs. Jennings, which occurred in 1865, the rights of her heirs could hardly have been questioned. And yet, she being a married woman, the lapse of time cannot affect the right of her heirs, they having instituted suit in a reasonable time after her death. Lapse of time will not be laches, if the party was under disability.

(Perry on Trusts, 1st ed. § 230). The
791 husband has been *in possession, but his possession was not inconsistent with his wife's claim of right, set up by her heirs; and if it was, acquiescence cannot be imputed to a married woman. Her husband had possession under the deed from the heirs of William Kite, which was of record, and not under the joint deed to decedent and himself of 1837, which was renounced by him when he consented that the entire tract so conveyed should be valued and taken into the partition as a part of the decedent's lands, and actually accepted it at the price put on the entire tract, not upon a moiety, as and for a part of his wife's share of her father's estate. For the decree after this, and when Dr. Jennings to this day disclaims any right or title under the joint deed, and has never claimed any since the death of William Kite, but as we have seen disclaimed it when the lands were partitioned amongst the heirs, I confess is incomprehensible to my mind. This deed made to Dr. Jennings by the heirs of William Kite, except the minor and his wife, who did not unite in it, was sufficient to charge even a subsequent purchaser with constructive notice of the wife's right.

The fact of the deed being of record for thirty or forty years cannot affect the rights of Mrs. Jennings, she being under disability during that whole period, nor her children, they having instituted suit against S. B. Jennings to assert their rights within the time limited by law after the death of their mother, when their rights became vested.

Unless Mrs. Jennings or her heirs are barred by the execution of the deed to her

husband by her co-heirs, I cannot apprehend the shadow of a doubt as to the right of her heirs to at least five-sevenths of the land in question, subject to their father's life estate by the curtesy. As we have seen, she is not a party to the deed that conveys the land to him, and has never acknowledged on privy

792 examination the conveyance of her title, which was clear *and unquestionable, if not to the whole, to at least five-sevenths of these lands. It is true that she united in the other conveyances, and it is very probable she would have united in this too if she had been told to do so. We all know how readily a dutiful and trustful wife is disposed to confide all business matters to the disposal of her husband, and to do whatever he and the men who have it in charge direct. And if she had been joined in the deed to her husband she would doubtless have considered it all right, and would have acknowledged that too. But she did not do it. She was clearly entitled to at least five-sevenths of the land, which had been four or five years before allotted to her in the partition. But the deed was made by the other heirs to her husband, for five-sevenths of which he had not even a pretext of title. It was evidently done without knowledge as to its effect upon the rights of the wife, or without due consideration. I have no idea that there was any intention of any of the parties to defraud Mrs. Jennings of her rights. But if it was not a conveyance to the husband as to at least five-sevenths, in trust for his wife, it was an actual fraud upon her rights, and a court of equity would hold the husband a trustee for his wife. *Brown v. Lynch*, 1 Paige Ch. R. 147; *Barnesly v. Powell*, 1 Ves. Sr. R. 283; *Young v. Peachy*, 2 Atk. R. 254; *Thymn v. Thymn*, 1 Vern. R. 296. Constructive trusts arise (says Professor Minor) independently of the intention of the parties by construction of law, being fastened on the conscience of him who has the legal estate, in order to prevent what otherwise would be a fraud. They occur not only when property has been acquired by fraud or improper means, but also where it has been fairly and properly acquired; but it is contrary to the principles of equity that it should be retained, at least for the acquirer's own benefit. 2

Min. Inst. (1st ed.) 206, 207, citing 1 Lom. Dig. 233; 1 Spence's Eq. Jur. 511-12.

793 *A court of equity will construe a deed so made to the husband, the consideration moving exclusively from her, as made in trust for her, and will regard the husband as trustee for the wife. We set up a trust in *Snaveley v. Pickle*, 29 Gratt. 27, though the grantee had been in possession under the deed since 1845. And a court of equity will be vigilant to secure to the wife her rights. Even if Mrs. Jennings had been divested of her inheritance, in the mode by which a married woman may under the statute part with her real estate, a court of equity will closely scrutinize the act. Judge Moncure, in *Statham v. Ferguson's adm'r & als.*, 25 Gratt. 28, 43. When land is sold for the purpose of partition, the share of the proceeds

belonging to a feme covert will be treated as land, and cannot be paid to the husband except with her assent upon a privy examination. *Hughes ex parte*, 1 Dev. Ch. 118; *Snell v. Jamison*, 2 Dev. & Bat. Ch. 2 Hill Ch. 646; 5 Iredell Eq. 396. There is nothing in the case of *Phelps v. Seely* which is in conflict with the foregoing. From my recollection of that case it was an attempt to raise a resulting or implied trust against the purchaser of the property in favor of the party claiming the trust, although the consideration did not move from him, but from the purchaser; whilst in this case the consideration of the deed vesting the legal title in the husband, moved unquestionably from the wife.

From every view I have been able to take of this case, my mind has been brought to a clear conviction that the appellants, the heirs of Mrs. Jennings, are entitled to at least five-sevenths of the lands in controversy. The only doubt I have is, whether they are not entitled to the whole. My brethren think otherwise, which is the only circumstance that could cause a doubt as to the correctness of my conclusion. But it has not changed my conviction as to the right of 794 the case. I must therefore *adhere to my opinion, though with diffidence and regret that I have to dissent.

MONCURE, P., and STAPLES, J., concurred in the opinion of CHRISTIAN, J.
Decree affirmed.

795

* *Plecker v. Rhodes*.

September Term, 1878, Staunton.

1. **Toll-Bridges—Authority of Legislature.**—The general assembly has the power to authorize an individual to build a toll-bridge over a river.
2. **Same—Acquisition of Land Statutes.**—The act authorizing the building of the toll-bridge authorizes the individual to purchase or condemn the land necessary for the abutments or way to the bridge in the mode prescribed by law. The act, chapter 56 of the Code of 1873, is the act to govern the proceeding to condemn the land. And although that act does not refer to toll-bridges, it will be considered as amended by the act authorizing the bridge.
3. **Same—Effect of Statute Authorizing.**—When the statute confers the privilege of building the toll-bridge, that determines the question of the public convenience, and the only question to be ascertained by the proceedings in the court is the damages to the owners of the land condemned.
4. **Same—Condemnation of Land—Notice to Owner.**—The act authorizing the building of the bridge requires that it shall be commenced in six months and completed in two years. The notice to the owner of land of motion to the court for the appointment of commissioners to value the land proposed to be condemned was more than six months after the passage of the act. This notice was not necessary to the commencement of the bridge, and does not, therefore, show that the bridge was not commenced in six months.
5. **Same—Time of Completion—Forfeiture.**—The completion of the bridge in two years having

been hindered by the owner of the land in delaying the work by his appeal from the judgment of the county court confirming the report of the commissioners, he will not be allowed to set up the forfeiture. It is a matter for the commonwealth to determine whether the forfeiture shall be enforced.

The case is sufficiently stated in the opinion of Judge Anderson.

796 *G. W. Berlin, for the appellant.
William B. Compton, for the appellee.

ANDERSON, J. By an act of the general assembly approved March 6, 1874, the plaintiff in error, David A. Plecker, was authorized to erect a toll-bridge across North river at Mount Crawford, in the county of Rockingham, at or near the site of the former bridge; and for that purpose he is expressly authorized "to purchase or condemn, in the mode prescribed by law, a lot of ground not exceeding one acre for the erection of a toll-house, and so much land as may be necessary for the abutments and the construction of said bridge, and a convenient pass-way over the same." The land on the west side of the river, where he proposed to erect the bridge, was owned by the defendant in error, Jackson Rhodes, and being unable to purchase from him the land necessary for the purpose, he says he instituted proceedings in the county court of Rockingham to have so much as was necessary condemned in pursuance of the said act, which were resisted by the said Rhodes, but resulted in the judgment of the court in his favor, and in the condemnation of so much of the said defendant's land as had been laid off and set apart by the commissioners of the court for the purpose. And he says that he thereupon proceeded with the work of constructing and erecting the bridge, and had it nearly completed when the said defendant in error obtained a writ of error and supersedeas to the judgment of the county court from the circuit court of Rockingham county, and the reversal of the same. And he comes to this court by writ of error and supersedeas to the judgment of the said circuit court for relief.

At the very threshold of the case we are confronted with the declaration that
797 the legislature had not the *power to subject private property to such a purpose. The police of a state embraces in its system of internal regulations, among others, interior communication. Chief Justice Shaw said in *Commonwealth v. Alger*, 7 Cush. R. 53, 84: "We think it a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community." And Redfield, Chief Justice, another eminent judge, says in *Thorpe v. Rutland & Burlington R. R. Co.*, 27 Verm. R. 140, 149, by this "general police power of the state, persons and property are sub-

jected to all kinds of restraints and burdens in order to secure the general comfort, health and prosperity of the state; of the perfect right in the legislature to do which, no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned." These eminent authorities are cited by Cooley in his work on *Constitutional Limitations*, p. 572-3, in support of this well-established doctrine, and he cites other numerous authorities, to which I need only refer.

On page 592, after saying that the state may authorize the construction of bridges over navigable waters, notwithstanding they may, to some extent, interfere with the right of navigation, he observes: "The legislature must always have power to determine what public ways are needed," &c. This power of granting authority to individuals to erect toll-bridges has been exercised by the legislature of the state from a period perhaps coeval with the foundation of the government. We have instances of it in the construction of Mayo's bridge over James river at Richmond, the bridge at Fredericksburg, over the Rappahannock, the bridge over
798 James river at *Lynchburg, and over the same stream at Buchanan in Bouteourt county. The first of the bridges I remember to have heard of at or near Buchanan, was Beale's bridge, which was erected, I suppose, before I was born.

But it is assumed by defendant's counsel that the act authorizing the erection of the bridge in question is for private benefit, and that section 14, article 5, of the constitution of this state, by implication, prohibits the taking the private property of one individual for the private use or benefit of another. In general that may be sound in principle, but we do not think it is implied by the clause of the constitution referred to, or that it is a constitutional prescription. There are certainly exceptions to it, and when it comes in conflict with the maxim *sic utere tuo ut alienum non laedas*, it is not true. One citizen is entitled to a right of way through his neighbor's land, if it is the only way by which he can have access to his mill or to his courthouse, &c. Nor is it sound if the conferring the privilege or benefit upon the individual, will be for the public benefit and convenience. The charter of companies for making turnpike roads and railroads, with special privileges, is for the benefit of the private individuals who undertake the enterprise, else they would not undertake it. But they are works which will be for the benefit of the community, or the state, or supposed to be, otherwise the legislature would not grant the charter. And so the establishment of ferries is for the benefit of the individuals, to whom the franchise is granted. And in like manner the authority given to an individual for the construction of a toll-bridge across a river, is a franchise which is to benefit the individual to whom it is granted, else he would not undertake it; but it is granted to the individual in consideration of the convenience and benefit it will be to the public. All these exercises of the functions

of sovereignty by the legislature, and
 799 the bestowment *of franchises upon individuals, are designed to be for the public benefit, and rest upon the same principle. Whether they will be beneficial to the public, when the application is made to the legislature to grant them, is a question addressed to that body, and unless they are satisfied that the public will be benefited by their construction, the franchise will not be granted. When the application is made to the courts, it is for the courts to determine whether the work will be beneficial to the public, as in the establishment of roads and landings, the power to do which is vested in the courts by statute, chapter 52, Code of 1873; and the mode of procedure is prescribed by which the courts may determine whether the proposed road or landing, will be of public benefit, and also the advantage and disadvantage to individuals, and by which individuals and private parties may be compensated for their property which it may be necessary to appropriate to the attainment of the projected improvement. But when the franchise, as the construction of toll-bridges, is granted as in this case directly by the legislature, the benefit it will be to the state or the public is the basis upon which the franchise is granted; and if granted, it is upon the ground that the legislature is satisfied that it will be of public benefit, and hence in such cases the law requires no enquiry to be made by the courts with regard to the benefit it will be to the public. But if in the construction of the work it is necessary to take private property, or private parties are damaged, then it is necessary that the enquiry should be made by the courts as to the value of the property, or the amount of damage sustained, and to award compensation. That has to be done in the case of railroad companies. When a charter is granted to a company or an individual to construct a rail or turnpike road, no action or enquiry is required to be made by the courts as to whether the work will be

800 *beneficial to the public or not; that question has been decided by the legislature itself, when it granted the charter. And just so when the legislature grants to an individual or company a franchise to construct a toll-bridge, there is no law requiring the question to be submitted to the courts whether it will be beneficial to the public or not; that question has already been decided by the legislature.

In accordance with this principle, the act of March 6th, 1874, was enacted, granting to D. A. Plecker authority to erect the toll-bridge in question, and investing him with franchises therein. Whilst the act authorizes him to "purchase, or condemn in the mode prescribed by law, a lot of ground, not exceeding one acre, for the erection of a toll-house, and so much land as may be necessary for the abutments and the construction of the said bridge and a convenient pass-way over the same," it directs no enquiry to be made by the courts as to the public benefits which would accrue from the erection of said

bridge. There is no proof in the cause, if it would have been competent for the defendant to have offered such proof, that it would not be beneficial to the public. But if it were proper to go into such an enquiry, there is very strong presumptive evidence that it would be a very great convenience and benefit to the public. The bridge is to be erected over North river, a very considerable stream near the town of Mount Crawford, to furnish a pass-way over said river upon a public highway, near the site of a former bridge upon said highway, which is not now standing, and a slight change to be made in the old road so as to pass over the proposed new bridge. These facts tend strongly to show that it would be a great public convenience and benefit, and it must have been so regarded by Plecker or he would not have undertaken to construct it; for in proportion to the use and benefit to the public, it would be beneficial to
 801 him. *We do not think that there is any ground of error in the assignment that the commissioners made no report as to the public benefits, and that no such enquiry was directed by the court.

But it is objected that the plaintiff proceeded under chapter 56 of the Code, and not under chapter 52. The act of March, 1874, which authorizes him to condemn the land, does not require him to proceed under chapter 52 or 56, but to condemn it in the mode prescribed by law. Chapter 56 does prescribe the mode whereby the lands of private parties may be condemned for such purposes, and that mode was pursued in this case. But that act only authorizes a company incorporated for a work of internal improvement, the court of a county or the council of a town to condemn the land. It may with much force be argued that the plaintiff by the act of 1874 is chartered as a sole corporation for a work of internal improvement. He is invested with important chartered privileges as a sole corporation. He and his legal representatives are invested with power to collect tolls on all travel and transportation over said bridge, and the rate of the tolls is regulated by the act. And it is expressly reserved to the legislature to change and regulate hereafter the rate of tolls "prescribed by this charter." The act calls it a "charter." And it moreover provides that "all laws in force regulating toll-bridges shall apply to this act." Those laws may be found in Code of 1873, ch. 64, §§ 25, 26, 27, 28, 29, 30; and they show that the proprietor of the toll-bridge is in some sense a public character, and that he holds the franchise under responsibilities to the state and under the regulations of law, and that the erection of a toll-bridge is not a matter exclusively of private interest, but that it is a work in which the public has an interest, and which is subject to state control.

802 *But this view is not necessary to warrant this proceeding. Although chapter 56 of the Code does not give to D. A. Plecker authority to proceed in this prescribed mode, but gives such authority only to a company, &c., as before recited, we think the

act of 1874 is cumulative in this respect, and gives like authority to D. A. Plecker so to proceed. It expressly gives him authority to condemn, which chapter 56 of the Code does not, if he is not a sole corporation, and to condemn in the mode prescribed by law. And this is the mode prescribed by law to condemn land for such purposes. We are of opinion, therefore, that the proceedings in this case under chapter 56 of the Code, and by authority of the act of March, 1874, were warranted.

There are other assignments of error, which we are of opinion are unsustained. We need only notice one of them—that the act of March 6, 1874, required D. A. Plecker to begin the bridge within six months from its date, and the time had expired before he gave notice to Rhodes of the motion in this proceeding. The said notice was not necessary to the commencement of the bridge. That may have been commenced within six months. The getting of timbers or other material, we think, would have been a commencement within the meaning of the act. And before the twelve months had expired, within which time the bridge was required to be completed, the act was amended and re-enacted, to-wit: on the 15th of January, 1875, requiring the bridge to be completed within two years. If it was not entirely completed within that time, which is not shown by the evidence certified, the work was most probably retarded by the obstruction interposed by the defendant in error. The progress of the work was probably obstructed by him until the judgment of the county court against him and in favor of the plaintiff, on the 20th of May, 1875. He seems from thence to have made no opposition, and *from anything that appears to have acquiesced and remained silent, whilst he saw the plaintiff prosecuting the work, and probably at great expense, until the 3d of March, 1877, when he applies for and obtains from the circuit court a supersedeas to any further prosecution of the work—not two years from the time the plaintiff was released from his obstructions by the judgment of the county court. We think under the circumstances he ought not to be allowed to insist upon a forfeiture by the plaintiff of his franchise, because of his not completing the bridge within two years. If it be a delinquency on the part of the plaintiff, he is in all probability more to blame for it than anybody else, and it is not for him to derive a benefit from it. It is a matter between the plaintiff and the commonwealth, or the legislature, whether the latter would under the circumstances subject the former to a forfeiture of his franchise because he had failed to comply with the strict terms of the proviso, to complete the bridge within two years. The plaintiff says the bridge was nearly completed, when he was arrested again in the work by the defendant obtaining from the circuit court a supersedeas.

Upon the whole, we are of opinion to reverse the judgment of the circuit court, and to affirm the judgment of the county court of Rockingham county.

MONCURE, P., and CHRISTIAN, J., concurred in the opinion of ANDERSON, J.

STAPLES and BURKS, J's, concurred in the conclusion, but not in all the views set forth in the opinion of ANDERSON, J.

The judgment was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of *the record of the judgment aforesaid, and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the said judgment of the circuit court reversing the judgment of the county court of said county is erroneous, and that there is no error in the said judgment of the said county court. It is therefore considered that the said judgment of the circuit court be reversed and annulled, and that the plaintiff in error, David A. Plecker, recover against the defendant in error, Jackson Rhodes, his costs by him expended in the prosecution of his writ of error aforesaid here. And this court proceeding to render such judgment as the said circuit court ought to have rendered, it is considered that the judgment of the said county court be affirmed, and that the said David A. Plecker, the defendant in error in the said circuit court, do recover against the said Jackson Rhodes his costs by him in the said court expended; which is ordered to be certified to the said circuit court of Rockingham county.

Judgment of the circuit court reversed.

805 *Balt. & Ohio R. R. Co. v. Whittington's Adm'r.

September Term, 1878, Staunton.

1. Contributory Negligence—Burden of Proof.—In an action for damages occasioned by the negligence or misconduct of the defendant, it is not necessary for the plaintiff to allege in his declaration or to prove the existence of due care and caution on his part to entitle him to recover. If the defendant relies upon contributory negligence of the plaintiff to defeat the action, he must prove it, unless the fact is disclosed by the evidence of the plaintiff, or may be fairly inferred from all the circumstances.

2. Pleading—Stating Cause of Action.†—In an action for damages against a railroad company, a

***Contributory Negligence—Burden of Proof.**—It is held by a majority of the courts and most text-writers and is sustained by a long line of Virginia decisions that there is a presumption of ordinary care in favor of the plaintiff and where defendant relies on the contributory negligence of the plaintiff the burden of proof is on the defendant to show such negligence. *Piedmont Co. v. Patterson*, 84 Va. 747; *Improvement Co. v. Andrew*, 86 Va. 270; *Sheff v. Huntington*, 16 W. Va. 307; *Fowler v. Baltimore R. Co.*, 18 W. Va. 579, 7 Am. & Eng. Enc. Law (2nd Ed.) 453; *Kimball v. Friends*, 95 Va. 138; *Southern R. Co. v. Bryant*, 95 Va. 220.

†**Pleading—Stating Cause of Action.**—In the following cases the opinion of the principal case in regard to the particularity necessary in stating the

count in the declaration, after setting out that the defendant was working a railroad in the county, with engines and cars for carrying passengers and freight, alleged that on a day named "the defendants conducted themselves so carelessly, negligently and unskilfully in the operation of their said business as to inflict upon W (plaintiff's intestate), severe bodily injuries, by reason whereof he did, on the 28th of June, die." The count is defective in not stating where the deceased was or how he was injured.

3. Same—Special Pleas.—Where issue has been joined on the plea of the general issue, the court may refuse to allow the defendant to file special pleas where the facts stated in the pleas may all be given in evidence under the general issue.

4. Negligent Injuries—Duty of Employees.*

—An employee of a railroad company, who is engaged in mending the track of the road, who, whilst he might get further off, stands near enough to the railroad track to be struck by a train if perchance there should be an increase of speed or a change of cars, is guilty of the grossest imprudence and negligence. No man is justified in placing himself near a passing train upon any such idea or presumption, and for an injury sustained by so doing, he or his representative cannot recover.

5. Decision in This Case.—In this case, upon the facts as certified, the deceased was guilty of contributory negligence, and his administrator is not entitled "to recover damages from the railroad company for the injuries sustained by the deceased.

6. Change of Schedule—Duty to Notify.—If the injury sustained by the deceased was the result of a change of the usual train from an accommodation train of moderate rate of travel, to what is known as a lightning express train of a rate of travel from twenty-five to thirty-five miles per hour, and of a change of schedule of the time of running the train passing the point at which the deceased was killed, and said changes were by the chief authority of the railroad company, and the death of the deceased was without fault on his part, and the company had not given notice of said changes to their employees, of whom deceased was one, so as to enable them to avoid the danger: It was the duty of the said company to give such notice, and their failure to do so was negligence of the company, for which it is responsible in damages.

In April, 1875, Thomas M. Miller, administrator of Cornelius Whittington, deceased,

cause of action is cited with approval. *M'Coull v. City of Manchester*, 85 Va. 586; *Snyder v. Wheeling Electrical Co.*, 43 W. Va. 661; *Humphreys v. Mfg Co.*, 33 W. Va. 141. See also *Hawker v. Railroad Co.*, 15 W. Va. 628; *Hoffman v. Dickinson*, 31 W. Va. 142.

***Negligent Injuries—Duty of Employees.**

—In *Moore v. Railroad Co.*, 37 W. Va. 489, the court, on the authority of the principal case held that unless an employee is acting under orders in remaining on or near the track, he places himself there at his own peril, and cannot recover for injury there received. See 7 Am. & Eng. Enc. Law (2nd Ed.) 424 for general rule and Virginia cases.

Contributory Negligence—General Principles.—The principal case is cited in reference to general rules of contributory negligence in the following cases: *Dun v. Railroad Co.*, 78 Va. 656; *Railroad Co. v. Morris*, 31 Gratt. 200; *Railroad Co. v. Anderson*, 31 Gratt. 812; *Railroad Co. v. Harman*, 83 Va. 578.

instituted an action of trespass on the case in the circuit court of Frederick county against the Baltimore and Ohio Railroad Company to recover damages for having occasioned the death of Whittington. The declaration contained three counts. The first count set out, for that whereas, heretofore, viz: On the 23d of June, 1874, in said county of Frederick, the defendants were occupying and using a certain railway for the purpose of propelling along the same locomotives and cars for the transportations of passengers and freight; that on the said 23d day of June, 1874, the defendants, by their servants, did wrongfully, negligently, and of their own default, throw from their said cars upon and against the said Cornelius a large piece of timber, thereby inflicting upon said Whittington severe injuries, by reason whereof he did, on the 28th June, 1874, die, whereby right of action accrued in pursuance of the act of general assembly in such cases made and provided, to the plaintiff who hath, since the death of said Whittington, qualified as the administrator of his estate, to demand and receive of the defendants 807 for the wrong *and injury done as aforesaid, wherefore, &c., laying the damages at \$10,000 dollars.

The third count is like the first, except that the thing cast from the cars was described as a heavy piece of wood.

The second count, after following substantially the first count down to the word "freight," proceeds: That on said 23d of June, 1874, the defendants conducted themselves so carelessly, negligently and unskilfully in the operation of their said business as to inflict upon the said Cornelius Whittington severe bodily injuries, by reason whereof he did, on the 28th of June, 1874, die; whereby, &c.

The defendant appeared and demurred to the whole declaration and each count thereof, and pleaded not guilty, and the plaintiff joined in the demurrers and took issue on the plea.

At a subsequent term of the court the court overruled the demurrers, and the defendant then asked to be allowed to file a special plea to each count in the declaration, but the court refused to permit the same to be filed, on the ground that the facts therein contained were covered by the general issue, and for the reason that the attorneys for the plaintiff stated that they were willing to admit that the defendant could, under the general issue, show the facts alleged in said several pleas; and the defendants excepted. The facts set out in the pleas were, that Whittington and Krebs were co-employees of the defendants, and in the same employment; that Krebs was a competent and prudent person, and that the large piece of timber was thrown off the cars by Krebs.

There were numerous exceptions taken by the defendants during the progress of the trial, but it is only necessary to state one of them, which was the third and is as follows: After the retirement of the jury and the close of the argument, the jury returned 808 into court, and in *writing asked the

court a question in these words: Can the jury, under the second count in the bill, bring in a verdict for damages for plaintiff? To which the court replied that it was for them to determine whether such a verdict should be given upon the evidence, and gave the jury the following instruction: "If the jury believe from the evidence that the death of Whittington was the result of a change of the usual accommodation train of moderate rate of travel, from twenty to thirty-five miles per hour, and of a change of schedule of the time of running the train passing the point at which Whittington was killed, that such changes were by the chief authority of the Baltimore and Ohio Railroad Company, and that the said death was without fault on his part, and that said company had not given notice of said changes to its employees, Whittington being one of them, so as to enable them to avoid the danger, they are instructed that it was the duty of the said railroad company to give such notice, and their failure to do so is the negligence of the said company, for which said company is responsible in damages." And the court permitted the counsel for the defendant to argue to the jury upon the evidence of the case with the instruction given, the plaintiff's counsel having argued in full the questions involved in said instruction before the instruction was given, and before the jury were sent out.

The jury found a verdict in favor of the plaintiff for \$3,000, which the defendant moved the court to set aside and direct a new trial of the cause, on the ground that it was contrary to the law and evidence. But the court overruled the motion and rendered a judgment according to the verdict. And thereupon the defendant excepted, and all the facts proved are stated in the bill of exceptions. The view of the facts taken by this court is presented in the opinion of Judge Staples.

809 *Upon the petition of the Baltimore and Ohio Railroad Company, a writ of error and supersedeas was awarded.

Dandridge & Pendleton and H. W. Sheffey, for the appellants.

Holmes Conrad and Tucker & Tucker, for the appellee.

STAPLES, J., delivered the opinion of the court.

The court is of opinion that the circuit court did not err in overruling the demurrers to the first and third counts of the plaintiff's declaration. In an action for damages occasioned by the negligence or misconduct of the defendant, it is not necessary for the plaintiff to allege and prove the existence of due care and caution on his part to entitle him to recover. If the defendant relies upon contributory negligence of the plaintiff to defeat the action he must prove it, unless indeed the fact is disclosed by the evidence of the plaintiff, or may be fairly inferred from all the circumstances. As proof of due care is not a part of plaintiff's case, it is of course not necessary he should aver it in his declaration. *Railroad Company v. Gladmon*,

15 Wall. U. S. R. 401; *Shearman & Redf. on Negligence*, § 43, and cases cited.

The court is further of opinion that the circuit court erred in overruling the demurrer to the second count in the declaration. Substantially, the allegation is that the defendants were possessed of certain engines and cars used and employed in carrying passengers and freight along the line of their railway in Frederick county, Va., and that on the 23d of June, 1874, the defendants conducted themselves so negligently and unskillfully in the operation of their said business as to inflict upon the plaintiff's intestate severe bodily injuries, by reason

810 *whereof he died. Now, whether the plaintiff's intestate was at the time a passenger on the train and received his injuries as such, or whether he was an employee of the company and was injured while engaged in their service, or whether he was a stranger crossing the track of the company's road, or whether he was on the track at all, or in the cars, or at a station, or in what manner he was injured, the declaration does not inform us. It was impossible for the defendants to learn from this declaration the ground upon which plaintiff was proceeding. The declaration amounted to an averment simply, that the plaintiff's intestate was injured by the negligence of the defendants in the operation of their business in using and employing their engines and cars on their railway. The object of a declaration is to set forth the facts which constitute the cause of action, so that they may be understood by the party who is to answer them, by the jury who are to ascertain the truth of the allegations, and by the court who are to give judgment. 1 Chitty Plead. 256; Barton's Law Prac. p. 103. It is very true that in actions for torts it is frequently sufficient to describe the injury generally, without setting out the particulars of the defendant's misconduct. In such cases great latitude of statement is allowed. But this rule does not justify a general and indefinite mode of declaring, admitting of almost any proof. 1 Chitty Plead. 406, note; *Jones v. Stephens*, 11 Price's R. 235; 1 Saunders on Plead. and Evidence, 510.

The learned counsel for the plaintiff insists that if greater particularity is required in stating the cause of action, the plaintiff is liable to be defeated on the trial by a variance between the allegations and the proofs. A declaration can, however, subserve no good purpose unless it be sufficiently specific to inform the adverse party of the ground of the complaint. If it is deficient in that particular it may as well be

811 dispensed with altogether. *The plaintiff is presumed to have some knowledge of the facts upon which his action is founded. If he is in doubt as to the precise nature of the evidence, he may frame his declaration with different counts, varying his statements to meet every possible phase of the testimony.

The second count being defective in the particulars already mentioned, the demurrer to it ought to have been sustained.

The court is further of opinion that the circuit court did not err in rejecting the special pleas tendered by the defendants and set out in their first bill of exceptions. The facts stated in their pleas were covered by the general issue joined at a previous term. It was announced by the court and conceded by the counsel for the plaintiff, that the matters set forth in the pleas could be shown under the issue joined, and they were in fact relied on before the jury. Under such circumstances it is clear the defendants could not have been in the least prejudiced by the rejection of the pleas. The circuit court very properly exercised its discretion in refusing to allow them to be filed. 1 Rob. Prac. 233.

The court is further of opinion that the circuit court erred in not setting aside the verdict and granting the defendants a new trial. The certificate of facts given by the presiding judge, shows that the plaintiff's intestate was in the service of the defendants as manager or foreman of the hands employed in making repairs on a section or sections of the road near Newtown station; that he had been thus employed for several years, and that while standing near the track of the road he was struck by one of the passenger trains. In what manner this occurred does not very clearly appear. The theory of the plaintiff's counsel is, that the deceased being at work in repairing the track of the road, upon the approach of the train,

withdrew from the track a sufficient
 812 *distance to be entirely safe, if the train had been running at its usual speed and with its usual cars. But on that day the train was running on a new schedule with greatly accelerated speed, and with a Pulman or sleeping car attached, which is much wider than the ordinary car, and that the deceased was not notified of either of these facts; that at the point where the injury occurred, there is a curve in the bed of the road, and as the train was passing around this curve the increased speed of travel imparted to it a vibratory or oscillatory motion, and by reason of this motion and the greater width of the Pulman car, the deceased was struck by the iron step attached to that car.

These are mere inferences of the learned counsel, for the record contains no proof of the supposed curve in the road, or that the Pulman car was for the first time attached to the train that day, or of the alleged vibratory motion, or the extent of it, or of the important fact that the deceased was at a sufficient distance to be secure if the train was running upon the previous schedule. This whole theory of the learned counsel is based upon the proposition that a railroad employee may nicely calculate or estimate the exact distance at which a man may stand from the railroad track when a train is approaching, supposing the train to travel at its usual speed, and that he has the right to assume that this speed will not be increased without notice to him, and if without such notice it is increased, and the employee is thereby injured, it is such negligence in the company as entitles the party to damages,

although it is manifest that the employee might avoid every injury simply by placing himself a few feet further from the track of the road.

This, it must be admitted, is reducing the calculation of escape and accident to a fractional point. When it is considered that upon many of the railroads there are hundreds and even thousands of laborers
 813 daily and hourly *employed all along the line, and not unfrequently twenty and even fifty trains a day, this proposition that a company is under obligation to give notice to each of its employees of every change of schedule, and of every alteration in the width of its coaches, involves consequences of the greatest magnitude. It is not denied that a company may be liable to an employee for an injury occasioned by a change of schedule of which the employee has no notice, provided he is without fault or negligence himself. But it is obvious to every mind, that a man who stands near enough to a railroad track to be struck by a train, if perchance there should be an increase of speed, or a change of cars, is simply guilty of the greatest imprudence and negligence.

No man is justified in placing himself near a passing train upon any such idea or presumption. It is inexcusable rashness and folly to do so. The instincts of self-preservation, the dictates of the most ordinary prudence, would suggest, and even require, that every person upon the approach of a train shall retire far enough to avoid injury, whatever may be the speed of the train or the width of the cars. He must at his peril place himself where he cannot be struck by the train so long as it continues upon its track. Of course the result might be very different where the employee in remaining on or near the track is acting under the instructions of the company.

In the present case the deceased both saw and heard the train long before it reached him. It is not denied he had ample time to get out of the way. He knew, or ought to have known, the train was considerably behind its usual time that day, and was, therefore, necessarily running at an increased speed.

O'Neil, a subordinate of the deceased, was on the same side of the road with the deceased, but separated from him by a bridge; he, upon the approach of the train, stepped
 814 five or six feet down the side of the embankment *from the track, and thus placed himself in a position of security. Cross, another employee, saw the train coming and stepped out upon an abutment of the bridge, and was unhurt. Rogers, another laborer under the deceased, had been working on the side of the track immediately opposite the place the deceased was working, had passed to the deceased's side of the track just before the train came, and assisted him in raising and ramming a loose joint in the rails; he heard the train whistle at Newtown station, saw it coming and stepped immediately across the track to the side on which he had previously stood, and escaped all

danger. The deceased, who was a superintendent, a foreman, and presumably possessed of more intelligence than the others, could have done the same thing, or he might have gone down the embankment as was done by O'Neil. The only witness who saw him at all while the train was passing, states that at the rear platform of the rear car he saw a man apparently within a foot of the train, with his face to the train, in the act of spinning or whirling around, tumbling down the embankment.

If this be so, and it is certified as a fact in the cause, it would of itself go very far to show the grossest negligence on the part of the deceased in remaining so near the road as to incur all the risks of injury from the passing train. Under such circumstances it is clear there can be no recovery. The rules of law governing in cases of contributory negligence are well settled. They have been very recently the subject of consideration in the case of the Baltimore & Ohio R. R. Company *v.* Sherman, decided at the present term. The principle of the cases is, that if the wrongful or negligent act of the plaintiff co-operated with the misconduct of the defendant to produce the damage, the action cannot be maintained. In other words, if the plaintiff through want of ordinary

care has materially contributed to the **815** injury he has sustained, *he is precluded from a recovery, although the defendant may be chargeable with negligence also. If, therefore, it should be conceded in this case that the defendants were guilty of negligence in not apprising the deceased of the change of schedule time and of the addition of the Pullman car, and that the deceased was injured by reason of the operation of these two causes, still it is plain the deceased, by the exercise of ordinary care and prudence, such as was shown by his associates, would have sustained no injury whatever. 2 Redf. on the Law of Railways, 244; Peirce on Amer. R. R. Law, 272.

These principles of law apply with peculiar force to employees of a railroad company, who are in a relation of privity with their principals, have every opportunity of becoming well acquainted with the business, and are presumed to know and understand something of the risks and dangers incident to that business. From such persons a greater degree of caution in avoiding dangers ought to be required than from passengers and others having no privity with the company and no especial acquaintance with the operations of the road. And this distinction is not only sustained by the authorities, but is founded in reason and sound policy.

For these reasons the court is of opinion that the verdict is contrary to the law and the evidence, and the circuit court erred in not setting it aside and granting the defendants a new trial. This renders unnecessary any special consideration of the several instructions asked for by the defendants, and set out in their bills of exceptions Nos. 4 and 5. Besides, it is apparent the questions presented by these instructions are not likely to arise upon any future trial.

Plaintiff's instruction set out in defendants' third bill of exceptions is as follows:

"If the jury believe from the evidence that the death of Whittington was the **816** result of a change of the usual *train from an accommodation train of moderate rate of travel to what is known as a lightning express train of a rate of travel from twenty-five to thirty-five miles per hour, and of a change of schedule of the time of running the train passing the point at which Whittington was killed, that said changes were by the chief authority of the Baltimore and Ohio Railroad Company, and that the death of said Whittington was without fault on his part, and that said company had not given notice of said changes to its employees—Whittington being one of them—so as to enable them to avoid danger, they are instructed that it was the duty of said railroad company to give such notice; and their failure to do so is the negligence of the said company, for which said company is responsible in damages."

This instruction, in itself, is not objectionable. From what has been already said, however, upon the subject of the motion for a new trial, it has been seen that the evidence shows that the death of the plaintiff's intestate "was not without fault on his part." In this view it may be a question whether the facts justified an instruction of the kind; but in the language of this court in *Early v. Garland's lessee*, 13 Gratt. 1, 14: "To withdraw a case from a jury by first passing upon a question of fact and then refusing the instructions because in the opinion of the court the evidence failed to prove the case assumed, would necessarily involve a confusion of the boundaries separating the province of the court from that which properly belongs to the jury. Where there is any evidence tending to make out the case supposed in an instruction, it is safest and best to give the instruction, if it propound the law correctly." *Early v. Garland's lessee*, 13 Gratt. 1, 2.

In this view it cannot be affirmed that the circuit court erred in giving the instruction, more especially as the question of negligence was peculiarly one for the consideration of the jury. But for the reasons already **817** *stated, the court is of opinion that the judgment of the circuit court is erroneous and must be reversed and annulled, the verdict set aside, and a new trial awarded the defendants, with liberty to the plaintiff to amend his declaration if he so desires.

The judgment was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the second count in the plaintiff's declaration is not sufficiently certain in setting forth the facts upon which the cause of action is founded, and the court therefore erred in overruling the demurrer to that count, but the said circuit court did not err in overruling

the demurrer to the other counts of the declaration.

The court is further of opinion that the circuit court did not err in giving to the jury the instruction set out in the defendants' third bill of exceptions. The court deems it unnecessary to express any opinion upon the two instructions asked for by defendants and refused by the court, as it is obvious the questions presented by said instructions are not likely to arise upon any future trial.

The court is further of opinion that the said circuit court did not err in rejecting the special pleas tendered by the defendants, as the matter of said pleas was covered by the general issue, and under that issue were relied on before the jury.

The court is further of opinion that the circuit court erred in refusing to set aside the verdict and grant the defendants a new trial, for the reason that the verdict was contrary to the law and the evidence.

818 *It is therefore considered by the court that, for the reasons aforesaid, the judgment of the circuit court be reversed and annulled, the verdict set aside, and a new trial awarded the defendants in conformity with the views herein expressed; and that the plaintiffs in error recover against the defendant in error their costs by them expended in the prosecution of their writ of error and supersedeas aforesaid here; and the cause is remanded to the said circuit court and leave given the plaintiff to amend his declaration, if he desires to do so; all which is ordered to be certified to the said circuit court of Frederick county.

Judgment reversed.

819 *Parent's Adm'r v. Spitler's Adm'r & als.

September Term, 1878, Staunton.

Absent, CHRISTIAN, J.

Witnesses—Death of Other Party.*—P and C, commissioners, sell land to B, who executes his bonds for the deferred payments, with G and P as his sureties. B sells the land to K. P being dead, G, P and K are incompetent witnesses to prove the payment of the bonds by B to P.

This was a creditor's bill in the circuit court of the county of Rockingham, brought in June, 1874, by the administrator of Jacob C. Spitler, deceased, and others, against Hugh Connell, the surviving administrator of George W. Cupp, Enoch L. Brower, administrator of Samuel Parent, deceased, who in his lifetime was one of the administrators of said Cupp, the heirs of Cupp and Parent, Solomon Garber, Abraham Paul, John M. Kiser and a number of other parties, to have a settlement of the administration of the estate of Cupp and a sale of his real estate

***Witnesses—Death of Other Party.—**In *Hughes v. Harvey*, 75 Va. 207, the principal case is distinguished on its facts from that case. See generally 4 Min. Inst. (2nd Ed.) 767; *Morris' ex'or v. Grubb*, 30 Gratt. 286 and *note*.

for the payment of his debts. The court made a decree directing a number of accounts, and among them an account of the administration of Connell and Parent on the estate of Cupp.

The commissioner made his report, which was excepted to by the plaintiff. The only question involved in the case seems to have been in relation to one item charged by the commissioner against the administrators of Cupp, which was for money alleged to have been received by Parent in February, 1862. It appears that George W. Cupp died in 1855, owning real and personal estate, and largely indebted. In April, 1859, his adminis-

820 trators, *Connell and Parent, filed a bill against his widow and heirs for the sale of a part of his real estate for the payment of his debts; and a decree was made directing them to sell the property called the Dayton mills with some lands adjoining, which was part of said Cupp's estate. They made a sale of this property to B. F. Byerly, taking other real estate in part of the price, and for the balance the four bonds of Byerly, with Abraham Paul, Solomon Garber and Daniel Bowman as his sureties. This sale was reported to the court and confirmed, and Connell and Parent were authorized to withdraw the bonds and collect the money, and apply it to the payment of the debts of Cupp, paying first the debts which constituted a lien upon the property. The record in this case was destroyed during the war.

There having been a lien on the Dayton mills, it was agreed between the commissioners and Byerly that he should pay it out of the purchase money; which he did, leaving his two last bonds to be paid by him.

Prior to 1862, Byerly sold the Dayton mills to John M. Kiser, and in March, 1862, John M. Kiser conveyed the property with general warranty, in trust, to secure a debt to his father, George Kiser; and it was afterwards sold and purchased by said George Kiser.

In February, 1862, Parent, Byerly, John M. Kiser, Solomon Garber and Abraham Paul met at the law office of Allen C. Bryan, in Harrisonburg, for the purpose of settling the matters in relation to the sale of the property by Parent and Connell to Byerly and by Byerly to Kiser, Connell not being present. Whether the money due from Byerly was paid to Parent at that meeting, was the question; and the only witnesses introduced before the commissioner on this question were Garber, Paul and John M. Kiser; and Parent having died in 1867, the plaintiffs excepted to Garber and Paul as

821 interested in the matter, as the sureties of Byerly, and to Kiser as *interested as purchaser of the land, and Parent, the other party to the transaction, being dead, they were not competent to testify in relation to it. The only fact independent of their testimony which appeared, was that the money was put in the hands of Paul, and he deposited it in bank, and it was afterwards invested in Confederate States bonds.

The cause came on to be heard on the 15th of June, 1876, when the court overruled the exceptions to the report, and decreed that

Parent's administrator, out of the assets, &c., and Hugh Connell, should pay the sum of \$2,867.08, with interest on \$1,516.96, part thereof, from the 25th of May, 1876, to the receiver of the court, the whole of which amount, in the opinion of the court, was in the hands of Samuel Parent, and for which his estate was primarily liable, and Connell was only liable as his surety. And from this decree Parent's administrator applied to a judge of this court for an appeal; which was allowed.

David Fultz, for the appellant.

J. S. Harnsberger and John E. Roller, for the appellees.

ANDERSON, J., delivered the opinion of the court.

The important question in this case is, were the witnesses, Solomon Garber, Abraham Paul and John M. Kiser, who were parties to the suit, competent to testify? At common law, being parties to the suit, they would have been incompetent for that cause; but under the statute, Code of 1873, p. 1109, ch. 172, § 21, they would not be incompetent on that ground unless they come within one of the exceptions contained in the 22d section.

If they are incompetent it must be **822** because they *fall within the exception which provides that when one of the original parties to the contract, or other transaction, is dead, * * * the other party shall not be admitted to testify in his own favor, unless first called to testify on behalf of the party first named. This disqualification which renders a party to the suit incompetent, we held in *Martz's ex'or v. Martz's heirs*, 25 Gratt. 361, applies only to one who is a party to the contract or transaction, which is the subject of investigation. The appellant alleges that these witnesses were not only parties to the suit, but to the transaction to which Samuel Parent, who was dead when they testified, was also a party, and which was the subject of investigation, and that it is by reason of his alleged acts and declarations in that transaction which these witnesses were introduced to prove, that his estate is sought to be held liable. The appellant, by his counsel, excepted to the competency of each of them upon this ground, as they were introduced to testify, before either of them had answered a question.

What was the transaction? Samuel Parent and Hugh Connell, administrators of George W. Cupp, deceased, who had reported a sale of the Dayton mill property, which they had made under a decree of the court, to B. F. Byerly, and which was confirmed by the court, were authorized to withdraw the bonds for collection, which had been returned to court with their report, and to collect them, which bonds had been executed for the balance of the purchase money—\$4,375—by two of the said witnesses, Garber and Paul, and another, jointly with the said Byerly, as his sureties. Byerly, after his purchase, sold the property to John M. Kiser, the other witness.

These witnesses were introduced to prove that they met Byerly and Parent at the law office of A. C. Bryan in Harrisonburg, in February, 1862, to have a final settlement of these matters. The amount due from

823 John *M. Kiser to Byerly, was to be ascertained and paid, so as to furnish Byerly with the means of paying the balance due from him and his sureties on their joint bonds to the said commissioners; until which was done, the said John M. Kiser could not get his deed. They expected to meet both commissioners, but only one of them, Samuel Parent was present. They nevertheless proceeded with the business. To attain their object, in the first place, it was necessary to have a settlement with Parent to ascertain what was the balance due upon their joint bonds. This could only be attained by the assent of Parent. This was a part of the transaction, and it was an important subject of investigation in this suit to determine how much, if anything, was due upon these bonds. The next thing was to discharge the obligations by the tender and acceptance of the Confederate money to Parent, and to get the deed. And these witnesses are offered to prove, not only the tender of the money, but the acceptance of it by Parent. This is the transaction, in part at least, to which Parent was a party and in which his estate is deeply interested, in which he participated, and without whose assent the results claimed by the appellees could not have been reached; a transaction to which the witnesses, Garber and Paul, jointly bound in the contract, were parties. And Parent, the other party to the transaction, being now dead, and unable to testify, we are clearly of the opinion they were incompetent to testify under the statute. How is it as to the other witness, Kiser? He was not a party to the contract to which Parent was a party. But was he not a party to the transaction? What was his connection with it? His business there on that occasion was to have all matters finally settled, so that he could get his deed; to get that it was necessary that the whole of the bonds for the purchase money should be fully discharged. The commissioners were not authorized to make a deed until all the

824 purchase money *was paid. But that could not be done until he paid the balance that was due from him to Byerly, so as to put him in possession of the means to pay. And that he would be unwilling to do until he was sure of the deed from the commissioners. This assurance he could only get from Parent, and in fact only in part from him, as a deed from him, unless jointly with his co-commissioner, would be of no value. At all events, whatever assurance he may have had, he must have derived from the acts and declarations of Parent in this transaction as Connell was absent; and to prove the was introduced as a witness. It was in reference to his getting a title to the property he bought from Byerly, that his business was a party with Parent. And he was directly and

deeply interested in all that was said and done and transacted in reference to that matter. And he is introduced to prove that upon what was said and transacted by and between Parent and the rest of them, he paid the money to Byerly, and Byerly paid it to Parent, and that the latter accepted it as a payment, and executed the deed. To the transaction, so far as the payment of the money by him, and the execution of the deed by Parent depended upon the result of it, he was a party; and he is introduced as a witness to prove the declarations of Parent and the part he acted in that transaction. And to those matters he testifies. Now, if Parent was living, he might give a different version to the transaction. Connell says he did. He might testify that he was unwilling to act definitely in the matter in the absence of his co-commissioner, but was willing jointly with him to receive the money and execute the deed; that he was willing to sign the deed himself, but would not execute it by acknowledgment and delivery, unless his co-commissioner acted jointly with him, and that in consequence of that, the money was not paid to him, but was put in the hands of Paul, one of the obligors in the bond, to be

825 *paid to the commissioners when they jointly executed the deed, which it was thought might probably be done that day. We do not say that if he had been alive he would have so testified as to the part he acted in that transaction. But we do say that he might have so testified, and his testimony would be supported by the fact, that the deed, though signed by him, was not acknowledged by him; that he did not hold the money; that it was in the hands of one of the joint obligors, ready to be delivered when the deed was executed, but that it never was delivered to him or his co-commissioner, but deposited in bank, not to the credit of the commissioners, or either of them, but to the credit of the holder, Abraham Paul, where it was suffered to lie without the knowledge of the commissioners, and then withdrawn by the said Paul himself. We conclude, therefore, that it was a transaction to which John M. Kiser was also a party, and Samuel Parent being dead and unable to speak to it, the door to testify is and ought to be also closed against John M. Kiser.

The court is also of opinion that the testimony of these three witnesses being excluded, there is no sufficient testimony in the cause, without intending to indicate an opinion that it would be sufficient if it was received, to warrant the decree against the appellant, or to hold his estate, or Hugh Connell, the other commissioner, liable for the money which was placed in the hands of Abraham Paul and deposited in the bank by him to his own credit, and over which said commissioners have had no control, or to absolve the said B. F. Byerly and his sureties from the liability to the commissioners for the balance of the purchase money due for the Dayton mill property, the court not intending to indicate any opinion as to the question upon whom the loss of the money so deposited in the bank

should fall, that question not properly
826 *being before them; only intending to decide that there is no sufficient evidence in the record to fix the liability of loss on the appellant, or the co-commissioner, or his intestate. The court is of opinion, therefore, to reverse the decree of the circuit court of the 15th day of June, 1876, and all the subsequent decrees, with costs to the appellants; and the cause is remanded to the circuit court for further proceedings to be had therein in conformity with this opinion.

The decree was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the circuit court erred in overruling the appellant's exceptions to the testimony of Solomon Garber, Abraham Paul and John M. Kiser, witnesses introduced by the appellees, on the ground of their incompetency to testify in this cause, and in admitting their testimony; and also in holding the estate of Samuel Parent liable for the money placed in the hands of Paul for the purpose of discharging the debt due from Byerly and his sureties, the said Garber and Paul and another, upon their bonds executed to Samuel Parent and Hugh Connell, administrators and commissioners, for the balance of the purchase money due for the Dayton mill property. And the court being further of opinion that said debt has not been discharged, and that the said property is still liable for it, it is therefore decreed and ordered that the decree of the said circuit court of June 15th, 1876, and the decree subsequent thereto be reversed and annulled, and that the appellees, William L. Mowry, sheriff of Augusta county, and as such administrator de bonis non of Jacob C. Spitler,
827 *deceased (out of the assets of his intestate in his hands to be administered), B. F. Byerly, Abraham Paul, Solomon Garber, Daniel Bowman, John M. Kiser and George Kiser, do pay to the appellant his costs by him expended in the prosecution of his appeal and supersedeas aforesaid here. And the cause is remanded to the said circuit court for further proceedings to be had therein in conformity with the views herein declared.

Decree reversed.

828 *King v. Buck & als.

September Term, 1878, Staunton.

Usury—Limit of Lender's Recovery.*—Under the act of 1874, ch. 122, § 5, in relation to interest on money, in an action on a usurious contract, the judgment is to be for the principal sum ascertained to be due after deducting the usury and interest on that principal from the date of the judgment.

***Usury—Interest on Principal Allowed from Date of Judgment.**—The principal case is cited with approval and its ruling on this subject sustained in *Munford v. McVeigh*, 92 Va. 467 and *Exchange Bank v. Fugate*, 93 Va. 823.

This was an action of debt in the circuit court of Warren county, brought by Isaac N. King against M. B. Buck as maker, and five others as endorsers, of a negotiable note for \$2,000, dated the 21st of February, 1875, and payable one hundred and twenty days after date, and \$2.61 costs of protest. The only question in this court was, whether interest was to be allowed upon the amount of money which was the consideration of the note, and if so from what time. The judgment was rendered on the 10th of May, 1877, for the principal sum of \$1,745, without interest, and for \$2.61 costs of protest, with interest from the date of the protest; and King applied to a judge of this court a writ of error and supersedeas; which was awarded. The case is stated by Judge Anderson in his opinion.

M. Walton and S. S. Turner, for the appellant.

Williams & Williams, for the appellees.

ANDERSON, J., delivered the opinion of the court.

This is an action of debt by the holder against the maker and endorsers of a **829** negotiable note for \$2,000, *and \$2.61 costs of protest, with interest thereon from the 24th of June, 1875, till payment. The defendants severally pleaded nil debit and usury, upon which issues were joined; and neither party desiring a jury, the cause was submitted to the decision of the court. And the court being of opinion that the contract sued on was usurious, and that the sum of money actually loaned by the plaintiff, was the sum of \$1,745, gave judgment for the plaintiff for that amount, without interest on said sum or on said judgment, and also for the sum of \$2.61, the costs of protest, with interest thereon. The plaintiff excepted to the said ruling and judgment of the court, and the case is brought here upon a writ of error and supersedeas to said judgment.

The errors assigned are—first, that the court by its judgment extended the plaintiff's forfeiture of interest beyond the maturity of the note; secondly, that it extended the forfeiture after judgment, and indefinitely until payment.

Section 5, of chapter 122, Acts of 1874, declares that "all contracts and assurances made, directly or indirectly, for the loan or forbearance of money or other thing at a greater rate of interest than is allowed by the preceding section, shall be deemed to be for an illegal consideration as to the excess beyond the principal amount so loaned or forborne."

The question for the court was; What is lawfully due and owing to the plaintiff? For so much he was entitled to a judgment. The principal amount loaned by him was unquestionably owing to him. For that there was a valuable and lawful consideration—the amount actually loaned to the borrower—and for that he was entitled to a judgment. But for the interest which had accrued on that sum, being an excess beyond the principal, which by the terms of

the statute shall be deemed to be for an illegal consideration, the plaintiff was **830** not entitled to a *judgment. The court is of opinion, therefore, that it was not error to disallow interest to the date of the judgment.

Was it error to disallow interest upon the judgment itself? The amount for which the judgment was rendered was not by the statute tainted with usury. According to the statute, the usury did not affect the principal sum loaned. The consideration for that (the amount loaned) was not illegal. The illegality of the consideration extended only to the excess beyond the principal sum loaned.

This section of the act of 1874, makes a radical change in the law of usury, as it existed prior to the Code of 1873. At common law the whole contract was tainted with the usury, principal and interest. And prior to the statute, as it is in the Code of 1873, when the contract was for a greater rate of interest than was lawful, the contract was declared to be void by statute. The revisors in their report of 1846, page 714, proposed, in accordance with the English statute of 5 and 6 Will. IV, ch. 41, § 1, instead of making the contract void, to declare that it shall, as to the excess, be deemed to be for an illegal consideration. This recommendation was not adopted at the revision of 1849, and the contract continued to be void until the Code of 1873, when it is made void only for the interest in excess of six per centum per annum. By the act of 1874, supra, the law was amended so as to repeal the provision which makes the contract or assurance void, and to declare only that it shall be deemed to be for an illegal consideration, as to the excess beyond the principal amount loaned or forborne. And when the judgment gives the plaintiff the principal sum loaned, without interest to the date of the judgment, it fully meets and satisfies the requirements of this section; and it is an adjudication of what is due the plaintiff at the date of the judgment. The contract

831 *becomes merged in the judgment, and the plaintiff holds his debt by a higher security, a security which charges the whole real estate of his debtor. The judgment is for a debt which is neither tainted with usury nor founded upon an illegal consideration.

As the law now is, it is eliminated from all usurious taint, and from all that was founded on any illegal consideration, and stands upon the same footing of any other debt for which there is a judgment, and is in like manner entitled to bear interest from the date of the judgment. By the 14th section of chapter 173 of Code of 1873, a verdict which does not allow interest, shall bear interest from its date, and judgment shall be rendered accordingly. The court is of opinion, therefore, that the judgment in this cause is erroneous in disallowing interest upon the debt found to be due the plaintiff from the date of the judgment. And it being an error in the judgment of the court, and not a mistake, miscalculation, or such error as could have been corrected by motion to the court which rendered the judgment under section 5 of chapter 177 of the Code, the plaintiff's rem-

edy was by writ of error and supersedeas from this court. The court is of opinion, therefore, that there is error for this cause, for which the judgment of the circuit court should be reversed. And the court here-proceeding to render such judgment as the court below should have rendered, makes the following order:

The court being of opinion, for reasons stated in writing and filed with the record, that the circuit court erred in rendering judgment for the plaintiff for the debt found to be due, without interest upon the said judgment, it is considered that the said judgment be reversed and annulled, and that the plaintiff in error recover his costs of the defendants in error, expended in the prosecution of his writ of error here. And this court proceeding to render such judgment as
832 ought to have been rendered by the *court below, it is considered that the plaintiff recovered from the defendants the sum of \$1,745, with interest from the 10th day of May, 1877, the date of the judgment, till payment; and the further sum of \$2.61, the costs of protest, with interest thereon from the 24th day of June, 1875, till payment, and his costs expended in the prosecution of his suit in the circuit court.

Decree reversed.

833 *Wolf v. The Commonwealth.

March Term, 1878, Richmond.

1. **Criminal Law—Sufficiency of Indictment.**—An indictment charged that the accused "did feloniously and maliciously burn a certain barn and the property therein, said barn and the property therein being the property of one H. H. Dulaney, and situated in the county aforesaid, which said barn and the property therein was then and there of the value of \$1,500"—Held: Sufficient under ch. 188, § 6, Code 1873.
2. **Same—Admission of Confessions in Evidence.***—A confession made by an accused person is admissible if it is not induced by any fear of punishment or hope of reward.
3. **Same—Same—Persons in Authority.**—Such a confession is not inadmissible, because it was made to a person in authority, as to the examining justice, provided the confession was voluntarily made, and not elicited by any threat or promise of benefit.

This was an indictment against George Wolf for arson in the county court of Washington. There was a verdict finding the prisoner guilty and fixing the term of his imprisonment in the penitentiary at six years, and a judgment accordingly. The prisoner thereupon obtained a writ of error to the circuit court, where the judgment was affirmed; and he then applied to this court for a writ of error, which was allowed. The case is stated by Judge Christian in his opinion.

***Criminal Law—Admission of Confessions in Evidence.**—See Mitchell's Case, 33 Gratt. 845, citing the principal case and note.

S. M. Williams, for the prisoner.

The Attorney General, for the Commonwealth.

CHRISTIAN, J., delivered the opinion of the court.

This is a writ of error to a judgment of the circuit court of Washington county, 834 affirming a judgment of the *county court of said county, convicting the prisoner of arson, and fixing the term of his imprisonment in the penitentiary at six years.

Several bills of exception were taken during the trial, but they raise only two points which this court is called upon to decide. For while there was a motion to set aside the verdict and grant a new trial, which was overruled, it does not appear that this judgment of the court was excepted to by the prisoner, nor is there any certificate of all the facts proved, or of all the evidence heard on the trial. The bills of exceptions state only so much of the evidence as was objected to as inadmissible.

The first question we have to determine is, whether the court erred in overruling the demurrer to the indictment.

The prisoner was indicted under the 6th section of chapter 188, Code 1873, which provides that "if a person maliciously burn any building, the burning whereof is not punishable under any other section of this chapter, he shall, if the building with the property therein be of the value of one hundred dollars or more, be confined in the penitentiary not less than three nor more than ten years, and if it be of less value, be so confined not less than one nor more than three years; or, in the discretion of the jury, in jail not more than one year, and be fined not exceeding five hundred dollars."

The indictment in this case charges that the prisoner "did feloniously and maliciously burn a certain barn and the property therein, said barn and the property therein being the property of one H. H. Dulaney, and situated in said county, which said barn, with the property therein, was then and there of the value of \$1,500."

The ground alleged for the demurrer, as stated by the counsel for the petitioner, is, that "the offence is not charged with sufficient certainty, there being no allegation 835 *that there was actually any property in said barn, and the said property in said barn is not specified, or in any way stated so as to give the petitioner any notice of what he was called upon to answer."

The court is of opinion that this objection is not well taken, and the court did not err in overruling the demurrer.

The indictment was framed nearly in the very language of the statute. The charge was that the accused did "maliciously burn a barn, which, with the property therein, was of the value of \$1,500." The statute does not prescribe that the property in the barn shall be specified, nor its value, independent of that of the barn, shall be proved.

It only fixes the term of imprisonment

according to the value of the building and property therein that is burned. All this is a matter of proof. If the building and property therein contained is of the value of one hundred dollars, then the punishment is by confinement in the penitentiary not less than three nor more than ten years; if both building and contents are of less value than one hundred dollars, then the punishment is for a term of not less than one nor more than three years, &c. The prisoner was not taken by surprise in any sense when he was called upon to answer the charge of having burned a barn of H. H. Dulaney, which barn, with the property contained therein, was of the value of \$1,500. It was still his privilege to show, if he could, in order to reduce the punishment, that the value of the barn and contents was less than \$100, and it was legitimate for the Commonwealth to show that it was of a greater value than \$100. All this was matter of evidence, and did not affect the sufficiency or validity of the indictment.

The next question we have to determine is, whether the court erred in admitting **836** the confessions of the prisoner *offered by the Commonwealth in evidence. These confessions and the circumstances under which they were made are set out in two bills of exceptions, marked No. 2 and 3. In the first-named, as follows:

"The Commonwealth, to further maintain the issue on her part, asked the witness, H. H. Dulaney, if the defendant had told him anything about the burning of the barn above referred to, and the witness replied that he had stated in December after said burning, in the town of Goodson, —; the defendant approached witness and told witness that he had been wanting to talk to witness and defendant's father, and the —, thinking he wanted to talk to him about the barn-burning, said to defendant to be certain not to implicate himself or any one else that was not guilty, and that he (witness), without waiting to hear what defendant then had to say, procured one Hamlett the sergeant of said town, to take prisoner in charge until he (witness) could procure a warrant for his arrest; that after witness returned the defendant, in presence of witness, and a man whom said Hamlett had procured to guard the prisoner, told the witness that he (the defendant) and Jack Ross went to the barn on the night of the burning, and that said Ross struck a match and threw it on some straw and set the barn on fire; and that no notice or warning was given to the defendant at or before the making of said statement by witness or said guard. And the counsel for the prisoner thereupon objected to the introduction of said statement in evidence; and pending the argument thereof by defendant's attorney, the witness, in answer to a question from the court to re-state his testimony, testified as follows: That Wolf told him that he and Jack Ross went there on the night the barn was burnt to burn it, and that Ross struck a match and threw it on the straw. And the defendant's attorney insisted

on his motion to exclude the whole of **837** said statement; which motion the *court overruled, and the defendant excepted. And to further maintain the issue, the attorney for the Commonwealth asked the said witness if defendant had at any time made any statement to him in regard to said burning, and if so, to state the time and circumstances under which said statements were made; and the said witness stated that after the finding of this indictment, and when the prisoner was arrested, after having escaped from —, the witness accosted prisoner and said to him that he had been at liberty, had been loose, and that he had once told witness that he had taken part in burning the barn (referring to conversation at Goodson, referred to above), and asked him if he yet said that he had helped to burn the barn. In answer to which the defendant said, Jack Ross set fire to the barn, and that he (defendant) did not, but that he was there with him, and that he had denied setting the match to the barn, and that he would not own what he was not guilty of. After the said witness had detailed the said facts above, and before he gave the answer of defendant, the defendant by attorney, objected to witness answering the question asked by the attorney for the Commonwealth as to what defendant then said; which objection the court overruled, and permitted the witness to answer the question as stated, and the defendant excepted."

The court is of opinion that the confession contained in this bill of exceptions, under the circumstances under which it was given, was clearly admissible evidence, and that the court did not err in permitting it to go to the jury.

The confession in this case was not made to one in authority, nor was it made in consequence of any threat made or promise held out to the prisoner. On the contrary, it was made to one not in authority, and so far from being made under threat or promise of reward, was voluntarily made to one who **838** had a short time before said *to prisoner "to be certain not to implicate himself or any one else that was not guilty."

The rule upon this subject was laid down by this court in the case of *Smith v. Commonwealth*, 10 Gratt. 734. Judge Lee, in a very able and elaborate opinion, in which he reviewed many of the English and American authorities, says (page 739): "The rule which may be fairly deduced from authoritative decisions on the subject is, that a confession may be given in evidence unless it appear that it was obtained from the party by some inducement of a worldly or temporal character, in the nature of a threat or promise of benefit, held out to him in respect of his escape from the consequences of the offence or the mitigation of the punishment by a person in authority, or with the apparent sanction of such a person."

The doctrines of this case were reaffirmed and approved in the case of *Thompson v. Commonwealth*, 20 Gratt. 724.

The court is therefore of opinion, that the court did not err in admitting the confession

of the prisoner as set forth in the second bill of exceptions.

We come now to consider the third and last bill of exceptions. The confession set out in that is as follows:

"The Commonwealth, further to maintain the issue on her part, introduced one W. M. Rutherford, and asked the said Rutherford if he was present at the examination of the defendant and Jack Ross before one Esquire Campbell; to which the witness replied that he was; and then asked the said witness if the defendant made any confession to or before said Magistrate Campbell; and upon objection being made by defendant's counsel to the answering of said question, the court asked the witness to state the facts surrounding the said transaction, and the witness answered that he was unable to do so, and

could not state anything that occurred, 839 except that the *said magistrate asked a question, and the defendant answered it, and the court directed said Rutherford to stand aside, and called H. H. Dulaney to the stand, and told him to state the facts occurring at the time, and said witness stated that he was present at the trial until the time that Esquire Campbell was reading the warrant to the prisoners, and then went out of the room and was absent about three minutes, and when he returned the prisoners were just in the act of sitting down; that previous to leaving the room, nothing had been said to the prisoners in relation to the charge against them, and that he did hear the prisoners asked if they were guilty or not guilty, and did not hear them reply; and thereupon the witness Rutherford was recalled, and stated that he was standing very close to the prisoners, and heard nothing said to them except the question of Esquire Campbell and their reply, and that said prisoners were standing up when they replied to the question of Esquire Campbell, and that there was a large crowd in the room, and he was unable to state what occurred; and then the court, on consideration, overruled the objection of the defendant, and permitted said witness to answer said question, in answer to which the witness said that the said magistrate (Campbell) asked the said prisoners if they were guilty or not guilty, and that the defendant (Wolf) answered, 'We are guilty;' to which ruling of the court the defendant objected, and, to save the benefit thereof, filed this his bill of exceptions, which is signed, sealed, and made a part of the record."

The question raised by this bill of exceptions differs from the one we have just been considering only in this: Here the confession was made to a person in authority; indeed, to the magistrate before whom the prisoner, together with one jointly charged with the same offence, was being examined. But in order to exclude a confession it is not sufficient, according to the rule laid down

840 *in Smith's case, *supra*, that the confession should be simply one made to a person in authority, it must also appear that the confession was made under inducement of a threat or promise of benefit. If made

voluntarily to a person in authority, or even to one having the prisoner in custody, it is still admissible.

In 1 Whart. Am. Cr. Law, §§ 689, 690, where a large number of cases, English and American, are collected, it is said: "A confession made to an officer who has the prisoner in custody is admissible, provided it was not induced by improper means." And a confession is admissible although it is elicited by questions put to a prisoner by a magistrate, constable or other person; provided, of course, it is not induced by any threat or promise of benefit. The cases referred to by Mr. Wharton fully sustain the propositions laid down by him, and are settled by the great weight of authoritative decisions on the subject. See also Joy on Confessions, page 59 (marg.), section 7, and authorities cited in notes.

The evidence set forth in this bill of exceptions shows that the confession was induced by no improper means. The magistrates simply asks the prisoners, after reading the warrant to them: "Are you guilty or not guilty?" and Wolf, the prisoner whose case is now before us, answers, "We are guilty." We think this evidence was properly admitted.

We are therefore of opinion upon the whole case, that there was no error in the judgment of the circuit court, and that the same be affirmed.

Judgment affirmed.

841 *Massie v. The Commonwealth.

March Term, 1878, Richmond.

Absent, BURKS, J.

Intoxicating Liquor—Sales Without License—Appeal—Review.—M was indicted for selling liquor at Prillman's precinct, in the county of Franklin, without a license. The jury found him guilty, and he moved to arrest the judgment because the proof was not that he sold at the house or within the curtilage at Prillman's precinct, but in the woods some three or four hundred yards from the house. The court overruled the motion and rendered judgment on the verdict. It not appearing that the bill of exceptions contains all the evidence, this court must presume that there was proof that the sale of liquor was at Prillman's precinct, and that it was in the county of Franklin.

The case is stated by Judge Moncure in his opinion.

Dillard, for the appellant.

The Attorney General, for the Commonwealth.

MONCURE, P., delivered the opinion of the court.

This is a writ of error to a judgment in a case of misdemeanor. The plaintiff in error, William Massie, was indicted in the county court of Franklin county on the 6th day of March, 1876, for that he, "on the — day of May, 1875, at Prillman's precinct, in the said county of Franklin, did sell by retail, wine, spirituous and malt liquors, and mixtures thereof, to be drunk in and at the place of

sale, without having first obtained the
 842 certificate *and a license, according to law, to keep an ordinary or a licensed eating-house at the said place of sale, against the peace and dignity of the Commonwealth of Virginia." The general issue on the plea of "not guilty" was joined in the case, which was tried by a jury on the 6th day of June, 1877, when a verdict was rendered in these words: "We, the jury, find the defendant guilty, and assess the fine at thirty dollars." An entry on the record in these words immediately follows the entry of the verdict: "And the defendant, by his attorney, desiring to move the court for an arrest of judgment and a new trial, judgment on said verdict is withheld." On the next day, to-wit: the 7th of June, 1877, it is stated in the record that on "this day came," &c., "whereupon the defendant, by his attorney, moved the court for an arrest of judgment on the verdict rendered against said defendant on yesterday, which motion being fully argued, the same is overruled; whereupon the defendant, by his attorney, tendered a bill of exceptions, which was signed, sealed and made a part of the record; and the court proceeding to render judgment on said verdict, it is considered that the Commonwealth recover against said William Massie \$30, the fine by the jury in their verdict ascertained and the costs of this prosecution."

The bill of exceptions states that "the prisoner moved the court to arrest the verdict rendered by the jury, because the evidence did not authorize or justify the same, and the court certifies that the proof in the cause showed that no liquor was sold by the defendant at the house where the elections are held, or in the curtilage of said house, known as the Prillman precinct; but it was proved that on said day the defendant did sell ardent spirits in the woods near the public road, at the distance of three or four hundred yards from the house at which the votes were polled in said precinct, and nowhere else so far as the proof disclosed; but the court re-
 843 fused to *arrest said verdict, and rendered a judgment on the same. To which opinion of the court the defendant excepts." &c.

The defendant applied to the judge of the circuit court of said county for a writ of error to said judgment of the county court, which was refused; and then he applied to this court for such writ of error, which was allowed.

The only errors assigned in the judgment are:

"1st. It appears from the certificate of the evidence furnished by the court that no liquor was sold by the defendant at the house or in the curtilage known as Prillman's precinct; but the only liquor proved to have been sold by the defendant was sold in the woods three or four hundred yards from said house, and your petitioner represents that it does not appear from said proof that the place in the woods at which said liquor was sold was in Prillman's precinct at all; and,

"2d. It does not appear from the facts proved, as certified by the court, that Prill-

man's precinct is in the county of Franklin, or that the place in the woods at which the liquor was proved to have been sold is in said county."

The court is of opinion that there is no error in the said judgment on either of the said two grounds assigned as such, or any other.

In regard to the first assignment of error, it is not charged in the indictment that "liquor was sold by the defendant at the house or in the curtilage known as Prillman's precinct," but only that it was sold "at Prillman's precinct in said county of Franklin." It is said in this assignment of error, that "the only liquor proved to have been sold by the defendant was sold in the woods three or four hundred yards from said house," and "it does not appear from said proof that the place in the woods at which said liquor was sold was in Prillman's precinct at all." A conclusive
 844 answer to this objection *is, that the bill of exceptions does not set out, nor profess to set out, all the facts proved or evidence introduced on the trial. Non constat that it was not, and the presumption is that it was, proved on the trial that the place in the woods at which said liquor was sold was in Prillman's precinct.

In regard to the second assignment of error, it is also a conclusive answer to it that the bill of exceptions does not set out, nor profess to set out, all the facts proved or evidence introduced on the trial. Non constat that it was not, and the presumption is that it was, proved on the trial, that Prillman's precinct, and also the place in the woods at which the liquor was proved to have been sold, are in said county.

The court is therefore of opinion that the said judgment ought to be affirmed.

Judgment affirmed.

845 *Lawrence v. The Commonwealth.

March Term, 1878, Richmond.

1. *Venire Facias*—Inference from Record.*

—In a trial, for a felony the record says that the defendant, being arraigned, plead not guilty to the charges against him in said indictment alleged. And a panel of sixteen jurors summoned by the sheriff was examined by the court and found free from all legal exceptions, and qualified to serve as such jurors according to law. Whereupon the prisoner erased from the panel four of the jurors, and the remaining twelve constituted the jury for the trial

**Venire Facias*—Case Overruled.—In Jones' Case, 87 Va. 65 the court expressly overrules the principal case in so far as it holds that a *venire facias* may be presumed to have regularly issued from the recital of the record. The court says: "It has been repeatedly decided by this court that a *venire* is an indispensable process, both at common law and under the statute and therefore that the omission to direct a *venire* when required is an error apparent on the record of which advantage may be taken on motion in arrest of judgment, or for the first time on a writ of error in the appellate court. Hall's Case, 80 Va. 555; Richards' Case, 81 *Id.* 110."

of the accused, to whom there was no objection, to-wit, &c. It is to be inferred that the jurors were properly summoned.

2. Jury's Oath—What the Record Must Show.*—It is not necessary that the form of the oath administered to the jury should be entered on the record; but it is sufficient if it appears from the record that they were duly sworn.

3. Presence of Prisoner—When Inferred from Record.†—It is necessary that the prisoner shall be present in person when arraigned and during his trial; but if it may be inferred from the record that he was present, that is sufficient, though it is not formally stated that he was present.

4. Same—When Unnecessary.‡—It is not necessary that the prisoner should be present when the jury which had been sent out for the night is brought in in the morning and sent to their room.

5. Practice—Introduction of Witnesses.§—The attorney for the Commonwealth may introduce witnesses in chief to sustain the charge, whose names are not written at the foot of the indictment.

6. Indictment for Rape.—The indictment for rape charges in one count that it was done by force and against the consent of the female, and that she was under the age of twelve years. The prisoner may be convicted under the indictment if the jury shall believe she was under twelve years of age, though she consented to the act.

7. Rape—Female's Age.||—The prisoner may be convicted, though the female told him she was over twelve years of age and he had reasonable
846 cause to believe that she was over that age. He takes the risk, and if she was not twelve years old he is guilty under the statute.

***Jury's Oath—What the Record Must Show.**—As supporting the rule of the principal case that it is sufficient if it appear from the record the jury were duly sworn, see *Ice's Case*, 34 W. Va. 244; *Sutfin's Case*, 22 W. Va. 771.

†Presence of Prisoner—Inference from Record.—The following cases cite the principal case with approval and said with it that if it may be inferred from the record that the prisoner was present during his trial that is sufficient though it is not formally stated that he was present. *Benton's Case*, 91 Va. 794; *Cluverius' Case*, 81 Va. 848; *Cross' Case*, 44 W. Va. 331. See also *Sperry's Case*, 9 Leigh 622.

‡Same—When Unnecessary.—In *Jones' Case*, 79 Va. 215, the court cites the principal case as authority for holding that it is not necessary for the prisoner to be present when the jury is called and sent to their room to consider of their verdict, the jury afterwards returning into court and in the presence of the prisoner rendering their verdict. In *Parson's Case*, 39 W. Va. 464, it was held that the prisoner must be present when action is had on a motion for a new trial.

§Appellate Court—When It Will Not Reverse.—In *Donohoo's Case*, 22 W. Va. 766, the court citing the principal case laid down the rule that in review the judgment of the court below the appellate court will not reverse the judgment on the ground that there is doubt of its correctness. See also *Morgan's Case*, 35 W. Va. 277; *Baker's Case*, 33 W. Va. 336; *Cluverius' Case*, 81 Va. 816 citing the principal case; *Blair & Hoge v. Wilson*, 28 Gratt. 165 and *note*.

||Carnal Abuse of Children—Consent.—As to the carnal abuse of children and the effect of their consent to the acts, see *Givens v. Com.*, 29 Gratt. 830 and 19 Am. & Eng. Enc. Law 949.

8. Appellate Court—When It Will Not Reverse.—A case in which, though if the judges of this court had been on the jury they would have found a different verdict, or if they had presided at the trial, they would have set aside the verdict and granted a new trial, as an appellate court they must affirm the judgment.

This was an indictment in the county court of King William county against Charles Lawrence for rape. The case is stated by Judge Moncure in his opinion.

George P. Haw, for the prisoner.
The Attorney General, for the Commonwealth.

MONCURE, P. This is a writ of error to a judgment of the county court of King William, rendered on the 23d day of October, 1877, against the plaintiff in error, Charles Lawrence, in a prosecution for rape. It was charged in the indictment that the said Charles Lawrence, "on the eighth day of August, in the year one thousand eight hundred and seventy-seven, and in the county aforesaid, with force and arms on and upon one Serena Coleman, a female child under the age of twelve years, to-wit: of the age of eleven years and eleven months, feloniously did make an assault; and her, the said Serena Coleman, then and there unlawfully, feloniously, violently and against her will, and by force did ravish and carnally know her, the said Serena Coleman, against the peace and dignity of the Commonwealth of Virginia." The accused pleaded not guilty to the charges against him in said indictment alleged. The case was tried by a jury, which found a verdict against him in these words:

"We, the jury, find the prisoner guilty, and ascertain his term in the state penitentiary to be ten years."

The accused moved the court to set aside the verdict, and grant him a new trial;
847 which motion was overruled *and judgment was rendered according to the verdict. The accused applied to the judge of the circuit court of said county for a writ of error to the said judgment, which writ of error was refused. He then applied to this court for such writ, which was accordingly awarded.

There were various assignments of error in the judgment, most of which were made in the petition for a writ of error to the judge of the circuit court. But an additional one was made in the petition for such a writ to this court. And still another in the oral argument of the case before this court. We will proceed to notice and dispose of these assignments of error in the order in which they were relied on in the said arguments; and.

First. The assignment made for the first time in the said petition for a writ of error to this court, which assignment is in these words: that by the record "it appears that a panel of sixteen jurors only were summoned in the case; whereas, by the law, the panel should have been composed of twenty-four, from which the jury should have been selected; and that they were not sum-

moned under a venire facias, or drawn in the manner provided by law."

It is stated in the record that "the defendant, being arraigned, pleaded not guilty to the charges against him in said indictment alleged. And a panel of sixteen jurors summoned by the sheriff, were examined by the court and found free from all legal exceptions, and qualified to serve as such jurors according to law. Whereupon, the prisoner erased from the panel four of the jurors, and the remaining twelve constituted the jury for the trial of the accused, to whom there was no objection, to-wit:" &c. And this is all that is said in the record about the summoning and constituting the jury.

The Code, ch. 202, §§ 4, 5 and 9, pp. 1245-6, as amended by the act of 1875-6, ch. 167, pp.

207-8, provides for the issuing of a **848** venire facias and the summoning *and constitution of a jury for the trial of persons accused of felony; and it is provided in section 9, as amended, that the directions of the statute shall be pursued "until a panel of sixteen jurors, free from exception, be completed. The accused shall have a peremptory challenge as to four of the panel, and the remaining twelve shall constitute the jury for the trial of the case," &c. There can be no doubt but that a venire facias was issued and other proceedings thereon had as aforesaid, though the same are not set out in the record, except from the completion of the panel of sixteen jurors as aforesaid, which fact, and the further proceedings had in the case in regard to the jury, are set out. It does not appear in the record that there was an irregularity in any of these proceedings. If there had been, it might, and no doubt would have been excepted to by the accused, who had counsel in court at the time, and thus put upon the record. There having been no such exception, the presumption is there was no such irregularity. In Stephens' case, 4 Leigh 679, it was held that in the trial for a capital felony it is not necessary that it should be expressly stated in the record that the petty jurors were freeholders, and that a motion in arrest of judgment because several of the petty jury were not freeholders; this being matter of fact not appearing in the record, is not a good reason for arresting judgment. In Bristow's case, 15 Gratt. 634, it was held that an objection to the mode of selecting the jury in a trial for murder, must be made at the time the jury are chosen, and the prisoner cannot avail himself of it after verdict. The principle of those cases applies to this.

We are therefore of opinion that there is no error in the judgment in this respect.

Second. The next assignment of error noticed in the argument, is one which was there noticed for the first time, not having

been made in the petition for a writ **849** of *error, either to the circuit court or to this court. That assignment of error is that it does not appear from the record that the jury were duly sworn, or rather that it appears that they were not duly sworn.

The counsel for the plaintiff in error, to

show the proper form of the oath to be administered to the jury in such cases, refers to 3 Rob. Pr. old ed. p. 174, where the following form is given: "You shall well and truly try and true deliverance make between the Commonwealth and the prisoner at the bar, whom you shall have in charge, and a true verdict give according to the evidence; so help you God." Also to Matthew's Criminal Dig. p. 293, note 14, in which the same form is stated.

There can be no doubt of the correctness of this form, which is generally, if not always, pursued in cases of felony, and was no doubt pursued in this case. But it is not prescribed by any law, common or statute, and one of the same import would be sufficient. It is not necessary that the form should be copied in the record, but sufficient that the jury should therein appear to have been duly sworn.

We are of opinion that it so appears in this case. It is stated in the record, after setting out the facts in regard to the arraignment and plea of the accused, and the constitution and names of the jury summoned and impanelled for his trial, that they "were sworn the truth of and upon the premises to speak." Now, this was obviously not the form of the oath administered to the jury, but was merely intended to be a statement of the fact that the jury was duly sworn. In saying that they "were sworn the truth of and upon the premises to speak," reference was made by the word premises to the proceedings immediately set forth, to-wit: the indictment, the arraignment, the plea, and the constitution of the jury. And the effect is the same as if

850 it had been said *that the jury were sworn "well and truly to try and true deliverance make between the Commonwealth and the prisoner at the bar, and a true verdict give according to the evidence." The prisoner and his counsel were in court when the jury were sworn, and might, and no doubt would, have objected if the jury had not been properly sworn. That no objection was made, shows that they were properly sworn.

Third. The next assignment of error noticed in the argument is the first assigned in the petition to the circuit judge, and is in these words: "By reference to the second page of said record it appears that the prisoner was not present when he was arraigned, but appeared by attorney. He should have been present, and the record should show that he was present. And again on the second and third pages of the record it appears that when the jury returned into court and rendered their verdict the petitioner was not present, but the record shows appeared by his attorney.

It was a principle of the common law, that a person tried for felony shall be personally present during the trial, and this has been expressly declared by statute in Virginia ever since the act of 1847, p. 148, § 2-4. See Code, ch. 202, § 3, p. 1245. And the fact of such appearance must appear on the record. 1 Ch. Cr. Law, p. 414; 3 Rob. Prac., old, 267; Mat. Cr. Dig. p. 276, § 3, note 2; State v.

Able, decided by the supreme court of Missouri in April, 1877, and reported in No. 13, vol. 4, of the Law and Equity Reporter.

But the question has been expressly decided in this state in Sperry's case, 9 Leigh 623, in which it was held by the late general court that in a prosecution for felony the accused must be arraigned and plead in person, and in all the subsequent proceedings he must appear in person, not by attorney, and such appearance in person must be shown by the record. See also Hooker's case, 13 *Gratt. 763; though in Boswell's case, 20 Id. 860, it was held that the act which provides that a person tried for felony shall be personally present during the trial does not apply before his arraignment, but before his arraignment an order may be made in his absence.

The question in this case, therefore, is whether the accused was not personally present during the trial, and whether that fact does not appear on the record.

We are of opinion that he was so present, and that the fact so appears on the record.

It is stated in this assignment of error, as we have seen, that the prisoner was not present when he was arraigned, but appeared by attorney. He had a right of course to appear by attorney, and the fact that he so appeared does not show that he was not then personally present in court, and if it otherwise appears from the record that he was then personally present, it will be sufficient.

We think that it does otherwise so appear. It is not stated that the prisoner was arraigned by attorney, which would certainly have been a very singular process. But it is merely stated that he was arraigned, which seems, *ex vi termini*, to imply that he was then personally present. Again, it is said in the same connection, that "the prisoner," not his attorney, "erased from the panel four of the jurors," &c.; which seems also to imply that he was then personally present. But what seems to be conclusive on the subject, is that at the conclusion of the proceedings of the court on that day, it is stated in the record that "the said Charles Lawrence is thereupon remanded to jail"; which shows that he had been personally present during all the proceedings which were had in the case on that day.

Again, it is stated in this assignment of error, as we have seen, that when the jury returned into court *and rendered their verdict, the petitioner was not present, but the record shows appeared by his attorney.

The prisoner was no doubt present in court on the morning of the second day of the trial when the jury were brought into court by the sheriff who had them in charge, and again sent out of court to consult of their verdict. But whether he was or not, they might have been carried to their room, which was the proper place for them until they agreed on their verdict, by the sheriff who had them in charge, and without any order of court for the purpose. Of course such an order, even though made without the per-

sonal presence of the prisoner, would not be an error in the proceedings. When on the same day the jury returned into court with their verdict, and a motion was made to set it aside and grant a new trial, which was overruled, and judgment was thereupon pronounced against the prisoner, he was, no doubt, personally present in court, for it is stated at the conclusion of the proceedings of that day, that "the prisoner is thereupon remanded to jail."

In Sperry's case, *supra*, the court said: "If it can be inferred from the circumstances that the prisoner was remanded to jail, that he was personally present during the proceedings on the 28th of April, when the verdict of conviction was found, there is no such circumstance stated in the proceedings of the preceding day. The only statement in regard to the appearance of the prisoner on that day, is that he appeared by his attorney, without any circumstance stated from which it can necessarily be inferred that he was personally present. An appearance by attorney, cannot imply that "the court erred, as set forth in the court; and therefore, the record is deficient in what the law regards as essential to be stated in such a case."

In Hooker's case, *supra*, there was nothing in the record to show the personal presence of the prisoner in court when the proceedings complained of were had against him, and therefore they were held to be erroneous.

Fourth. The next assignment of error is that "the court erred, as set forth in the first bill of exceptions, in allowing the Commonwealth's attorney to introduce, upon the examination of witnesses in chief to sustain the charge, two witnesses, whose names were not written at the foot of the indictment, and who had not been summoned, and of the intention to examine which no notice, whatever, had been given to the petitioner. And thus the accused had no opportunity to impeach said witnesses, or to contradict their statements."

No authority was referred to to sustain the position here asserted, and certainly it is unsustainable. We are of opinion that there is no error in the judgment in this respect.

Fifth. The next assignment of error is that the court erred in refusing to give the two instructions set out in the second bill of exceptions. They are as follows:

1st. "The jury are instructed that they cannot find the accused guilty of any offence under the indictment if they believe from the evidence that the girl, Serena Coleman, consented;" and,

2d. "The jury are instructed if they believe the accused did have carnal connection with Serena Coleman by her consent, and that she was under twelve years old, yet they cannot find him guilty if they also believe from the evidence, that she stated to him she was twelve years old, and that he had reasonable cause to believe that she was twelve years old."

The law on which this case is founded is as follows:

"If any person carnally know a female of the age of twelve years or more, against her will by force, or carnally know a female child under that age, he shall be, at the discretion of the jury, punished by death **854** or confined *in the penitentiary not less than ten nor more than twenty years."

It seems not to have been perfectly certain whether the prosecutor was under or over twelve years of age at the time of the alleged injury complained of; and therefore it was charged in the indictment in such manner as to be sustained by the evidence according to either alternative. The indictment might properly have contained two counts, one of them charging that she was of the age of twelve years or more, and the other that she was under that age when the alleged offence was committed—the former charging that the carnal knowledge was "against her will, by force," and the latter omitting the words "against her will, by force." Instead of that, the indictment contains but one count, which charges the offence in both aspects—that is, that the accused, "with force and arm in and upon one Serena Coleman, a female child under the age of twelve years, to-wit: of the age of eleven years and eleven months, feloniously did make an assault on her, the said Serena Coleman, then and there unlawfully, feloniously, violently, and against her will and by force, did ravish and carnally know her, the said Serena Coleman, against the peace." &c. Under this indictment the accused might properly have been convicted generally, or of either alternative embraced in the indictment, according to the evidence.

We believe that the court did not err in refusing to give the first of the said two instructions to the jury; that is, "that they cannot find the accused guilty of any offence under the indictment if they believe from the evidence that the girl Serena Coleman consented." Now, if she was under twelve years of age, her consent was immaterial, and the accused may have been found guilty, notwithstanding her consent.

We also believe that the court did not err in refusing to give the other of the **855** said two instructions to the jury; *that is, that "if they believe the accused did have carnal connection with Serena Coleman by her consent, and that she was under twelve years old, yet they cannot find him guilty if they also believe from the evidence that she stated to him she was twelve years old, and that he had reasonable cause to believe that she was twelve years old." The offence of having carnal knowledge of a female under twelve years of age is entirely independent of and unaffected by any consent of hers, or any statement of hers to him in regard to her age, or any belief, or reasonable cause of belief, on his part that she was twelve years old. If he choose to have carnal connection with a female, he must do the act at his peril in regard to her being under the age of twelve years.

Sixth. The next and last assignment of error is that the court erred in refusing to

set aside the verdict and grant a new trial, because the verdict was contrary to the law and the evidence, as stated in the third bill of exceptions, in which the facts proved on the trial are certified.

Before taking any further notice of them, it seems proper to notice here an objection taken to the verdict in the petition to this court, in which it is said that the verdict is entirely too uncertain. It is in these words: "We, the jury, find the prisoner guilty, and ascertain his term in the state penitentiary to be ten years." It is objected that "the law fixes imprisonment as a punishment, but the verdict does not, and the judgment directs imprisonment." We think there is nothing in this objection, and that the verdict is sufficiently certain.

In regard to the question whether the verdict is contrary to the law and the evidence, we have had more difficulty than on any other question arising in the case. The question was fully and ably discussed by counsel, who cited and relied on various authorities, and which are 1 Russell on Crimes, ch. 5, § 2, pp. **856** 693-7; Taylor's Medical *Jurisprudence, ch. 58, pp. 700-4; Boxley's case, 24 Gratt. 649. But without reviewing these authorities, or the facts certified in the record as having been proved on the trial, we are of opinion that while we would probably have given a verdict of not guilty if we had been upon the jury, or set aside the verdict which was given and granted a new trial, if we had presided at the trial, yet it is not a case in which this court can properly reverse the judgment for any supposed error therein in that respect, as will appear by reference to Read's case, 22 Gratt. 924, and the cases therein referred to and commented on. We must, therefore, affirm the judgment, which we now do. But, for the reasons aforesaid, we are unanimously of opinion that the case is a proper one for the exercise of executive clemency, and we therefore recommend that a pardon be granted by the governor of this Commonwealth to the accused for the offence of which he has been convicted as aforesaid.

CHRISTIAN, STAPLES, and BURKS, J's, concurred in the opinion of MONCURE, P.

ANDERSON, J., dissented. He thought a new trial should be granted. That being refused, he concurred in recommending the prisoner to the mercy of the governor.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that though the judges thereof would probably have given a verdict of not guilty in the case if they had been the jury, or set aside the verdict which was rendered if they had presided at the trial, yet there is no error in the judgment for which it can properly be reversed. Therefore, it is considered that the said judgment be affirmed; which is ordered to be certified to the county court of King William county.

857 *But the court is unanimously of opinion that the case is a proper one for the exercise of executive clemency, and therefore respectfully recommend that a

pardon be granted to the accused for the offence of which he has been convicted as aforesaid, and it is ordered that a copy of this recommendation and of the above judgment be certified to his excellency, the governor of the Commonwealth, and that a printed copy of the record in the case be also sent to him.

Judgment affirmed.

858 *Kinney v. The Commonwealth.

September Term, 1878, Staunton.

K, a negro man, and M, a white woman, both domiciled in the county of Augusta, Virginia, left Virginia and went to Washington, D. C., and were married there according to the regular forms for celebrating marriages, and after remaining absent from Virginia about ten days, returned to their home in Augusta county, Virginia, where they have since lived as man and wife. By the laws of Virginia (C. V. 1873, ch. 105, § 1), all marriages between a white person and a negro are *absolutely void*. On an indictment for lewdly and lasciviously associating and co-habiting together—HELD:

1. Marriage—Void under Virginia Laws.—

Although such marriages are not prohibited by the laws of the District of Columbia, and this marriage was performed according to the ceremonies there prescribed, it is *void* under the laws of Virginia, and the parties are liable to the indictment.

2. Same—What Law Governs.—

While the *forms and ceremonies* of marriage are governed by the laws of the place where the marriage is celebrated, the *essentials* of the contract depend upon and are governed by the laws of the country where the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated.

The facts are fully stated by Judge Christian in his opinion.

J. M. Quarles, for the appellant.

The Attorney General, for the Commonwealth.

CHRISTIAN, J. The plaintiff in error was indicted in the county court of Augusta
859 county for lewdly associating *and cohabiting with Mahala Miller. He was found guilty and a fine assessed against him to the amount of \$500. The case was taken up on writ of error to the circuit court,

***Marriage — What Law Governs.** — In *Greenhow v. James*, 80 Va. 636, the court cites the principal case approvingly. The headnote in that case states the law as follows: "The law of the place of its celebration governs as to the forms of ceremony which constitute marriage. The law of the domicile governs as to the capacity of the parties. But the rule which requires that 'a marriage valid where celebrated, is valid every where else' has no application to a marriage entered into in a foreign country, in contravention of the public policy and statutes of the country of the domicile of the parties which pronounce marriage between them not only absolutely void but criminal."

See, however, dissenting opinion by RICHARDSON, J., distinguishing that case from the principal case. See also 1 Min. Inst. (3rd Ed.) 276.

which affirmed the judgment of the county court, and to this latter judgment of the circuit court a writ of error was awarded by one of the judges of this court. The bill of exceptions taken on the trial, in the county court, which brings up before this court the only question we have to determine, is in these words:

"Be it remembered, that on the trial of the indictment in this case, the Commonwealth, to sustain the issue on her part, proved to the jury that the defendant, Andrew Kinney, and a certain Mahala Miller, on the 1st day of January, 1877, and from that time to the 27th day of August, 1877, in the county of Augusta and state of Virginia, did live and associate together as man and wife; that said Andrew Kinney is a negro, and said Mahala Miller a white woman, and that in November, 1874, they, as citizens of the state of Virginia, regularly domiciled in the county of Augusta, left their own state for the purpose of being married in the District of Columbia, and in ten days thereafter returned to this state to live, and have since lived together as man and wife in said county of Augusta."

The defendant, to sustain the issue on his part, proved that he and the said Mahala Miller were married in the District of Columbia on the 4th day of November, 1874, in accordance with the laws of said district.

Whereupon the counsel for the defendant moved the court to instruct the jury as follows, that is to say: that under the circumstances proven, the marriage of Andrew Kinney and Mahala Miller, in the District of Columbia, on the 4th day of November, 1874, is valid and a bar to this prosecution, and that they must find a verdict of acquittal. But the court refused to give the said instruction to the jury, and instructed

860 the jury as follows: *—"That the said marriage of the defendant and said Mahala Miller was, under the circumstances proven, but a vain and futile attempt to evade the laws of Virginia, and override her well known public policy, and is therefore no bar to this prosecution; to which opinion and action of the court, in refusing the said instruction asked for by the counsel for the defendant, and in giving the said instruction given by the court, the defendant, by his counsel, excepts, and tenders this his bill of exceptions, which he prays may be signed, sealed and made a part of the record in this case."

The sole question submitted by this bill of exceptions for the adjudication of this court is, Whether the alleged marriage celebrated in the District of Columbia, "in accordance with the laws of said district," as certified in the certificate of facts, is a bar to this prosecution? It is conceded that a marriage in this state between a white person and a negro is void. It is not only prohibited by the statute law, but penalties are imposed for its violation. The 1st section of ch. 105, Code 1873, provides that "all marriages between a white person and a negro, and all marriages which are prohibited by law on account of either of the parties having a former wife or

husband then living, shall be absolutely void without any decree of divorce or other legal process." In the same section other marriages prohibited by law therein mentioned, are voidable only—that is, declared to be void only from the time they shall be so declared by decree of divorce or nullity. These are cases of marriages within the prohibited degrees of consanguinity or affinity, or where either party was insane or incapable from physical causes. Such marriages are void when declared to be void by decree of divorce or nullity, or when the parties are convicted under the third section of chapter 192, which denounces certain penalties against marriages of parties within the prescribed degrees of consanguinity or affinity.

861 *But marriage between a white person and a negro is declared by statute to be absolutely void without any decree of divorce or other legal process. If, therefore, the marriage had been celebrated in this state between Andrew Kinney, who is a negro, and Mahala Miller, who is a white woman, no matter by what ceremonies or solemnities, such marriage would have been the merest nullity, and the parties must have been regarded, under our laws, as lewdly associating and cohabiting together, and obnoxious to the penalties denounced by our statute against this gross offence.

Does the marriage of the parties in the District of Columbia, where marriages between white persons and negroes are not prohibited, present a bar to this prosecution and put the parties on any different footing when arraigned before our tribunals for a violation of the laws of this state? It is admitted that Andrew Kinney and Mahala Miller had their domicile in Augusta county, in this state; that they remained out of the state only ten days after their marriage, and returned here, and that this county is still their domicile.

It is plain to be gathered from the whole record, if not indeed admitted, that these parties, knowing they could enter into no valid marriage contract in this state, went to the city of Washington for the purpose of evading the statute law of this state; were there married, and in a few days returned to this state. They never changed nor designed to change their domicile. It was here then; it is here now.

The important question, and one of first impression in this state is: Does the marriage in the District of Columbia, made in fraudem legis of this state, protect the parties in a prosecution in this state for a violation of its penal laws in this most important and vital branch of criminal jurisprudence,

862 affecting the moral well being *and social order of this state? Must the lex loci contractus or the lex domicilii prevail?

There can be no doubt as to the power of every country to make laws regulating the marriage of its own subjects; to declare who may marry, how they may marry, and what shall be the legal consequences of their marrying. The right to regulate the institution of marriage; to classify the parties

and persons who may lawfully marry; to dissolve the relation by divorce; and to impose such restraints upon the relation as the laws of God, and the laws of propriety, morality and social order demand, has been exercised by all civilized governments in all ages of the world.

It is insisted, however, by the learned counsel for the plaintiff in error, in the ingenious and able argument which he addressed to this court, that conceding the power of every state and country to pass such laws, yet they never act extra territorial, but must be confined, with rare exceptions, to such marriages as are contracted and consummated within the state where they are prohibited. He invokes for his client in this case the rule laid down by jurists and text-writers, that "a marriage valid where celebrated is good everywhere."

This is undoubtedly the general rule. But there are certain exceptions to this general rule, and while in its application and the affirmance of certain exceptions thereto, there was for a long time much confusion in the authorities and conflict in the cases, I think it may now be affirmed that there are exceptions to this general rule as well established and authoritatively settled as the rule itself.

Mr. Justice Story, in his valuable work on the Conflict of Laws, § 113, probably lays down the general rule contended for more strongly than any other modern author. He says: "The general principle certainly is,

863 is to be decided *by the law of the place where celebrated. If valid there it is valid everywhere. It has a legal ubiquity of obligation. If invalid there it is equally invalid everywhere." But he immediately adds in the following sections (113a): "The most prominent, if not the only known exceptions to the rule, are those marriages involving polygamy and incest, those positively prohibited by the public laws of a country from motives of policy, and those celebrated in foreign countries by subjects entitling themselves under special circumstances to the benefit of the laws of their own country."

In the comparatively recent case of *Brook v. Brook*, reported in 9 H. L. C. 193 (marg.), 145 (bottom), I find the most elaborate, learned and satisfactory discussion of this general rule on the subject of marriage, with the exceptions thereto, that I have seen in any of the numerous cases on the subject. The facts of that case and the principles therein declared are singularly apposite to the case in hand.

The Act of 5 and 6 William, 4, ch. 54, enacts that all marriages which should thereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity, "shall be absolutely null and void to all intents and purposes whatsoever." The marriage of a man with his wife's sister is included in this prohibition.

William Leigh Brook, after the death of his first wife, intermarried with Mrs. Emily Armitage, the lawful sister of his former wife. The marriage was celebrated at a Lutheran church at Wansbeck, near Altona,

in Denmark. At the time of the Danish marriage, both Mr. Brook and Mrs. Armitage were lawfully domiciled in England, and had merely gone over to Denmark on a temporary visit. According to the laws of Denmark, where the marriage was celebrated, it was not unlawful for a man to marry his wife's sister. In a suit among the heirs of

864 Brook, Vice-Chancellor Stuart, with whom *sat Mr. Justice Cresswell, were of opinion, and so declared, that the marriage in Denmark was, by the laws of England, invalid. The case was carried up to the house of lords. It was there considered with that great deliberation and carefulness characteristic of that great tribunal. Opinions were delivered by the lord chancellor (Lord Campbell), Lord Cranworth, Lord St. Leonards, and Lord Wensleydale. After reviewing a number of English and some American cases, the lord chancellor said: "They (the appellants) rest their case entirely upon the fact that the marriage was celebrated in a foreign country, where the marriage of a man with the sister of his deceased wife is permitted." There can be no doubt of the general rule that a foreign marriage, valid according to the law of a country where it is celebrated, is valid everywhere. But while the forms of entering into the contract of marriage are to be regulated by the *lex loci contractus*, the law of the country in which it is celebrated, the essentials of the contract depend upon the *lex domicilii*, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated. Although the forms of celebrating the foreign marriage may be different from those required by the law of the country of domicile, the marriage may be good everywhere. But if the contract of marriage is such inessentials as to be contrary to the law of the country of domicile, and it is declared void by that law, it is to be regarded as void in the country of domicile, though not contrary to the law of the country in which it was celebrated. This qualification upon the general rule "that a marriage valid where celebrated is good everywhere," he adds, is to be found in the writings of many eminent jurists who have discussed the subject, among whom he mentions Huberus and Story.

865 Lord Cranworth states that the marriage referred to in *the general rule is not a marriage prohibited by the laws of the country to which the parties contracting matrimony belong. The other lords, as well as Lord Cranworth, concur fully in the opinion of the lord chancellor.

Whatever conflict of authority there may have been on this subject, it may now be affirmed, since the decision of *Brook v. Brook*, that in England, a marriage prohibited by law in that country, between parties domiciled there, and declared by act of parliament to be absolutely void, is invalid there no matter where celebrated. In this country the same doctrine is affirmed in North Carolina, Louisiana and Tennessee. See *Williams v.*

Oates' ex'or, 5 Ired. R. 535; *State v. Kennedy*, 76 North Car. 251; *State v. Ross*, 77 North Car. S. C. Central Law Journal, April, 77; 10 La. An. 411, *Dupre v. Boulad's ex'or*.

Whenever the question has arisen in the southern states, it has been held that a marriage between a white person and a negro, although the marriage be celebrated in a state where such marriages are not prohibited, is void in the state of the domicile, and when they go to another state temporarily, and for the purpose of evading the law, and return to their domicile, such marriage is no bar to a criminal prosecution. And such is the law of this state. It is now so declared by statute. See Sess. Acts of 1877-8. The statute, however, was passed after the marriage of the parties in this case. But without such statute, the marriage was a nullity. It was a marriage prohibited and declared "absolutely void." It was contrary to the declared public law, founded upon motives of public policy—a public policy affirmed for more than a century; and one upon which social order, public morality, and the best interests of both races depend. This unmistakable policy of the legislature, founded, I think, on wisdom and the moral development of both races, has been shown by 866 not only declaring marriages *between whites and negroes absolutely void, but by prohibiting and punishing such unnatural alliances with severe penalties. The laws enacted to further and uphold this declared policy would be futile and a dead letter if in fraud of these salutary enactments, both races might, by stepping across an imaginary line, bid defiance to the law, by immediately returning and insisting that the marriage celebrated in another state or country, should be recognized as lawful, though denounced by the public law of the domicile as unlawful and absolutely void. No state will permit its citizens to violate its laws by such evasions. But the law of the domicile will govern in such case, and when they return, they will be subject to all its penalties, as if such marriage had been celebrated within the state whose public law they have set at defiance.

There is one American case which is directly opposed to the principles herein declared, the facts of which are precisely the same as in the case before us. It is the case of *Medway v. Needham*, 16 Mass. R. 157, which was strongly relied on by the learned counsel for the plaintiff in error as authority to govern this case. But I think that case is not supported by authority nor grounded on any sound principles of law. That was the case of a marriage between a white person and a negro. The parties were domiciled in Massachusetts, whose laws at that time prohibited such marriages. They went into Rhode Island, where such marriages were lawful, were there married, and returned to Massachusetts. The supreme court of that state held the marriage to be valid, and declared, in an elaborate opinion, that "a marriage which is good by the laws of the country where it is celebrated, is valid in every other country; and although it should

appear that the parties went into another state to contract such marriage, with a view to evade the laws of their own country, the marriage in the foreign country will
 867 *nevertheless be valid in the country in which the parties live."

In commenting on this case, the lord chancellor, in *Brook v. Brook*, supra (219), says: "I cannot think it is entitled to much weight, for the learned judge admitted that he was overruling the doctrine of Huberus and other eminent jurists; he relied on decisions in which the forms only of celebrating the marriage in the country of celebration and the country of domicile were different; and he took the distinction between cases where the absolute prohibition of marriage is forbidden on motives of policy, and where the marriage is prohibited as being contrary to religion on the ground of incest. I, myself, must deny the distinction. If a marriage is absolutely prohibited in any country as being contrary to public policy and leading to social evils, I think that the domiciled inhabitants of that country cannot be permitted, by passing the frontier and entering another state in which the marriage is not prohibited, to celebrate a marriage forbidden by their own state, and immediately returning to their own state, to insist on their marriage being recognized as lawful."

Lord Cranworth, referring to the same case, said: "I also concur entirely with my noble and learned friend that the American decision of *Medway v. Needham*, cannot be treated as proceeding on sound principles of law.

"The province or state of Massachusetts positively prohibited by its laws, as contrary to public policy, the marriage of a mulatto with a white woman; and on one of the grounds, pointed out by Mr. Story, such a marriage ought certainly to have been held void in Massachusetts, though celebrated in another province where such marriages were lawful."

With such condemnation, from so high a source, of this decision as authority, and when it is opposed by the decisions of our sister southern states above referred to,
 868 and contrary *to sound principles of law. I think, though a case exactly in point upon its facts, it can have but little weight in forming our judicial determination of the question before us in this case.

There is another American case also relied on by the counsel for the plaintiff in error for the doctrine that "a marriage valid where celebrated is valid everywhere." It is a Kentucky case, *Stevenson v. Gray*, reported in 17 B. Monr. R. 193. That was a marriage between a nephew and his uncle's wife. Such a marriage was prohibited in Kentucky, but not in Tennessee. The parties went into Tennessee, and were there married and returned to Kentucky. It was held that the marriage was valid in Kentucky. But it is to be noted that such marriages are not declared by the Kentucky statute absolutely void, but voidable only—that is, to be avoided by judgment of a district court or court of

quarterly sessions. The reasoning of the judge who delivered the opinion of the court in that case, shows that he treats the case of a marriage voidable only, and not ipso facto void. If such marriage had been declared absolutely void by the Kentucky statute, the decision of the court, no doubt, would have been different.

In the seventh edition of Story's "Conflict of Laws," p. 178, the editor adds a section in which he says: The limitation defined by Lord Campbell, chancellor, in *Brook v. Brook*, is certainly characterized by great moderation and good sense; that while the form of the contract, the rites and ceremonies proper or indispensable for its due celebration, are to be governed by the laws of the place of the contract or of celebration, the essentials of the contract depend upon the *lex domicilii*, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated. Hence, if the incapacity of the parties is

such that no marriage could be solemnized between *them * * * and,
 869 without changing their domicile, they go into some other country where no such limitation or restriction exists, and there enter into the formal relation with a view to return and dwell in the country in which such marriage is prohibited by positive law, it is but proper to say that a proper self-respect (of the state or government in prohibiting such a marriage) would seem to require that the attempted evasion would not be allowed to prevail.

I have thus considered, at length, the authorities, English and American, on this question, because it is one of first impression in this court, and because it is a question which materially affects public morality, social order and the best interests of both races. The public policy of this state, in preventing the intercommingling of the races by refusing to legitimate marriages between them has been illustrated by its legislature for more than a century. Every well organized society is essentially interested in the existence and harmony and decorum of all its social relations. Marriage, the most elementary and useful of all, must be regulated and controlled by the sovereign power of the state. The purity of public morals, the moral and physical development of both races, and the highest advancement of our cherished southern civilization, under which two distinct races are to work out and accomplish the destiny to which the Almighty has assigned them on this continent—all require that they should be kept distinct and separate, and that connections and alliances so unnatural that God and nature seem to forbid them, should be prohibited by positive law, and be subject to no evasion.

Upon the whole case, I am of opinion that the marriage celebrated in the District of Columbia between Andrew Kinney and Mahala Miller, though lawful there, being positively prohibited and declared void by

the statutes of this state, is invalid
870 here, and that said marriage *was a
mere evasion of the laws of this state,
and cannot be pleaded in bar of a criminal
prosecution here. If the parties desire to
maintain the relations of man and wife, they
must change their domicile and go to some
state or country where the laws recognize
the validity of such marriages.

Upon the whole case, I am of opinion
that there is no error in the judgment of the
circuit court affirming the judgment of the
county court, and that both be affirmed by
this court.

The other judges concurred in the opin-
ion of CHRISTIAN, J.

Judgment affirmed.

INDEX.

ACTIONS.

1. The charter of a city having provided for a board of police commissioners, and vested in them the power of removing the chief of police (who is a state officer), only giving to the mayor the power of suspending the said officer for a short time, if the mayor removes the officer from his office he exceeds his power, and is responsible to the officer in a civil action for damages.

Burch v. Hardwicke, 24

ALIMONY.

1. It may be there are cases in which the court might refuse a divorce, and yet give alimony to the wife. But if the husband is willing to be reconciled to the wife upon terms she can properly accept, if he has not abandoned her, if his conduct has not been such as to justify her separating from him, she is not entitled to alimony.

Lathan, by, &c., v. Latham, 307

APPEALS.

1. Upon a bill by judgment creditors of C to subject two pieces of real estate held by different parties to the satisfaction of their judgments, there is a decree dismissing the bill as to one of these parties, from which there is no appeal; and there is a subsequent decree subjecting the other parcel of land, and the holder of this land obtains an appeal from this last decree. This appeal does not bring up the first decree; and the appellees cannot set up any objections to that decree upon this appeal.

Burkholder & als. v. Ludlam & als., 255

2. See Appellate Court, No. 5, and Price v. Thrash, 515

APPELLATE COURT.

1. Where the whole matter of law and fact is submitted to the court below, and its decision is based upon the mere credibility of the witnesses, it will not be disturbed by the appellate court, unless palpably wrong.

Cheatham v. Hatcher & als., 56

2. But this principle has no application in a case where the decision of the lower court proceeded, not upon the credit to be given to the witnesses, but upon a rule of law supposed by it to be correct, but in fact erroneous.

Idem, 56

3. When an appellate court cannot review the action of the court below in refusing to set aside a verdict on an issue out of chancery.

See Vendor and Purchaser, No. 3, and Ayres & als. v. Robins, 105

4. Where a deposition is taken and read without objection in the court below, it is

too late to object to it for the first time in the appellate court.

Burkholder & als. v. Ludlam & als., 255

5. Bill by T, a judgment creditor of P, against P and his alienees, to subject to the satisfaction of his judgment, the land still held by P, and the lands in the hands of the alienees, charges that the deeds to these alienees were fraudulent and without consideration. The bill is taken for confessed as to all the parties but P, who answers denying the fraud, and saying they were on valuable consideration. The court below holds the deeds to have been fraudulent, and decrees a sale of the land; and P alone appeals—HELD: The alienees are the parties interested in this question, and they not having appealed, P cannot question the fraud in this court.

Price v. Thrash, 515

874 *6. Where there is a mere irregularity in an interlocutory decree, the appellate court will amend the decree in that respect, and as amended affirm it with costs to the appellee.

Idem, 515

7. A right to land set up by a caveator in his petition for appeal, but not set up in the court below, cannot be considered by the appellate court.

See Caveats, No. 5, and

Trotter & als. v. Newton & al., 582

8. One party to a trial of an issue out of chancery objects to proof of statements made by another party, and being overruled excepts. Yet as the exception does not state what the statements were, the appellate court cannot know that he was injured by them.

Steptoe v. Pollard, 689

9. It being an issue out of chancery, the court might render a decree in the cause upon the proper pleadings and evidence, without regarding any improper evidence, and if the competent evidence justifies the decree, it will not be reversed because incompetent evidence was admitted before the jury.

Idem, 689

10. M was indicted for selling liquor at Prillman's precinct, in the county of Franklin, without a license. The jury found him guilty, and he moved to arrest the judgment because the proof was not that he sold at the house or within the curtilage at Prillman's precinct, but in the woods some three or four hundred yards from the house. The court overruled the motion and rendered judgment on the verdict. It not appearing that the bill of exceptions contains all the evidence, this court must presume that there was proof that the sale of liquor was at Prillman's precinct, and that it was in the county of Franklin.

Massie's case, 841

11. A case in which, though if the judges of this court had been on the jury they

would have found a different verdict, or if they had presided at the trial, they would have set aside the verdict and granted a new trial, as an appellate court they must affirm the judgment. *Lawrence's case*, 845

ATTACHMENTS.

1. A purchaser for value of land without notice of an attachment served upon it, but not docketed, is entitled to hold it free of the attachment lien.

Cammack v. Soran & al., 292

2. An attaching creditor can have no judgment against a garnishee until he has first established his claim against his debtor.

Withers v. Fuller & als., 547

3. The county court has no jurisdiction, at a monthly term of the court, to render a judgment in favor of an attaching creditor against his debtor. Such a judgment is not simply voidable, but it is absolutely void, and cannot be the foundation for any subsequent proceeding. *Idem*, 547

4. A county court may at its monthly term provide for the preservation of attached effects, and a garnishee having admitted his indebtedness to the debtor, the court may order him to pay his debt to a receiver appointed by the court; and a payment to the receiver by the garnishee is a valid payment, and a discharge of his indebtedness as to the attaching creditor. *Idem*, 547

5. What constitutes a residence in the state within the meaning of the statute in relation to attachments.

See *Domicile and Residence, passim*, and

Long v. Ryan & al., 718

BANKRUPTS.

1. Only the estate of a bankrupt, whatever it may be, at the time of his becoming such, including any estate he may have aliened by an act fraudulent and void as to his creditors, is vested in his assignee in bankruptcy for the benefit of his creditors. And therefore no estate which may have been sold by him to a bona fide purchaser for valuable consideration fully paid, prior to the act of bankruptcy, becomes so vested in said assignee.

McAden & als. v. Keen & als., 400

Barr, assignee, v. White & als., 531

875 *2. A judgment creditor of a bankrupt whose judgment is a lien upon any estate bona fide sold and conveyed by the bankrupt, before his bankruptcy, may claim and secure in the proceeding in bankruptcy, his portion of the estate of the bankrupt, in virtue of his said judgment, without accounting or giving credit for anything on account of the lien of his judgment upon the estate so sold and conveyed. *Idem*, 400

3. Though such creditor may have so claimed and received in the proceeding in bankruptcy, his portion of the estate of the bankrupt, such judgment creditor may, by a suit in equity, enforce the lien of his said

judgment upon the estate bona fide conveyed before the act of bankruptcy, for the recovery of any balance of said judgment which may remain unsecured in the proceeding in bankruptcy; and that, though he may not, in the said proceeding, have asserted or given any notice of the lien of his said judgment upon the estate so sold and conveyed.

Idem, 400

4. When a state court having jurisdiction of a case in equity is entitled to hold it though the defendant is declared a bankrupt.

See *Practice in Chancery, No. 5*, and *Barr, assignee, v. White & als.*, 531

5. When in such case the assignee is concluded by the action of the state court.

See *Practice in Chancery, No. 5*, and *Idem*, 531

BONDS.

1. A bond which has been assigned by the obligee, is paid to the obligee before it is due, without notice of the assignment. The payment is valid, and the assignee cannot recover upon the bond from the obligor.

Preston v. Grayson County, 496

2. When and in what order a prior vendor's lien upon land will be set off upon bonds given to the subsequent vendor of the land and assigned at different dates to different persons.

See *Liens, No. 4*, and *Armentrout's ex'ors & als. v. Gibbons & als.*, 632

CAVEATS.

1. In a case of caveat founded on the alleged better right of the caveator to the land in controversy, the first enquiry is as to his title or interest in the subject.

Trotter & als. v. Newton & al., 582

2. The caveator cannot recover upon the mere infirmity of the title of the caveatee; for however defective that may be, no one has a right to interpose for the purpose of preventing him from carrying his entry into grant, unless he has a better right, legal or equitable, in himself. *Idem*, 582

3. The caveator must state in his caveat the grounds on which he claims the better right to the land in controversy; and he will not be permitted to abandon on the trial the right which he has set out in his caveat as that under which he claims, and prove a different right. *Idem*, 582

4. In February, 1796, D obtained a grant for 4,660 acres of waste mountain land; the grant showing that there was excluded from the grant 47½ acres of prior claims of F. In 1854, T bought D's land at a judicial sale. In 1873, N laid a warrant on the 47½ acres and applied for a grant, and T filed his caveat to prevent the issue of the grant; and stated as the grounds of his claim, among others, 1st. That F had entered and surveyed the land, and it did not appear that his right had ever been forfeited; and, 2d. That T had been in possession of the land under color of title for more than twenty years, paying taxes upon it—HOLD:

1. T cannot set up title in F to defeat the caveatee; but must show a better right in himself. *Idem*, 582

2. As T only purchased the land of D, which did not include the land in controversy, and does not connect himself with the right of F, he must show an exclusive, actual and continued possession under a colorable claim of title, for the period required by the statute to ripen his possession into a valid title. *Idem*, 582

3. The whole tract being waste mountain land, and the evidence *not showing any continued possession of the land in controversy, T cannot maintain his caveat. *Idem*, 582

5. In the petition for an appeal T states that he had located a warrant on the land in controversy, and claims that he is protected by the provisions of § 14, ch. 108, Code of 1873—*Held*:

1. That the statute only applies to a party who has actual possession and claim, which T did not have. *Idem*, 582

2. The claim not having been made in the court below, cannot be considered in the appellate court. *Idem*, 582

3. This ground of claim not having been stated in the caveat, cannot be afterwards set up. *Idem*, 582

CONFEDERATE CONTRACTS.

1. On a contract for the sale of land by M to C, a bond dated July 2, 1863, for \$3,000, payable on demand, is given for a balance of the purchase money, and a deed of trust to secure it. In December, 1867, C estimates the value of the \$3,000 as of Confederate money at the date of the bond, in United States currency, adds interest on this sum to date of tender, then adds the premium on gold, and tenders the amount to M in discharge of his bond. M, claiming that the bond was to be paid in good money, refuses to receive it. C then gives him notice, under section 5 of the adjustment act of 1866, to proceed to institute proceedings for the recovery of his debt; but M does not institute any proceedings to recover his debt until October, 1872, when the trustee advertises the land for sale, and C enjoins it—*Held*:

1. Under the evidence the debt was to be paid in Confederate money, and the amount tendered was the proper amount.

Compton v. Major & al., 180

2. The case is to be governed by the act of 1866, and not by the amended act of 1867, and M is only entitled to the amount tendered without interest. *Idem*, 180

3. The statute providing that the creditor shall be barred from all legal remedy whatever founded on such debt or contract, to recover more than the sum tendered, without interest, this statute includes the remedy by sale under the deed of trust.

Idem, 180

CONFEDERATE INVESTMENTS.

1. When investments by an executor in Confederate bonds, though under an order of court, are invalid.

See Executors and Administrators, No. 3, and

Carter v. Dulaney & als., 192

2. When investments by a trustee in Confederate bonds invalid.

See Trusts and Trustees, No. 2, and

Coltrane v. Worrell, 434

CONFESSIONS.

1. A confession made by an accused person is admissible, if it is not induced by any fear of punishment or hope of reward.

Wolf's case, 833

2. Such a confession is not inadmissible, because it was made to a person in authority, as to the examining justice, provided the confession was voluntarily made, and not elicited by any threat or promise of benefit.

Idem, 833

CONVEYANCES—FRAUDULENT.

1. Upon the facts of this case—*Held*: That no fraud or knowledge of fraud in a previous grantor of the land is brought home to the grantor in a deed of trust to secure a debt, or to the creditor.

Moore & als. v. Sexton's ex'x, 505

2. If B, a judgment debtor, purchases land and procures it to be conveyed to J, and it is conveyed to J, as the purchaser, and J conveys it to secure a bona fide debt, the creditor not being informed that it had been so purchased by B and conveyed to J, the judgment creditor of B has no lien upon the land for his debt as against the creditor under the deed of trust. *Idem*, 505

877 *3. In the case of a deed to a trustee for the separate use of a married woman, the consideration paid was in money derived from her earnings, and there was no agreement, either ante or post nuptial, that she should be entitled to her earnings, and the husband, though during the time of these earnings generally absent from home, had not deserted her. The earnings of the wife were the property of the husband, and the real estate thus purchased is subject to pay his debts.

Campbell v. Bowles' adm'r & als., 652

CORPORATIONS.

1. K, as the general freight and ticket agent of the R. & P. R. R. Co., gave a bond with sureties. The rule of the company was that he should settle monthly; and though there was no rule on the subject, it was expected that freight and tickets should be paid for in cash. K seems to have given credit at his own risk, to such persons as he chose, for the freight, and this was known by the president, who remonstrated with him for doing it. He did not settle his accounts promptly, and the deficit grew for eighteen months, when he was dismissed. There was no fraudulent concealment of these facts by the officers of the company, though the sureties of K were not informed of them—*Held*:

1. The sureties are not released from their liability for the default of K, by

the knowledge of the officers of the company that he gave credit for the freight delivered. And if there had been a rule that freight should be paid for in cash, and that rule had been changed after the execution of the bond, that would not have released the sureties.

Richmond & Petersburg R. R. Co.

v. Kasey & als., 218

2. There having been no fraudulent concealment of the fact that K did not settle promptly, the failure to inform the sureties of the fact, did not release them from their liability for the default of K.

Idem, 218

2. The rules and regulations of a corporation made for the government of the conduct of its officers, do not become terms and conditions of the bond or its officers unless such an intention is expressed on the face of the bond.

Idem, 218

3. In an action against a railroad company it is not necessary to aver in the declaration that it is a corporation; nor is it necessary to prove on the trial that the defendant is a corporation, unless with the plea there is filed an affidavit denying that it is. The court will ex officio take notice of the fact.

Balt. & Ohio R. R. Co. *v. Sherman's adm'r.*

602

COUNTIES.

1. The constitution of the state does not authorize the county authorities to assess property for taxation and levy taxes upon it independent of the action of the legislature.

Va. & Tenn. R. R. Co. *v. Washington County,*

471

2. Under the present legislation of the state the county authorities can only levy a tax upon such property as by law is assessed with state taxes in the county.

Idem, 471

3. Under the present legislation of the state, county authorities cannot levy a tax on the real estate of railroads in the county, either for county, township, school or road purposes.

Idem, 471

COUNTY COURTS.

1. The county court has no jurisdiction at a monthly term of the court, to render a judgment in favor of an attaching creditor against his debtor. Such a judgment is not simply voidable, but is absolutely void, and cannot be the foundation for any subsequent proceeding.

Withers *v. Fuller & als.,*

547

2. A county court may at its monthly term, provide for the preservation of attached effects, and a garnishee having admitted his indebtedness to the debtor, the court may order him to pay his debt to a receiver appointed by the court; and a payment to the receiver by the garnishee is a valid payment, and a discharge of his indebtedness as to the attaching creditor.

Idem, 547

3. An order of the county court setting

apart a homestead for the widow upon the ex parte application of the widow, is of no effect as against the heirs of the husband.

Helm *v. Helm's adm'r & als.,*

404

CRIMINAL JURISDICTION AND PROCEEDINGS.

1. In a trial for a felony the record says that the defendant, being arraigned, plead not guilty to the charges against him in said indictment alleged. And a panel of sixteen jurors summoned by the sheriff, was examined by the court and found free from all legal exceptions, and qualified to serve as such jurors according to law. Whereupon the prisoner struck from the panel four of the jurors, and the remaining twelve constituted a jury for the trial of the accused, to whom there was no objection, to-wit, &c. It is to be inferred that the jurors were properly summoned.

Lawrence's case, 845

2. It is not necessary that the form of the oath administered to the jury should be entered on the record; but it is sufficient if it appears from the record that they were duly sworn.

Idem, 845

3. It is necessary that the prisoner shall be present in person when arraigned and during his trial; but if it may be inferred from the record that he was present, that is sufficient, though it is not formally stated that he was present.

Idem, 845

4. It is not necessary that the prisoner should be present when the jury, which had been sent out for the night, is brought in in the morning and sent to their room.

Idem, 845

5. The attorney for the commonwealth may introduce witnesses in chief to sustain the charge, whose names are not written at the foot of the indictment.

Idem, 845

6. The indictment for rape charges in one count that it was done by force and against the consent of the female, and that she was under twelve years of age. The prisoner may be convicted under the indictment if the jury shall believe she was under twelve years of age, though she consented to the act.

Idem, 845

7. The prisoner may be convicted, though the female told him she was over twelve years of age and he had reasonable cause to believe that she was over that age. He takes the risk, and if she was not twelve years old he is guilty under the statute.

Idem, 845

8. A case in which, though if the judges of this court had been on the jury they would have found a different verdict, or if they had presided at the trial they would have set aside the verdict and granted a new trial, as an appellate court they must affirm the judgment.

Idem, 845

DEEDS.

1. A deed conveying land and retaining a vendor's lien, if duly recorded, is notice of the lien to subsequent purchasers of the land, though the record of the deed may have been

destroyed, and such purchaser may not have known that a lien had been reserved.

Armentrout's ex'ors & als. *v.* Gibbons & als., 632

DÉPOSITIONS.

1. Notice is given to take depositions at two distant places on the same day. The other party may attend at one of the places, and object to the depositions taken at the other place for want of notice; but if he attends by his counsel at both places, he cannot except to the depositions taken at either or both places.

Latham, by, &c., *v.* Latham, 307

2. Where a deposition is taken and read in the court below, without objection, it is too late to object to it in the appellate court.

Burkholder & als. *v.* Ludlam & als., 255

DIVORCES.

1. In suits for divorce the pleadings and rules of evidence are the same as in 879 other suits in equity, except that *the bill shall not be taken for confessed, and the cause must be heard independent of the admissions of either party on the pleadings. But where the answer is responsive to the bill, the defendant is entitled to the benefit of it, as in other cases in equity.

Latham, by, &c., *v.* Latham, 307

2. Although the fact that a married man is seen in a house of ill-fame, is strong evidence of the crime of adultery, yet it is open to explanation; and it was satisfactorily explained in this case. Idem, 307

3. Desertion is a breach of matrimonial duty, and is composed, first, of the breaking off of the matrimonial cohabitation; and, secondly, an intent to desert in the mind of the offender. Both must combine to make the desertion complete. A mere separation by mutual consent is not desertion by either party. Idem, 307

4. The cruelty that authorizes a divorce is anything that tends to bodily harm, and that thus renders cohabitation unsafe; or, as is expressed in the older decisions, that involves danger of life, limb or health. Idem, 307

5. There may be cases in which the husband, without violence, actual or threatened, may make the marriage state impossible to be endured. There may be angry words, coarse and abusive language, humiliating insults, and annoyances in all the forms that malice can suggest, which may as effectually endanger life or health as personal violence; and which therefore would afford grounds for relief by the court. But what merely wounds the feelings, without being accompanied by bodily injury or actual menace, does not amount to legal cruelty. Idem, 307

6. The father is the legal custodian of the minor children, and they will not be taken from his custody without the strongest reasons therefor. Idem, 307

7. If the application by the wife for a divorce is refused; if the court is satisfied that she is the chief obstacle in the way of a reconciliation, and that the husband is, under all the circumstances, entitled to the custody of the child, it is impossible to impose terms upon him and to say he shall be compelled to have the child, under the decree of the court, at particular places and times, to gratify the wishes and feelings of the mother. Idem, 307

8. It may be there are cases in which the court might refuse a divorce, and yet give alimony to the wife. But if the husband is willing to be reconciled to the wife upon terms she can properly accept; if he has not abandoned her; if his conduct has not been such as to justify her separation from him, she is not entitled to alimony. Idem, 307

DOMICILE AND RESIDENCE.

1. There is a wide distinction between domicile and residence. To constitute a domicile two things must concur: First, residence; second, the intention to remain there for an unlimited time. Residence is to have a permanent home for the time being, as contradistinguished from a mere temporary locality of existence.

Long *v.* Ryan & al., 718

2. What is the meaning of the word residence, as used in any particular statute, must be decided by its particular circumstances. The word is often used to express a different meaning, according to the subject matter. Idem, 718

3. The word residence, in the statute in relation to attachments, is to be construed as meaning the act of abiding or dwelling in a place for some continuance of time. Idem, 718

4. While on the one hand the casual or temporary sojourn of a person in the state, whether on business or pleasure, does not make him a resident of the state within the meaning of the attachment law, especially if his personal domicile is elsewhere, so on the other hand, it is not essential that he should come into the state with the intention to remain here permanently, to constitute him a resident. Idem, 718

5. R, domiciled in Washington, obtains a contract upon the W. & S. railroad, 880 *to construct three sections of the road, and he may be employed to build culverts and bridges in such time as the engineer of the road may fix. He rents out his house in Washington. removes his family to a place on the route of the road, and keeps house. Before the work is finished, or the time for completing it has arrived, an attachment is sued out against his effects—HELD: He was a resident of the state, and the attachment quashed. Idem, 718

ELECTION.

1. G, after directing that his estate shall be kept together for the support of his wife and children, empowers his executor to sell,

if he shall think it would be to the interest and benefit of his wife and children, any part of the estate "except the homestead known as Seguine and the mills and appurtenances thereto attached." And he directs an equal division of his estate among his five children. Three of the children were by a former wife, who had inherited one-third of Seguine. G bought the other two-thirds, lived upon it, and during his first wife's life expended some \$9,000 in improvements upon it. In 1864, the Confederate government impressed the timber standing on 289 acres of Seguine, and G having received payment for it, he with that money and some of his own, bought two tracts of land which he owned at his death, and which passed under his will—**Held**:

1. The will does not make a case of election as to the one-third of Seguine; but the three children by the first wife are entitled to take that third by inheritance from their mother, and to share equally with the other two children in the estate of their father G.

Gregory & als. v. Gates & als., 83

2. The will does make a case of election as to the one-third of the timber taken from Seguine, and the said three children cannot take that and claim under the will.

Idem, 83

EQUITY JURISDICTION.

1. When vendor of land may go into equity to enforce specific performance of the contract, though the purchaser is in possession, and only a part of the money is due, he having right to subject the land.

See Vendor and Purchaser, No. 1, and

Ayres & als. v. Robins. 105

2. A court of equity will compel the conveyance of the legal title of land claimed under a parol gift, supported by a meritorious consideration, and by reason of which the donee has been induced to alter his condition and make expenditures of money in valuable improvements on the land.

Burkholder & als. v. Ludlam & als., 255

3. Bill by W charges that W and wife conveyed to his son E, a tract of land on the consideration that E should provide for and take good care of W and his wife so long as they may live, in a comfortable manner, both in sickness and in health, and should build a comfortable dwelling-house for them on the land, and that he utterly failed and refused to comply with his agreement. And that these promises were fraudulently made by E for the fraudulent purpose of obtaining said deed, and that plaintiff relied on said promises and would not have executed said deed if they had not been made; and that said deed was obtained by means of said fraud so practiced upon him by E. Upon demurrer to the bill—**Held**:

1. W did not have an adequate remedy at law for the failure to perform either of

the considerations stated in the bill, and equity has jurisdiction to relieve him.

Wampler v. Wampler, 454

2. The bill charging a fraud by E in procuring the deed, on that ground equity has jurisdiction to give relief.

Idem, 454

3. The court of equity may, upon these facts, if sustained, rescind the contract, set aside the deed, and put the parties in the same position they were before the contract was made and the deed executed.

Idem, 454

881 *4. Executions are improperly issued by foreign plaintiffs and made returnable in four weeks: though under the statute, Code of 1873, ch. 183, § 40, the defendants in the executions may move the court, or the judge in vacation, to quash them, as this must be done upon notice to the plaintiffs, and can only be done by publication as to the foreign plaintiffs, under these circumstances the defendants may enjoin the executions.

Snaveley & als. v. Harkrader & als., 487

5. See Bankrupts, No. 3, and McAden & als. v. Keen & als., 400

6. For the jurisdiction of state courts when the defendant becomes bankrupt, and how they should proceed, see Practice in Chancery, No. 5, and

Barr, assignee, v. White & als., 531

7. It is not necessary since the revision of the law in 1849, that a judgment creditor shall exhaust his remedies at law before going into equity to subject the lands of his debtor, or his fraudulent alienees, to satisfy his judgment.

Price v. Thrash, Idem, 531
515

8. Person holding a vendor's lien on land may proceed to subject the land without asking an account of the personal estate.

See Liens, No. 4, and
Armentrout's exor's & als. v. Gibbons & als., 632

9. L was indebted to the firm of J, M, S & O. After the death of S, L drew a bill of exchange on O, who was largely indebted to him, for the amount of his debt due to the firm, and the bill was accepted and protested for non-payment, and notice to L was given. M and L died, and O and J were declared bankrupts. M's executrix filed her bill against the executors of L and S and the assignees of J and O, to recover the amount of the bill, and to have it applied according to the interests of the parties. Upon demurrer to the bill—**Held**: That a court of equity had jurisdiction in the case.

Martin's ex'r v. Lewis' ex'or, 672

10. In such a case parol evidence is not admissible to prove that at the time the bill was drawn it was expressly agreed between M, who acted for the firm, and the agent of L, who drew the bill, that if it was accepted by O, it was to be taken in full of the debt of L, and he was not to be liable further for it or

his debt; and without this agreement the agent of L. would not have drawn the bill.

Idem, 672

11. It not being claimed that there was any fraud or misrepresentation in the transaction, it is not a case in which a court of equity will correct the paper so as to conform it to the alleged agreement between the parties.

Idem, 672

EVIDENCE.

1. In an action under the statute by the administrator of a party killed upon a railroad track against the company, the plaintiff may on the trial, and before the testimony is concluded, prove that the deceased left a widow and children.

Balt. & Ohio R. R. Co. v. Sherman's adm'r, 602

2. When statements of one person as to a contract in which another party is interested will be competent evidence against this other party.

Stephoe v. Pollard, 689

EXCEPTIONS—BILL OF.

1. The writ of mandamus will lie to compel the judge to sign a bill of exceptions taken to his rulings and tendered to him during the term, if the truth of the case be fairly stated therein.

Page v. Clopton, Judge, 415

2. Where a bill of exceptions is tendered which does not fairly state the truth of the case, it is the duty of the judge, with the aid of the counsel, to settle the bill, and when so settled to sign it; and if he refuses to do this mandamus will lie to compel him.

Idem, 415

3. The usual practice is to give notice of the exception at the time the decision is made, and reserve liberty to draw up and present the bill for settlement and signing, either during the trial, or after the trial and during the term, as may be allowed by the court, but it must be signed during the term at which final judgment is rendered. And it will be disregarded in the appellate court, if signed after the end of such term, although signed pursuant to a previous order allowing it, unless—perhaps—such order be made by consent of parties.

Idem, 415

4. The rule as to notice of an intention to take an exception, or of taking it, at the time of the ruling does not apply to a case of a *sue*, in which the exceptant and the judge are the only parties.

Idem, 415

EXECUTIONS.

1. For the powers, duties and liabilities of sheriffs dealing with executions in their hands, see *Sheriff, passim*, and

Grandstaff, late sheriff & als. v. Ridgely, Hampton & Co., 1

In a suit by infants who have removed out of the state, by their next friend, against their Virginia guardian, they ask that their property may be transferred to their foreign

guardian; and the court decrees that the amount found to be due from the Virginia guardian to the several plaintiffs shall be paid to the foreign guardian, and that he may sue out execution on the decree. Upon appeal, so much of the decree as directs the payment to the foreign guardian is reversed, and he is directed to proceed according to the statute to have the infants' estate removed, and when that is done the circuit court may decree that said several sums shall be paid over to him. Without any further proceeding, several executions are sued out in the name of the infants for the amounts due them respectively, the executions being made returnable in less than four weeks, and the Virginia guardian enjoins the executions—*Held*:

1. Every execution should conform accurately to the judgment or decree which it is used to enforce; and as the decree directed the money to be paid to the foreign guardian, and authorized him to sue out execution, the executions were irregularly and unlawfully issued.

Snively & als. v. Harkrader & als., 487

2. The court of appeals having reversed so much of the decree of the circuit court as directed the money to be paid to the foreign guardian, and authorized him to sue out execution, it was irregular and illegal to issue the executions until the circuit court had decreed the payment of the money.

Idem, 487

3. Although under the statute, Code of 1873, ch. 183, § 40, the defendants in the executions might have moved the court or the judge in vacation to quash them, as this must be done upon notice to the plaintiffs, and could only be done by publication as to these foreign plaintiffs, under the circumstances the defendants were entitled to enjoin the executions.

Idem, 487

EXECUTORS AND ADMINISTRATORS.

1. An executrix receiving in December, 1864, payment in Confederate money, of a debt due before the war, well secured, is guilty of a *devastavit*, though she had been informed by the Confederate assessor, that she must take an oath, or pledge herself, to receive payment of ante-bellum debts in Confederate currency, or pay her taxes in gold or silver; and she received the payment very reluctantly under the pressure of this threat.

Patteson & als. v. Bondurant's ex'ors & als., 94

2. The executor of the debtor, paying the debt to the executrix, knowing the constraint under which she acted; that she was unwilling to receive such payment; that she had no use for the money, but if received she would have to invest it, participated in the *devastavit*, and the testator's estate is primarily liable to pay the debt.

Idem, 94

3. D died in 1856, and by his will directed that any fund of his estate remaining after payment of his debts and funeral expenses, should be invested by his executor, and the interest applied to pay an annuity left to his wife. In January, 1860, the executor has in his hands \$4,991.84. In 1862, he invests in his own name \$5,900 in Confederate eight per cent. bonds. In December, 1864, he applies to and obtains from the judge of the circuit court of Richmond an order authorizing him to invest \$5,900 which he held in his hands as executor, in Confederate bonds, and he invests the amount in February, 1865—*HILD*:

1. The statute did not authorize the investment of the fund in his hands, which was in fact good money, in Confederate bonds, in 1865.

Carter v. Dulaney & als., 192

2. The bonds invested in 1862 were invested in his own name, and were his bonds, though he may have intended to hold them for the estate. *Idem*, 192

3. The executor is not to be credited for the amount of the investment, but is liable for the amount in his hands in January, 1860. *Idem*, 192

4. When there may be a decree against an administrator and his sureties in favor of distributees, without requiring refunding bonds.

See *Infants*, No. 1, and

Harman & als. v. Davis' adm'r & als., 461

5. It is error to decree that an administrator *de bonis non* shall pay a debt of his testator out of the assets in his hands, upon an admission in his answer that there are debts due the estate uncollected more than sufficient to pay all the debts.

Kent's adm'r v. Cloyd's adm'r, 555

6. Where a creditor's bill has been filed against the administrator, devisees and legatees, and a decree for an account has been made in the cause, no other creditor of the estate can maintain a separate suit in another court for the satisfaction of his debt. And if the bill shows he had knowledge of the decree for an account in the first suit, his suit will be dismissed upon demurrer to the bill. *Idem*, 555

FINES.

1. Fines imposed for a violation of law are embraced in the act of 1871, known as the funding act, and a person upon whom such a fine is imposed may discharge it by the over-due coupons taken from the bonds mentioned in said act.

Clarke v. Tyler, Sergeant, 134

FOREIGN JUDGMENTS.

1. That the judgment of one state may have in another the effect provided for by the constitution of the United States, Article IV, section 1, and the act of congress of May 26, 1790, the court in which the judgment was rendered must have had jurisdiction of the case when it pronounced the judgment.

Bowler v. Huston, 266

2. Whether or not a defendant resides in the state in which the action is brought, he must be summoned, or appear in person or by attorney, in the suit, in order to give the court jurisdiction of the case, so as to give its judgment the effect in another state provided for by the constitution and act of congress. *Idem*, 266

3. It is perfectly competent for a defendant, in an action in one state, on a judgment rendered in another, to plead and show in his defence that he was not summoned, and did not appear, in person or by attorney, in the suit in such other court; and that, too, even though it be expressly stated in the record of the suit in that court that he was actually summoned and did so appear. *Idem*, 266

4. This defence ought to be made by special plea. *Idem*, 266

5. One member of a dissolved partnership has no authority, unless specially given, to retain an attorney to defend the other members of the late firm in an action brought against them. Such authority does not result from the partnership itself. *Idem*, 266

884 *6. A judgment rendered in another state against all the members of a partnership, after its dissolution, does not personally bind a member of said partnership not served with process, and not appearing in the case, although the other members were served, or appeared and caused an appearance for all. *Idem*, 266

7. A judgment in New York under the Code of procedure of that state against the members of a dissolved partnership, one of whom was not served with process and did not appear in person or by attorney in the suit, is not such a judgment as is contemplated by the constitution and act of congress, as to such person. *Idem*, 266

GIFTS.

1. B, who married the daughter of C, bought a lot when he was poor, and C in good circumstances. B being unable to pay for the lot, turned it over to C, who paid for it, took the title in his own name, and commenced to build a house on it for his daughter, the wife of B: Before the house was finished B removed with his family to another town and engaged in business, which was succeeding well, when C offered that upon condition that he would return, he would turn over the lot and unfinished building to the wife of B as her own property. B acceded to this, and with his family returned, and he paid the expenses of doing so, and then with his own earnings and that of his wife finished the building, took possession, and had remained therein for about twelve years; but no deed was made by C to the property until the insolvency of C and after judgments were obtained against him and duly docketed. The house and lot was then conveyed by C to a trustee for the wife of B in consideration of five dollars and love and affection. In a suit by the judgment creditors to annul the

deed and enforce their liens—**HOLD:** That the title to the house and lot was in the trustee of the wife and children of B, and that the liens on the judgments against C did not attach to the property.

Burkholder & als. v. Ludlam & als., 255

2. A court of equity will compel the conveyance of the legal title of land claimed under a parol gift, supported by a meritorious consideration, and by reason of which the donee has been induced to alter his condition, and make expenditures of money in valuable improvements on the land.

Idem, 255

GUARDIAN AND WARD.

1. In a suit by a guardian for the sale of his ward's lands, a decree is made appointing commissioners to sell it; and October, 1859, they sell the land at public auction, when the guardian becomes the purchaser at a full price, makes the cash payment, and executes his two bonds with sureties, for the deferred payments. All the papers in the cause were destroyed by the Union forces during the war, except the order book of the court extending from 1858 to 1863, and the two bonds of the purchaser, which were found among scattered papers in the office. The purchaser goes into possession of the land, which he has held ever since without question. Though the order book does not contain a decree confirming the sale, yet no question having been made as to the purchaser's title down to 1873, when suit is brought by the commissioner and the parties entitled to the proceeds, against the purchaser's assignee in bankruptcy, and the sureties of the purchaser, to enforce the payment of the purchase money of the land, which had fallen very much in value, the sale will be held to be valid, and the sureties in the bonds held liable.

Reed v. Jones & als., 123

HOMESTEADS.

1. A widow whose husband has died leaving no children and no debts, and has not claimed the homestead in his lifetime, is not entitled to a homestead in his estate as against his heirs.

Helm v. Helm's adm'r & als., 404

885 *2. An order of the county court setting apart a homestead, made upon the ex parte application of the widow, is of no effect as against the heirs. *Idem*, 404

3. A deed of trust to secure a debt executed by the grantor and his wife conveying real and personal estate which had been previously set apart by the husband as his homestead, has priority over the homestead exemption, and the said property may be subjected to satisfy the debt.

White v. Owen & als., 43

4. *Quere:* Whether a deed of trust by the husband, in which the wife did not join, would have priority over the homestead exemption. *Idem*, 43

HUSBAND AND WIFE.

1. For the general powers of a married

woman over her separate estate, see the opinion of *BURKS, J.*, in

Bank of Greensboro' v. Chambers & als., 202

2. In contemplation of a marriage between C and M, a deed of marriage settlement is executed by which C conveys to a trustee his dwelling-house and lot in Danville, other real estate, all his personal property, including his tobacco fixtures, in trust for the separate use of his intended wife for life, remainder to their children. The purpose of the settlement, as expressed in the deed, is to provide a home for the wife and children, and the only power of alienation expressed in the deed is, that the trustee may, on the written request of the wife, sell and reinvest on the same trusts. C, who before the marriage was a manufacturer of tobacco, after the marriage carried on the business in the name of his wife, and to obtain advances of money to carry on the business, C and his wife and the trustee conveyed the house and lot to a trustee to secure the advances—**HOLD:** Looking to the purpose and the whole provisions of the deed of marriage settlement, the wife had no power to convey her interests in the property for the purpose of securing said advances.

Idem, 202

3. As to covenants by a married woman, see *Marriage Settlements, No. 4*, and

Justis v. English & als., 565

4. In the case of a deed to a trustee for the separate use of a married woman, the consideration was paid by money derived from her earnings, and there was no agreement, either ante or post nuptial, that she should be entitled to her earnings; and the husband, though during the time of these earnings generally absent from home, had not deserted her. The earnings of the wife were the property of the husband, and the real estate thus purchased is subject to pay his debts.

Campbell v. Bowles' adm'r & als., 652

INDICTMENTS.

1. An indictment charged that the accused "did feloniously and maliciously burn a certain barn and the property therein, the said barn and the property therein being the property of one H. H. Dulaney, and situated in the county aforesaid, which said barn and the property therein was then and there of the value of \$1,500"—**HOLD:** Sufficient under ch. 188, § 6, Code 1873.

Wolf's case, 833

INFANTS.

1. In a suit by the widow and infant children of H, against D, the administrator, and his sureties, for a settlement of his accounts, and for distribution, a commissioner reports D debtor in \$7,942.39; to which D excepts. He afterwards withdraws his exceptions, and there is a decree by consent of all the parties, by which D and his sureties admit there is due \$5,000 for distribution among the plaintiffs; and the plaintiffs consenting to accept this sum, there is a decree

for the payment to the widow of one-third and the infant plaintiffs the two-thirds, payable in one, two and three years. Afterwards D and his sureties file a bill of review, on the grounds that the infant plaintiffs could not consent to the decree, and
 886 *that no refunding bonds were required by the decree—HOLD:

1. It was not error to decree in the cause in favor of the plaintiffs because some of them were infants. They do not complain of the decree; and though the infants were incapable of consenting to the decree, it is binding upon them if for their benefit; and the court having the whole case before it, and being satisfied the decree is for their benefit, there is no error on the face of the decree for which it could be reviewed and reversed.

Harman & als. v. Davis' adm'r & als., 461

2. There was no error in the decree in not requiring refunding bonds to be given by the plaintiffs. This would have been incompatible with the evident intent and legal effect of the decree, which was that the sum decreed to be paid by D and his sureties was in his hands for distribution among the plaintiffs. And the acknowledgment and consent of D, stated in the decree, was a waiver of any right of his to require refunding bonds. Idem, 461

INSURANCE.

1. C takes out a policy of insurance on his life for the benefit of his wife. The insurance company fails in the lifetime of C. C may sue in his own name to recover the premiums he has paid.

Universal Life Ins. Co. v. Cogbill & als., 72

Same v. Dupuy & als., 72

2. A foreign insurance company has deposited bonds with the treasurer of the state in pursuance of the statute, and fails. A policy holder may sue the company in the circuit court of the city of Richmond, and make the treasurer a party defendant to subject the bonds in his possession to satisfy the premiums he has paid upon the policy. See act of April 4, 1877, amending § 32, ch. 36, Code of 1873, p. 368. Idem, 72

3. If in such case the commonwealth is made a defendant, it is not cause for dismissing the bill on demurrer; but the bill should be dismissed as to the commonwealth. Idem, 72

4. In such case the treasurer represents the commonwealth as a public officer, and the case is embraced in the statute, Code of 1873, ch. 44, § 7, giving to the circuit court of the city of Richmond exclusive jurisdiction in cases in which certain state officers named are necessary or proper parties. Idem, 72

INTEREST.

1. How trustee will be charged with interest, see Trust and Trustees, No. 3, 4, and Coltrane v. Worrell, 434

2. Under the act of 1874, ch. 122, § 5, in relation to interest on money, in an action on a usurious contract, the judgment is to be for the principal sum ascertained to be due after deducting the usury, and interest on that principal from the date of the judgment.

King v. Buck & als., 428

JUDGMENTS.

1. See Foreign Judgments, passim, and Bowler v. Huston, 266

2. In 1866, C, by an agreement in writing, sold and conveyed to W a lot in Danville. The agreement was never recorded, and the deed was not recorded until September 18th, 1873. W having paid all the purchase money to C, conveyed the lot to R, to secure to him a debt of \$4,000. This deed was recorded on the 24th of August, 1866. In April, 1868, W was declared a bankrupt, giving in the lot as a part of his estate. In May, 1868, the register in bankruptcy conveyed to the assignee in bankruptcy; and in September, 1868, on the joint application of the assignee and R, as a lien creditor of the bankrupt, the court in bankruptcy ordered a sale of the lot; and the sale was made to R, and on the 18th of November confirmed, and the assignee directed to convey the lot to R; which was done on the same day, and R took possession. In July, 1872, M recovered a 887 judgment against C in *the corporation court of Danville, which was docketed on the 11th of March, 1873—HOLD: Though M had notice of the sale by C to W, the lot is liable to satisfy the judgment, notwithstanding all the subsequent conveyances and proceedings in relation to said lot.

March, Price & Co. v. Chambers & al., 299

3. For the rights of a judgment creditor against the estate of a bankrupt, see Bankrupts, No. 2, 3, and

McAden & als. v. Keen & als., 400

4. If B, a judgment debtor, purchases land and procures it to be conveyed to J as the purchaser, and J conveys it in trust to secure a bona fide debt, the creditor not being informed that it had been so purchased by B and conveyed to J, the judgment creditor of B has no lien upon the land for his debt as against the creditor under the deed of trust.

Moore and als. v. Sexton's ex'x, 505

5. It is not necessary, since the revision of the law in 1849, that a judgment creditor shall exhaust his remedies at law before going into equity to subject the lands of his debtor, or his fraudulent alienees, to satisfy his judgment. Code of 1873, ch. 182, §§ 6, 9.

Price v. Thrash, 515

Barr, assignee, v. White & als., 531

6. The remedy in equity against the real estate is not dependent upon inadequacy of the legal remedy to satisfy the judgment out of the personal estate, or the insufficiency of such estate for that purpose; but it may always be resorted to whether there be or no personal estate of the debtor sufficient to satisfy the judgment. Idem, 515

7. There being no averment in the bill filed by the judgment creditor to subject the debtor's land to pay the debt, or admission or proof that the rents and profits of the land will not pay the debt in five years, it is error to decree a sale of the land before having this enquiry made. *Idem*, 515

8. But where in such cases the bill avers that the rents and profits will not pay the debt in five years, and the bill is taken for confessed, it is not necessary to direct such an enquiry before decreeing a sale of the land.

Barr, assignee, v. White & als., 531

9. L owned a tract of land which he cultivated, and a younger brother and two sisters lived with him, but not as tenants. There were liens on the land, and L owed his brothers and sisters money. By parol contract L sold the land to his brother and sisters, they assuming to pay the liens, and paying the balance in his bonds, which they delivered to him, and they took and held possession of the land. L afterwards conveyed the land to them, but before the deed was recorded H docketed a judgment which he had recovered against L after the parol agreement had been made and carried into effect—*Held*: The judgment is not a lien upon the land.

Long & als. v. Hagerstown Agric. Imp. Manf. Co., 665

10. When United States court has no jurisdiction to render a judgment, and the judgment is invalid, see *Jurisdiction U. S. Courts, No. 1*, and

Nulton & als. v. Isaacs & als., 726

JURISDICTION OF U. S. COURTS.

1. In a cause in the circuit court of the United States, brought by citizens of Maryland, against the Bank of the Valley of Virginia, to have the assets of the bank administered, upon the petition of the plaintiffs and upon notice to N, one of the debtors of the bank and a citizen of Virginia, the court rendered judgments against him for the amount due—*Held*: That N, being a citizen of Virginia, the United States court had no jurisdiction in the case to render the judgments against N, and they were invalid as judgments.

Nulton & als. v. Isaacs & als., 726

LACHES AND LAPSE OF TIME.

1. See *Marriage Settlements, No. 4*, and
Justis v. English & als., 565

868 *LIENS.

1. See *Judgments, No. 2, 4*, and
March, Price & Co. v. Chambers & al., 299

Moore & als. v. Sexton's ex'x, 505

2. See *Gifts, No. 1*, and
Burkholder & als. v. Ludlam & als., 255

3. See *Bankrupts, No. 2, 3*, and
McAden & als. v. Keen & als., 400

4. In 1856 M sold and conveyed her share

of a tract of land to her brothers, J and H, reserving a vendor's lien in the deed for \$1,204.93. In 1860 J and H sold and conveyed with general warranty the whole tract to A for \$23,500, of which one-third was paid in cash, and bonds of \$2,000 given to H, payable in each year from 1861 to 1867, and \$1,666.66 in 1868, reserving in the deed a vendor's lien as security. In 1860 H assigned the four bonds falling due in 1865-66-67 and 68 to K, and K assigned to G in April, 1861, the bond due in 1866, and in November, 1865, she assigned to G the bond due in 1867. In the latter part of 1860, or the first of 1861, K assigned to S the bond due in 1865. A died in 1867, having paid off the first four bonds and made payments to G on the sixth, and after his death his executors paid to K the last bond. The deed from M to J and H was recorded, but was destroyed by the federal forces in 1864. After the war, C, as assignee of M, filed a bill to enforce the vendor's lien in the deed from M to J and H for the \$1,204.93, and obtained a decree. Pending C's suit, G filed his bill to enforce the vendor's lien in the deed to A, for a balance due on the two bonds assigned to him. A's executors and devisees insisted that they should have credit on the bonds assigned to G and S for the amount of C's decree; they insisting that the purchase money paid by A in his lifetime and the executors since, was paid without any knowledge of C's lien on the land, that deed having been destroyed. J and H were insolvent—*Held*:

1. A was entitled to a credit on the amount of the purchase money due by him as vendee of said land for the said sum of \$1,204.93, with interest, and he was so entitled as against the said bonds, at least if the assignments were made without his assent.

Armentrout's ex'ors & als. v. Gibbons & als., 632

2. That the liability of such assigned bonds to such right of set-off is not in the order in which said bonds are payable, but in the inverse order of their assignment; and if some of said bonds were assigned and some were not, the unassigned bonds were liable to the right of set-off, before the assigned bonds, even though the unassigned were payable before the assigned bonds. *Idem*, 632

3. That the said land remained liable in the hands of A, the vendee, to the vendor's lien for the said sum of \$1,204.93 and interest, notwithstanding the destruction of the record of the deed, and that the said A and his executors may have paid the full amount of the purchase money and interest without actual knowledge of the existence of such lien at the time of such payment; the due recordation of the said deed in which said lien was reserved being constructive notice to him and them of the existence of such lien, and as effectual for this purpose as actual notice of its existence, or as if the deed had not been destroyed. *Idem*, 632

4. If A received notice of the assignment of the said bonds to K, before his payment of the bonds of 1861-62-63 and 64, then such payment to the extent of the said sum of \$1,204.93, with interest, was a payment in his own wrong. But if he made such payment without such notice, then he or his estate is entitled to credit for the said sum of \$1,204.93 on the said assigned bonds.

Idem, 632

5. The bond for \$1,666.66, paid by the executors of A to K, was subject to the said set-off in preference to and in exoneration of the bonds assigned by K to G and S; and this though the executors paid it without knowledge of the said C's lien.

889 *Both A and his executors were chargeable with constructive notice of said set-off by reason of the recordation of the deed aforesaid, and the liability of said estate resulted from such notice.

Idem, 632

6. The bill having been filed to enforce the vendor's lien upon the land, it was not necessary that the plaintiff should have a settlement of an account of the personal estate of A for the purpose of exhausting the same in the payment of his debts before he could enforce the charge reserved on the land for the payment of the purchase money. This charge is as effectual as would have been a deed of trust on the land to secure the purchase money; which certainly might have been enforced by a sale, either before or after A's death, without the necessity of first exhausting the personal estate.

Idem, 632

LIMITATIONS—STATUTE OF.

1. See Marriage Settlements, No. 4, and
Justis v. English & als., 565

MANDAMUS.

1. The writ of mandamus will lie to compel the judge to sign bills of exceptions taken to his rulings and tendered to him during the term, if the truth of the case be fairly stated therein.

Page v. Clopton, Judge., 415

2. When a bill of exceptions is tendered which does not fairly state the truth of the case, it is the duty of the judge, with the aid of the counsel, to settle the bill, and when so settled to sign it; and if he refuses to do this mandamus will lie to compel him.

Idem, 415

3. The office of the writ of mandamus is to compel corporations, inferior courts, and officers, to perform some particular duty incumbent upon them and which is imperative in its nature, and to the performance of which the relator has a clear legal right, without any other adequate specific legal remedy to enforce it; and even though he may have another specific legal remedy, if such remedy be obsolete or inoperative, mandamus will lie. The remedy is extraordinary, and if the right is doubtful, or the duty discretionary,

or there be any other adequate specific remedy in use, the writ will not be allowed.

Idem, 415

MARRIAGES.

1. K, a negro man, and M, a white woman, both domiciled in the county of Augusta, Virginia, left Virginia and went to Washington, D. C., and were married there according to the regular forms for celebrating marriages, and after remaining absent from Virginia about ten days, returned to their home in Augusta county, Virginia, where they have since lived as man and wife. By the laws of Virginia (C. V. 1873, ch. 105, § 1), all marriages between a white person and a negro are absolutely void. On an indictment for lewdly and lasciviously associating and cohabiting together—HELD:

1. Although such marriages are not prohibited by the laws of the District of Columbia, and this marriage was performed according to the ceremonies there prescribed, it is void under the law of Virginia, and the parties are liable to the indictment. *Kinney's case.*, 858

2. While the forms and ceremonies of marriage are governed by the laws of the place where the marriage is celebrated, the essentials of the contract depend upon and are governed by the laws of the country where the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated.

Idem, 858

MARRIAGE SETTLEMENTS.

1. For the general powers of a married woman over her separate estate, see the opinion of *Burka, J.*, in

Bank of Greensboro' v. Chambers & als., 202

2. The court will look to the whole settlement, its purpose and provisions, to ascertain what is the power of a *married woman over her separate estate.

Idem, 202

3. A bill filed for the reformation of a marriage settlement, prayed that the deed might be so corrected as to secure the property to the married woman, free from the marital rights of her husband, as if she were a feme sole, and with power to dispose of the same by a writing in the nature of a deed or will; and all parties interested, by their answers concurred in the prayer of the bill; and the decree directed that the property should be, and was secured to the said married woman, "as fully and completely as if she were a feme sole, free from the debts of her husband, and in no manner liable for his debts or contracts"—HELD: That the court might look to the bill and answers for the purpose of ascertaining the proper construction of the decree; and that the decree when so construed, operated to confer upon the married woman power to dispose by her sole act of the real estate settled upon her.

Burging v. McDowell & als., 236

4. In the contemplation of the marriage of

B and L, B by deed in which L joined, conveyed her property consisting of personality, and a life estate in land, to M, in trust for her separate use, with full power in her to dispose of the rents and profits as if she had never married, and to transfer in such proportion and form as she shall from time to time direct, notwithstanding her coverture, by any writing under hand and seal, attested by three or more credible witnesses, or by her will, executed and attested in the same mode. By a paper executed as prescribed in the deed, B directed her trustee to purchase two lots to be paid for out of her trust fund; and this was done and they were conveyed to the trustee on the same trusts. These deeds were duly recorded. The trustee dying, C and W were appointed trustees. Afterwards B, by deed executed by herself alone, and acknowledged by her in the clerk's office without privy examination, upon full consideration, conveyed the lots to W, and he died, and they were sold to different purchasers. B died intestate in 1862; and in March, 1875, her heirs filed their bill against the purchasers to recover the lots—HELD:

1. The deed of marriage settlement directing how the trust fund may be disposed of by B, and the lots having been purchased under her directions, as prescribed in that deed, were a part of the trust estate, and being real estate could only be conveyed in the mode directed in the deed; and therefore the deed from B to W did not pass the title of the lot to W.

Justis v. English & als., 565

2. The purchasers holding under W are affected with notice of the trusts, and will be treated as trustees for Mrs. B and her heirs. *Idem*, 565

3. It is not a case in which equity will aid a defective conveyance in favor of a bona fide purchaser. *Idem*, 565

4. Mrs. B being under coverture until her death in 1862, and the statutes of limitations having been suspended until December, 1869, it does not bar the claim of the heirs of B; and under the circumstances the delay in bringing the suit does not bar the claim. *Idem*, 565

5. Though there is a covenant of general warranty in the deed from B to W, yet as there is nothing to show that she intended to bind her estate by that covenant, and no personal decree could have been made against her, and it does not appear that the heirs of B have received property in which the purchase money of the lots was invested, the purchasers are not entitled to have the purchase money returned out of the estate of B, or to subject the lots for it.

Idem, 565

NEGLIGENCE.

See Railroad Companies, *passim*, and
Balt. & Ohio R. R. Co., *v. Sherman's adm'r*, 602

Same *v. Whittington's adm'r*, 805

NEW TRIALS.

1. New trial granted on condition that 891
the cause shall be tried upon the *plea and issue then in the case, the court cannot allow another plea.

See Practice at Common Law, No. 1,
and

Prunty v. Mitchell & Cobbs, 247

NOTICE.

1. A recorded deed, though the record is destroyed is notice to subsequent purchasers.

See Deeds, No. 1, and
Armentrout's ex'ors & als. v. Gibbons & als., 632

NOVATION OF DEBT.

1. P being indebted to B for certain machinery, which B had bought of S, and for which he owed S, B and S go together to P to deliver to him the machinery, and then and there P executes his notes to S for the amount he was to pay for the machinery. In fact the machinery proves very defective, and P is entitled to a deduction from the price he was to give for the machinery. Under the circumstances, held that P did not intend to novate his debt to B, and he is entitled to have a credit upon his notes given to S for the amount he is entitled to claim for the defect in the machinery.

Stephoe v. Pollard, 689

OFFICERS—STATE AND MUNICIPAL.

1. The chief of police of a city is the officer of the state, and not of the municipality in which he exercises his office.

Burch v. Hardwicke, 24

2. For what officers performing their duties in a city are state, and what are municipal officers, see the opinion of Staples, J.

Idem, 24

3. Though under the constitution of the state, article 6, § 20, the mayor has authority to remove the officers of the municipality, the constitution does not invest him with the power to remove state officers, though they are elected by the people of the municipality, or appointed by the municipal authorities, and are paid by them.

Idem, 24

4. The charter of a city having provided for a board of police commissioners, and vested in them the power of removing the chief of police, only giving to the mayor of the city the power of suspending the said officer for a short time, if the mayor removes the officer from his office he exceeds his power, and is responsible to the officer in a civil action for damages. *Idem*, 24

5. When the treasurer of the state is a proper party in suits by holders of policies of insurance.

See Insurance, No. 2, 4, and
Universal Life Ins. Co. v. Cogbill & als., 72

PARENT AND CHILD.

1. The father is the legal custodian of his

children, and they will not be taken from his custody without the strongest reasons therefor; and this right is not affected by the voluntary separation of the parents.

- Latham, by, &c., *v.* Latham, 307
 2. See Divorce, No. 7, and
 Idem, 307

PAROL EVIDENCE.

1. Parol evidence which is not inconsistent with a record to which it refers, is competent evidence.

- Preston *v.* Grayson County, 496

2. Parol evidence is not admissible to prove that a bill of exchange was accepted by the payee in full of a debt due by the drawer, and that the drawer was not liable upon it in any event.

- Martin's ex'x *v.* Lewis' ex'or, 672

PARTIES.

1. When a pendente lite purchaser not a necessary party.

- See practice in chancery, No. 2, and
 Price *v.* Thrash, 515

2. When the treasurer of the state is a proper party in suits by holders of policies of insurance.

- See Insurance, No. 2, 4, and
 Universal Life Ins. Co. *v.*
 Cogbill & als., 72

PARTITION.

1. C, by his will, directs that his 892 *estate shall be kept together for the support of his wife and children, until his widow shall marry or die, or until his youngest child comes to the age of twenty years. And he directs that a certain sum shall be paid to a child who shall marry, and thus cease to be supported out of the profits of the estate. The widow renounces the will—HELD: This does not authorize a division of the estate, but it is to be kept together until one of the contingencies mentioned in the will occurs.

- Gregory & als. *v.* Gates & als., 83

PARTNERS AND PARTNERSHIP.

1. One member of a dissolved partnership has no authority, unless specially given, to retain an attorney to defend the other members of the late firm in an action brought against them. Such authority does not result from the partnership itself.

- Bowler *v.* Huston, 266

2. A judgment rendered in another state against all the members of a partnership after its dissolution, does not personally bind a member of said partnership not served with process, and not appearing in the case, although the other members were served or appeared, and caused an appearance to be entered for all.

- Idem, 266

3. A judgment in New York under the code of procedure of that state against the members of a dissolved partnership, one of whom was not served with process, and did not appear in person or by attorney in the

suit, is not such a judgment as is contemplated by the constitution and act of congress as to such person. Idem, 266

PAYMENTS.

1. A bond which has been assigned by the obligee is paid to the obligee before it is due, without notice of the assignment. The payment is valid, and the assignee cannot recover upon the bond from the obligor.

- Preston *v.* Grayson county, 496

2. Fines imposed for a violation of law are embraced in the act of 1871, known as the funding act, and a person upon whom such a fine is imposed may discharge it by the over-due coupons taken from the bonds mentioned in said act.

- Clarke *v.* Tyler, sergeant, 134

PLEADING—AT COMMON LAW.

1. In an action by an execution creditor against a sheriff and his sureties for the failure to pay over money collected on the execution, if the declaration does not state that the plaintiff does not live in the county of the sheriff, it is not necessary to aver a demand upon the sheriff.

- Grandstaff, late sheriff & als. *v.*
 Ridgely, Hampton & Co., 1

2. In such an action one count avers that the execution went into the hands of a deputy of the sheriff, and became a lien on all the property of the debtor, and that the deputy collected the whole of the execution; but does not aver that the execution was levied or that the money was paid before the return of the writ. The count is fatally defective. Idem, 1

3. In such an action one count, after stating that said execution was in the hands of the deputy and was returnable on a stated day, avers that neither the deputy sheriff, nor the said sheriff of S county, made such return since that time, but such return of said execution to make have wholly neglected and refused, &c. The count is substantially sufficient. Idem, 1

4. In an action for damages occasioned by the negligence or misconduct of the defendant, it is not necessary for the plaintiff to allege in his declaration the existence of due care and caution on his part to entitle him to recover.

- Balt. & Ohio R. R. Co. *v.* Whittington's adm'r, 805

5. In such an action against a railroad company, the declaration should state where the deceased was and how he was injured.

- Idem, 805

PLEADING—IN EQUITY.

1. I files his bills in equity, claiming to be a judgment creditor of N, deceased, 893 *seeking to subject to the satisfaction of his judgment a tract of land conveyed by N, in trust for the separate use of his wife, and two other tracts conveyed by N to his son. He charges that the deeds were without consideration, and were fraudulent. He

states that N and his son were partners, and asks that if it is necessary to show the true consideration of the deeds to the son, that his account as late partner of N may be settled—**HELD**: The bill is not multifarious.

Nulton & als. v. Isaacs & als., 726

PRACTICE—AT COMMON LAW.

1. P brings assumpsit against M, who pleads non-assumpsit, on which issue is made up, and on the trial there is a verdict for P. M then asks for a new trial, and the court grants it on the condition that M shall pay the costs of the first trial, and agree that upon any future trial of the cause it shall be tried solely upon the issue already made up, without any additional plea; and to this M assents. The case is then sent to another court, and on the motion of M, he is permitted to file another plea; to which P excepts. There is a judgment for M, and a writ of error by P—**HELD**:

1. It was competent for the court to grant the new trial upon the condition stated. If M objected to the condition, he should have accepted and spread the facts upon the record. Having accepted the condition, he is bound by his acceptance.

Prunty v. Mitchell & Cobbs, 247

2. If the same court who heard the evidence on the first trial and granted the new trial on condition, might, at a subsequent term, have dispensed with it and have admitted another plea, certainly no other court could do so. Idem, 247

3. In reversing the judgment, the cause will be sent back to be tried upon the issue on the plea of non-assumpsit, or any other matter which has occurred since the new trial was granted, and which is proper and sufficient to be pleaded puis darrein continuance. Idem, 247

2. As to bills of exceptions, when and how prepared.

See Exceptions, Bill of, No. 2. 3. and Page v. Clopton, Judge, 415

3. As to what evidence may be admitted which is dependent upon other evidence yet to be produced, and how it may be excluded if such other evidence is not produced.

See Sheriffs, No. 12. and Grandstaff, late Sheriff & als. v. Ridgely, Hampton & Co., 1

4. In an action on a foreign judgment, if defendant would set up the defence that he was not served with process and did not appear in the case, he must make the defence by special plea.

Bowler v. Huston, 266

5. For proceedings in cases of caveat, and what defences may be made, and when, see Caveats, passim. and

Trotter & als v. Newton & al., 582

6. See Sheriffs, Nos. 13, 14, 15, and Grandstaff, late sheriff & als. v.

Ridgely, Hampton & Co., 1

7. In an action under the statute by the administrator of a party killed upon a rail-

road track against the company, the plaintiff may, upon the trial, and before the jury has rendered a verdict, introduce evidence to prove the deceased left a widow and children, and the number and ages of the children.

Balt. & Ohio R. R. Co. v. Sherman's adm'r, 602

8. Where issue has been joined on the plea of the general issue, the court may refuse to allow the defendant to file special pleas, where the facts stated in the special pleas may all be given in evidence under the general issue.

Balt. & Ohio R. R. Co. v. Whittington's adm'r, 805

PRACTICE—IN CHANCERY.

1. How court may proceed to ascertain the damages for the failure of a vendor of land to perform one of his covenants.

See Vendor and Purchaser, No. 3, and Ayres & als. v. Robins, 105

2. Upon a bill by a judgment creditor *to subject lands still in the hands of his debtor, and also lands in the hands of the alienees of the debtor, pending the suit one of these alienees conveys a part of the land conveyed to him by the debtor, in trust to secure a debt. This was a conveyance pendente lite, and it is not necessary that the plaintiff should amend his bill and make the trustee and creditor parties, in order to dispose of the subject.

Price v. Thrash, 515

3. In such case there being no averment in the bill or admission or proof that the rents and profits of the lands retained by P will not pay the debt in five years, it is error to decree a sale of the land before having this enquiry made. Idem, 515

4. But in such a case where the bill charges that the rents and profits of the land will not pay the debt in five years, and the bill is taken for confessed, it is not error to decree a sale of the land without first directing the enquiry as to the rents and profits.

Barr, assignee, v. White & als., 531

5. B files his bill in the circuit court of R to subject the real estate of D to satisfy a judgment for \$199.80, with interest from the 20th of April, 1860, and \$6.96, costs. The bill is taken for confessed, and there is a decree that A, appointed a commissioner, sell the land, or so much as is necessary, to satisfy the judgment and the costs of this suit, upon credits stated. A sells the whole tract for \$2,000 to W, who complies with the terms of sale, and A reports the sale to the court, and it is confirmed. After the sale, but before it is confirmed, D is declared a bankrupt, and without taking any step in the state court he applies to the United States district court, and there obtains a decree setting aside the sale, which decree is reversed by the United States circuit court, and the assignee in bankruptcy of D directed to proceed in the state court to obtain such relief as he may be entitled to—**HELD**:

1. The state court having possession of

the case, and having made a decree therein before the bankruptcy of D, he or his assignee can only proceed in that court to maintain their rights. *Idem*, 531

2. The assignee of D, who knew of the proceedings in the state court, not having made himself a party in that court, and it not appearing that that court even knew of the bankruptcy of D, the decree of the court confirming the report in the absence of the assignee was a valid decree. *Idem*, 531

3. W being a bona fide purchaser of the land, and his purchase confirmed by the court, it is for D or his assignee, if he would set aside the sale, to show that the price was inadequate, or that only a part of the land should have been sold to pay the plaintiff's debt; and this they failed to do. *Idem*, 531

4. The assignee is only entitled to have what D, the bankrupt, would have been entitled to if he had not been declared a bankrupt, viz: the surplus of the purchase money, after satisfying the plaintiff's judgment and the costs of this suit. *Idem*, 531

6. Where a creditor's bill has been filed against the administrator, devisees and legatees of a deceased testator, and a decree for an account has been made in the cause, no other creditor of the estate can maintain a separate suit, in another court, for the satisfaction of his debt. And if the bill shows he had knowledge of the decree for an account in the first suit, his suit will be dismissed upon a demurrer to the bill.

Kent's adm'r v. Cloyd's adm'r, 555

7. Though it is true that the case stated in a bill in equity must be sustained by the evidence, this rule will not forbid relief to the plaintiff where the case proved does not materially vary from the case stated; as where two deeds are charged to be without consideration, and intended to delay and hinder the plaintiff, and the proof is that the second, being a deed to a trustee for the separate use of the debtor's wife, was without valuable consideration.

Campbell v. Bowles' adm'r & als., 652

895 *PRINCIPAL AND AGENT.

1. See Corporations, No. 1, and Richmond & Petersburg R. R. Co v. Kasey & als., 218

PURCHASERS FOR VALUE.

1. The consideration for the sale and conveyance of land is a debt due at the time by the vendor to the purchaser. The purchaser is a purchaser for valuable consideration within the meaning of the recording acts. And such a purchaser having purchased and received a conveyance of the land without notice of an attachment which had been previously levied upon it, but which had not been docketed, is entitled to hold the land free from the lien of the attachment.

Cammack v. Soran & als., 292

RAILROAD COMPANIES.

1. In an action under the statute by the administrator of a party killed upon a railroad track against the company, the plaintiff may upon the trial, and before the jury has rendered a verdict, introduce evidence to prove that the deceased left a widow and children, and the number and ages of the children.

Balt. & Ohio R. R. Co. v. Sherman's adm'r, 602

2. In such an action, the deceased not being an employee of the company or passenger, but walking on the track for his own convenience, but not of necessity, it was held in this case, upon the evidence, that there was little ground to charge negligence upon the company; but if there was negligence on the part of the company, there was contributory negligence on the part of the deceased; and certainly the negligence of the company, if any, was not so gross as, notwithstanding the contributory negligence of the deceased, to render the company responsible for the damages sustained by the plaintiff from the killing of the deceased. *Idem*, 602

3. In an action for damages occasioned by the negligence or misconduct of the defendant, it is not necessary for the plaintiff to allege in his declaration or to prove the existence of due care and caution on his part to entitle him to recover. If the defendant relies on contributory negligence of the plaintiff to defeat the action, he must prove it, unless the fact is disclosed by the evidence of the plaintiff, or may fairly be inferred from all the circumstances.

Balt. & Ohio R. R. Co. v. Whittington's adm'r, 805

4. In an action for damages against a railroad company, a count in the declaration, after setting out that the defendant was working a railroad in the county, with engines and cars for carrying passengers and freight, alleged that on a day named "the defendants conducted themselves so carelessly, negligently and unskillfully in the operation of their said business as to inflict upon W (plaintiff's intestate), severe bodily injuries, by reason whereof he did, on the 28th of June, die." The count is defective in not stating where the deceased was or how he was injured. *Idem*, 805

5. An employee of a railroad company, who is engaged in mending the track of the road, who, whilst he might get further off, stands near enough to the railroad track to be struck by a train if perchance there should be an increase of speed or a change of cars, is guilty of the grossest imprudence and negligence. No man is justified in placing himself near a passing train upon any such idea or presumption, and for an injury sustained by so doing, he or his representative cannot recover. *Idem*, 805

6. In this case, upon the facts as certified, the deceased was guilty of contributory negligence, and his administrator is not entitled to recover damages from the railroad company for the injuries sustained by the deceased. *Idem*, 805

7. If the injury sustained by the deceased was the result of a change of the usual train from an accommodation train of moderate rate of travel, to what is known as a lighting express train of a rate of travel from twenty-five to thirty-five miles per hour, and of a change of schedule of the time of running the train passing the point at which the deceased was killed, and said changes were by the chief authority of the railroad company, and the death of the deceased was without fault on his part, and the company had not given notice of said changes to their employees, of whom deceased was one, so as to enable them to avoid the danger: It was the duty of the said company to give such notice, and their failure to do so was negligence of the company, for which it is responsible in damages.

Idem, 805

SET-OFF.

1. When and how a subsequent purchaser of land will be entitled to have a prior lien on the land applied as a set-off on his bonds given for the purchase money.

See *Liens*, No. 4, and

Armentrout's ex'ors & als. v. Gibbons & als., 632

2. When purchaser of machinery which proves defective will be entitled to have the amount to be deducted for the defect in the machinery applied as a credit on his bonds given for it to a third person, see *Novation of Debt*, No. 1, and

Steploe v. Pollard, 689

SHERIFFS.

1. In an action by an execution creditor against the sheriff and his sureties, upon his official bond, for the failure to pay over money he had collected on the execution which had gone into the hands of one of his deputies, the declaration not stating that the plaintiff did not reside in the county of the sheriff, it is not necessary to aver that a demand had been made upon the sheriff, as prescribed by the statute, before the action was instituted.

Grandstaff, late sheriff & als v. Ridgeley, Hampton & Co., 1

2. If it appears upon the trial that the plaintiff in the execution did not reside in the same county with the sheriff, then, unless the plaintiff proves that such demand was made on the sheriff, his action must fail.

Idem, 1

3. A sheriff or other officer has no authority to receive payment under an execution after the return day thereof, unless the execution has been previously levied. Such payment would not bind the creditor; nor would it impose any liability upon the sureties of the sheriff in his official bond. Although the sheriff may be responsible in his private capacity for money so received, no responsibility would attach to him in his official character, on that account.

Idem, 1

4. The act of 1849, Code of 1873, ch. 184, §§ 3, 4, though it gives to a fieri facias the

effect of a continuing lien after the return day, upon all the personal estate of the execution debtor (except as therein stated), does not enlarge the powers of the sheriff with respect to executions, and were not so intended. They simply extend the lien for the benefit of the creditor.

Idem, 1

5. The authority of an officer to collect money in discharge of an execution does not result from the lien, but is the consequence of the right to levy and sell the debtor's property under the execution. So long as the right to sell continues, the right to receive remains; but no longer.

Idem, 1

6. If the officer levies before the return day of the writ, he may sell after the return day is passed; and as a necessary consequence he may receive payment without selling. But if he fails to levy before the return day, his authority to sell ceases, and with it the right to receive payment in discharge of the writ. He may receive payment at any time before the return day without a levy.

Idem, 1

7. A count in an action by an execution creditor against the sheriff and his sureties, avers that the execution went into the hands of a deputy of the sheriff, and became a lien on all the property of the debtor, and that the deputy collected the whole amount of the execution; but does not aver that the execution was levied or that the money was paid before the return day of the writ. The count is fatally defective.

Idem, 1

8. Although a sheriff is liable to a fine, at the discretion of the proper court, for his failure to make due return of an execution, he is also liable to an action on his official bond by the party injured by his failure. The fine is in the nature of punishment for a personal offence, and is not considered as any satisfaction for the damage sustained by the creditor in being unjustly kept out of his money by the default of the sheriff or his deputy.

Idem, 1

9. Where the fine is paid by the sureties of the sheriff, in any subsequent proceeding against them on the judgment or decree upon which the execution issued, they will be entitled to a credit on the judgment or decree for the amount of the fine or fines so paid. Code of 1873, ch. 49, § 58.

Idem, 1

10. In an action by an execution creditor against the sheriff and his sureties, one count in the declaration, after stating that said execution was in the hands of the deputy, and was returnable on a day stated, avers that neither the deputy sheriff or the said sheriff of S county made such return since that time, but such return of said execution to make have wholly neglected and refused, &c. The count is substantially sufficient.

Idem, 1

11. In an action by an execution creditor against the sheriff and his surviving sureties for a failure to pay over money collected on the execution, one of the execution debtors is a competent witness to prove his payment

of money on the execution to a deputy of the sheriff. *Idem*, 1

12. The execution debtor, though he cannot say that this execution had been levied, may prove that he paid the money upon it, to the deputy sheriff after the return day of the execution; but if the plaintiff fail to prove that the execution was levied before the return day, the defendant may move to exclude all that the witness said with respect to payment by him. *Idem*, 1

13. The payment made by the debtor to one deputy was intended to be handed to M, another deputy, who had the execution. A few days after the payment the debtor saw M, and he directed M to apply the same to the plaintiff's execution; to which M made no objection, no reply. This evidence was properly left to the jury to determine whether the officer had acquiesced in the direction of the debtor, and whether, under the circumstances, the officer could properly apply any part of the money to other claims in his hands against the debtor. *Idem*, 1

14. In such action, though some of the sureties are dead, and it was the conduct of M that was involved in the case—**Held**: The transaction which was the subject of investigation was the alleged default of the deputy sheriff. All the parties to that transaction were living, and competent to testify in the cause. M was therefore a competent witness for the defendants. *Idem*, 1

15. After all the evidence was introduced the sheriff and the deputy, M, asked to be allowed to withdraw and make a return on the plaintiff's execution, a copy being left of said execution, it being in evidence, stating that as soon as returned to the county court clerk's office (from whence it was issued) they would offer said return in evidence—**Held**: It was no error to refuse the application. *Idem*, 1

16. When the creditor proceeds against the sheriff for money collected under an execution, the demand of payment in the sheriff's county is absolutely essential if the parties reside in different counties. But when the creditor is also suing for a failure to make due return on an execution, no demand is necessary previous to a judgment for such breach. The gist of the action is the failure to return the execution. *Idem*, 1

STATUTES.

1. The act of April 4, 1877, amending § 32, ch. 36, Code of 1873, p. 368, construed in *Universal Life Ins. Co. v. Cogbill & als.*, 72

898 *2. The act of 1849, Code of 1873, ch. 184, §§ 3, 4, in relation to executions, construed in

Grandstaff, late sheriff & als. v. Ridgely, Hampton & Co., 1

3. The act of 1866, called the adjustment act, construed in *Compton v. Major & al.*, 180

4. The act of 1871, entitled the funding act, construed in

Clarke v. Tyler, sergeant, 134

5. The act, Code of 1873, ch. 108, § 14, construed in

Trotter & als. v. Newton & als., 582

6. The act of 1874, ch. 122, § 5, in relation to interest on money, construed in

King v. Buck & als., 828

SURETIES.

1. Sureties of an officer of a corporation, what will not release them.

See Corporations, No. 1, and Richmond & Petersburg R. R. Co. v. Kasey & als., 218

2. A sheriff or other officer has no authority to receive payment under an execution after the return day thereof, unless the execution has been previously levied. Such payment would not bind the creditor; nor would it impose any liability upon the sureties of the sheriff.

Grandstaff, late sheriff & als. v. Ridgely, Hampton & Co., 1

3. Sureties of a guardian for the purchase money of his ward's land, purchased by the guardian at a judicial sale, held liable for the purchase money.

See Guardian and Ward, No. 1, and Redd v. Jones & als., 123

TAXES AND TAXATION.

1. The constitution of the state does not authorize the county authorities to assess property for taxation, and levy taxes upon it independent of the action of the legislature.

Va. & Tenn. R. R. Co. v. Washington County, 471

2. Under the present legislation of the state, the county authorities can only levy a tax upon such property as by law is assessed with state taxes in the county.

Idem, 471

3. Under the present legislation of the state, county authorities cannot levy a tax on the real estate of railroads in the county, either for county, township, school, or road purposes. *Idem*, 471

TOLL-BRIDGES.

1. The general assembly has the power to authorize an individual to build a toll-bridge over a river.

Plecker v. Rhodes, 795

2. The act authorizing the building of the toll-bridge authorizes the individual to purchase or condemn the land necessary for the abutments, or way to the bridge, in the mode prescribed by law. The act, chapter 56 of the Code of 1873, is the act to govern the proceedings to condemn the land. And although that act does not refer to toll-bridges, it will be considered as amended by the act authorizing the bridge. *Idem*, 795

3. Where the statute confers the privilege of building the toll-bridge, that determines the question of public convenience, and the only question to be ascertained by the pro-

ceedings in the court is the damages to the owners of the land condemned.

Idem, 795

4. The act authorizing the building of the bridge requires that it shall be commenced in six months and completed in two years. The notice to the owner of land of a motion to the court for the appointment of commissioners to value the land proposed to be condemned was more than six months after the passage of the act. This notice was not necessary to the commencement of the bridge, and does not, therefore, show that the bridge was not commenced in six months.

Idem, 795

5. The completion of the bridge in two years having been hindered by the owner or the land in delaying the work by his appeal from the judgment of the county court confirming the report of the commissioners, he will not be allowed to set up the forfeiture. It is a matter for the commonwealth *to determine whether the forfeiture shall be enforced.

Idem, 795

TRUSTS AND TRUSTEES.

1. In 1851, N E conveyed to his brother, J E, a tract of land on which there were four deeds of trust to secure debts, which were recognized in the conveyance from N E to J E; and J E covenanted to pay off the debts of N E, for which J E and two others were bound as his sureties, amounting to some \$4,000. J E paid part of the first, second and third mortgage debts, and took no assignment from the creditors. When the conveyance was made in 1851, the property was worth more than the amount of the mortgage debts and the debts for which J E was bound as surety of N E; but during the war it was very much injured by the enemy, who destroyed the buildings and cut off the timber. In 1871, the trustee in the first two deeds sold the land to satisfy the balance due under these deeds, and there was a balance left—HELD: That under the circumstances J E is not entitled to have this balance applied to repay him what he had paid upon the debts secured by the first three deeds; for he was in fact paying his own debt; but it is to be applied to pay, first the balance due under the third deed, and then the debt secured by the fourth deed.

Gayle v. Wilson, trustee, & als., 166

2. C, living in Virginia, trustee of D, a married woman separated from her husband, and residing in Missouri, holds bonds on a solvent debtor, well secured on real estate, which were executed before the war; and in 1863 receives payment in part of said bonds in Confederate money, and invests it for D in a Confederate bond. The receipt of Confederate money at that time was a breach of trust, and C will not be allowed a credit for the amount of the bond.

Coltrane v. Worrell, 434

3. C, holding bonds bearing interest, will be charged with the interest falling due during the war, the debtors living in Virginia.

and therefore bound to pay the interest to him. Idem, 434

4. By the terms of the trust, C was to pay the interest of the trust fund and as much of the principal as might be necessary for the support of D. Before the war he paid her some interest, and also since the war. In settling his account, whilst he will not be charged interest upon interest, his payments will not be credited upon the principal of the fund. Idem, 434

5. The trust deed provides that D shall have the interest and so much of the principal of the trust fund as shall be necessary for her support. If she dies in the lifetime of her husband she may dispose of the whole of the trust fund by her will, and if she survives him it shall be hers absolutely. She may have the trust fund removed to Missouri, and vested in a trustee appointed in that state to receive and hold it on the same trusts.

Idem, 434

6. A trustee cannot derive profit from the trust fund without rendering an equivalent therefor. He is bound to execute the trust for the benefit of the cestui que trust, whether the latter live at home or abroad, or the trust is to be executed in peace or in war. If the trust fund be perfectly secure, bearing interest at the beginning of the war, he cannot voluntarily change it so as to make it insecure and bear no interest.

Idem, 434

7. See Marriage Settlements, No. 4, and Justis v. English & als., 565

8. When a deed of trust will have priority over a homestead exemption.

See Homesteads, No. 3, and White v. Owen & als., 43

9. Though a resulting trust may be established by parol evidence, yet where M, the husband, held possession under two deeds, one in 1831 and the other in 1843, conveying to him absolutely, for thirty and forty years without question, the parol evidence must be clear and explicit, such as 900 to *leave no doubt of the character of the transaction.

Miller & als. v. Blose's ex'or & als., 744

Jennings & als. v. Shacklett & als., 765

10. Where the trust does not arise on the face of the deed, but is raised upon the payment of the purchase money which creates a trust which is to override the deed, the proof must be very clear, and mere parol evidence ought to be received with great caution.

Idem, 744

11. A resulting trust must arise at the time of the execution of the conveyance. Payment or advance of the purchase money at the time of the purchase is indispensable. A subsequent payment will not, by relation, attach a trust to the original purchase, for the trust arises out of the circumstance that the moneys of the real and not the nominal purchaser, formed at the time the consideration of that purchase, and became converted into land. Idem, 744

12. The mere fact of payment of the purchase money will not always be sufficient to raise a clear presumption of a trust, but evidence of the intention must often enter into the fact whether that payment is such an equity under the circumstances. The payment by a father of purchase money of land conveyed to a son, or nephew, or son-in-law, or any one whom he stood in loco parentis, would not of itself create a resulting trust. *Idem*, 744

13. In this case the evidence fails to prove satisfactorily either that the purchase money of the land was paid by K, the father of Mrs. M, and his executors, or that on the division in 1843, it was considered and treated as a part of K's real estate, and conveyed as such to M by the other heirs without any other consideration. *Idem*, 744

USURY.

1. Under the act of 1874, ch. 122, § 5, in relation to interest on money, in an action on a usurious contract, the judgment is to be for the principal sum ascertained to be due after deducting the usury, and interest on that principal from the date of the judgment.

King v. Buck & als., 828

VENDOR AND PURCHASER.

1. On the 31st of July, 1866, R and A enter into a contract by which R sells to A a tract of land on Cherrystone creek, and covenants that by the 1st of January, 1867, he will convey the land to A by deed, with general warranty at the cost of the vendee by proper deed tendered by A, and will deliver possession free of encumbrance. And A covenants to pay to R \$9,000, of which \$5,000 by the 1st of January, 1867, and sooner if R shall have made the conveyance and delivered possession, and for the balance in one and two years, with lien on the land from the day the conveyance is made and possession given. And R covenants that he will on or before the 1st of May, 1867, remove or cause to be removed the stakes marking the oyster grounds of S and D, so that these grounds shall be left unencumbered by the latter, and remain to the use of A. A was put into possession and paid the \$5,000 and the first and a part of the second deferred payments; but had not tendered to R a deed to be executed. In October, 1870, R files his bill for specific performance of the contract, averring his performance or willingness to perform it. On demurrer on the ground that the plaintiff had his remedy by action at law for the balance of the purchase money—*HOLD*: That though the plaintiff might have sued at law, that would not have afforded a remedy against the land; and therefore equity had jurisdiction of the case.

Ayres & als. v. Robins, 105

2. A answers and says that R has not complied with his covenant to remove the stakes of S and D, whereby he lost an important part of his inducement to purchase the land, and that the damage thus sustained was fully equal to the balance of the purchase money

unpaid, and without asking for a rescission of the contract, claimed an abatement of the price—*HOLD*: The covenants to pay the two deferred instalments and to remove the stakes of S and D, were dependent; and R not having removed them, A is entitled to have an abatement from the purchase money to the extent of the damage he has sustained by this failure of R to execute his covenant.

Idem, 105

3. The court directs an issue to be tried at its bar to ascertain whether R has complied with his covenant to remove the stakes of S and D, and if he has not, what damage A has sustained by his failure to do so. The first jury return a verdict that all the stakes have not been removed, and ascertain A's damages at \$2,317.50. This verdict is set aside by the court, on the motion of the plaintiff, and no exception is taken. The second jury did not agree, and the third found, as did the first, as to the removal of the stakes, but found a verdict for only \$350 damages. A moved the court to set aside this verdict, but the court overruled the motion, and A excepted; but the exception does not contain the facts or the evidence. The court makes a decree for the amount of the purchase money due, after deducting the \$350, and A appeals—*HOLD*: An issue was the proper mode of ascertaining the damages; and the bill of exceptions not giving the evidence before the jury, the appellate court must presume, in the absence of the evidence, that the verdict was correct. Though there were depositions in the record, they were taken before the trial of the issue, and it did not appear that they were read before the jury, or if read that they were the only evidence. *Idem*, 105

4. A purchaser of land, the consideration of which is a debt then due by the vendor to the purchaser, is a purchaser for value.

See *Purchasers for Value*, No. 1, and *Cammack v. Soran & al.*, 292

5. A purchaser of land is bound to know all that the deeds through which he claims will inform him of; and where the deeds refer to a suit in equity under which the land had been previously sold, if the commissioner who sold the land has failed to follow the decree under which he acted, so that the land is still liable to satisfy a creditor under a former lien, the purchaser is bound to know this fact; and a certificate of the clerk of the court that there was no lien or incumbrance upon the land, will not entitle him to the defence of bona fide purchaser without notice.

Wood & al. v. Krebbs, 703

WILLS.

1. A will must be subscribed, but need not be proved, by two attesting witnesses.

Cheatham v. Hatcher & als., 56

2. The testimony of a subscribing witness invalidating the will which he attested, ought to be viewed with suspicion.

Idem, 56

3. The opinion of a physician on a question of sanity, is entitled to peculiar weight, particularly where he had special opportunities of observation.

Idem, 56

4. The fact that the draftsman of a will takes a benefit under it, while it imposes upon the court the duty of careful scrutiny, does not invalidate the will.

Idem, 56

5. A request to a witness to subscribe the will, made by a third person in the hearing of the testator, is, in law, the request of the testator, if he is conscious and does not dissent therefrom.

Idem, 56

6. In this case the due execution of the will and the sanity of the testatrix was proved by one of the attesting witnesses, whose testimony was confirmed by other witnesses and circumstances surrounding the transaction. The other subscribing witness, on the other hand, denied the due execution, and the consciousness of the testatrix; but his testimony was impaired by the circumstance that it was in conflict with statements made by him soon after the execution of the will, and was inconsistent with his act in attesting the will—HOLD: That, the will was duly executed, and should be admitted to probate.

Idem, 56

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*WITNESSES.

1. Where a party to a suit is examined as a witness, and testifies about transactions the other party to which is dead, if he does not testify "in his own favor, or in favor of any other party having an interest adverse" to the party who is dead, or those claiming under him, but against his own interest and against the interest of those having an

interest adverse to the dead party, he is no incompetent.

Burkholder & als. v. Ludlam & als., 255

2. In an action of debt by W for the use of G, against the executor of M, upon two bonds purporting to be executed by M and R, the executor pleads non est factum, and payment. The only proof of the execution of the bonds by M, is proof of an acknowledgement by M to an agent of G, made after the assignment to G; and the proof as to the payments are payments made by R to G in the lifetime of M—HOLD: G is not a competent witness under the statute to testify in his own behalf.

Morris' ex'or v. Grubb, 286

3. In an action by an execution creditor against a sheriff and his sureties for the failure to pay over money collected on the plaintiff's execution, it was the conduct of the deputy sheriff that was involved in the case—HOLD: The transaction which was the subject of investigation was the alleged default of the deputy sheriff. All the parties to that transaction were living and competent to testify in the cause. M was therefore a competent witness for the defendants.

Grandstaff, late sheriff & als. v.

Ridgley, Hampton & Co., 1

4. In such an action the execution debtor is a competent witness for the plaintiff to prove the payment of money on the execution to the deputy sheriff. Idem, 1

5. P and C, commissioners, sell land to B, who executes his bonds for the deferred payments, with G and P as his sureties. B sells the land to K. P being dead, G, P and K are incompetent witnesses to prove the payment of the bonds to P.

Parent's adm'r v. Spitler's adm'r & als.,

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REPORTS OF CASES

DECIDED IN THE

SUPREME COURT OF APPEALS

OF VIRGINIA.

BY PEACHY B. GRATTAN.

VOLUME XXXI.

FROM NOVEMBER 14, 1878, TO MAY 1, 1879.

JUDGES

OF THE

SUPREME COURT OF APPEALS

DURING THE TIME OF THESE REPORTS.

R. C. L. MONCURE, PRESIDENT.

JOSEPH CHRISTIAN,
WALLER R. STAPLES,

FRANCIS T. ANDERSON,
EDWARD C. BURKS.

Attorney General, JAMES G. FIELD.

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CASES

DECIDED IN THE

Supreme Court of Appeals of Virginia.

Jordan v. Eve, Trustee, &c.

November Term, 1878, Richmond.

1. Incumbrances—Public Highways.*—E sells to J a tract of land through which a public highway runs, and conveys the land to J with a covenant against incumbrances. The public highway is not an incumbrance which is included in the covenant and for which J is entitled to compensation.

2. Court of Equity—Power in the Case.—The land was conveyed by H to E, and the deed was recorded on the 31st of December, 1866. At that time there were judgments docketed against H to the amount of \$9,845; but nearly all of them were against H as surety, and the principals in two, amounting to more than \$6,000, were good for the money. H had land in the county after the conveyance to E, valued at \$140,000. Upon a bill by E against J to subject the land under his vendor's lien for the payment of \$4,800 of the purchase money then due—**Held:** The court may decree a sale of the land, reserving the power to dispose of the proceeds of sale so as to protect the purchasers.

2 *This case was heard at Staunton, but was decided in Richmond.

By deed bearing date the 4th of October, 1866, and duly recorded on the 31st of December, 1866, M. G. Harman and wife conveyed to Robert C. Eve a certain tract of land in the county of Augusta, on both sides of the McAdam road, stated to contain four hundred and twenty-nine acres and three roods, it being the same land granted to the said M. G. Harman by Robert P. Harnsberger and wife, by deed bearing date the 22d of February, 1862. The consideration expressed in the deed was their love and affection for their daughter, Willie H. Eve, and her husband, the said Robert C. Eve; and it was upon trust for the use and benefit of these parties during their joint lives, but free from any incumbrance or charge of the

***Deeds—Covenant—Incumbrances—Public Highway.**—The finding of the first headnote of the principal case is affirmed in *Deacons v. Doyle*, 75 Va. 258; 2 Min. Inst. (4th Ed.) 721. Distinguished in *Trice v. Kayton*, 84 Va. 217, the facts in which case were that a lot in the city of Norfolk was sold and conveyed by metes and bounds with covenants for quiet enjoyment, free from incumbrances and it was discovered later that the house and fence encroached upon the street. **Held,** that the encroachment of house and fence upon the street was a hidden fact and a breach of the warranty. See also *Scott v. Bental*, 23 Gratt. 1; *Barr v. Fleming*, 29 W. Va. 326; *Patton v. Quarrier*, 18 W. Va. 447, where the principal case is cited and sustained.

said Robert C. Eve; and upon the death of either, for the joint benefit of the survivor and the children of Willie H. Eve during the life of the survivor, and then to the right heirs of said Willie H. Eve. And Robert C. Eve was empowered, with the consent of the said M. G. Harman, to sell the property and reinvest upon the same trusts.

In 1872 Eve sold and conveyed to the Valley railroad company so much of said land as is occupied by the said railroad track, measuring fifty feet on either side from the centre line of said track, and containing about seven acres.

On the 28th of October, 1874, Eve made a contract with William Jordan to sell him the said tract of land, then stated to be four hundred and twenty-two acres, for which Jordan was to convey to Eve another tract of land called the Bagly farm, a certain lot in Staunton, and execute to him his notes for \$10,210 in five equal annual instalments, with six per cent. interest from date, payable annually. And Eve and wife

3 executed *a deed, in which M. G. Harman joined, conveying the land to Jordan, and reserving a lien upon the land; and Jordan conveyed the Bagly farm and the Staunton lot to Eve, and executed to him his five bonds, each for \$2,042, at one, two, three, four and five years, bearing interest payable annually. The deed from Eve to Jordan, though delivered, has not been put upon record and is not in the record.

In October, 1876, Eve as trustee, instituted a suit in equity in the circuit court of Augusta county against Jordan, and after setting out in his bill the foregoing facts, he stated that Jordan's first bond, and the one year's interest on all of them had been long since due, and the second bond and the interest on the other three would be soon due; and he prayed that his lien upon the land might be enforced by a sale thereof, and from the proceeds of sale the amount due him might be paid, and provision made for the payments that were to fall due; and for general relief.

Jordan answered the bill. He says he bought the land at \$55 per acre, and it was represented by Harman, who, as agent of Eve, made the contract, that there were four hundred and twenty-two acres in the tract, and the amount of purchase money was fixed on that basis; that he had discovered that this quantity was what was contained in the tract before the sale to the railroad company, and he insists he is entitled to an

abatement for so much of the land as had been previously sold by Eve to the railroad company.

He further says, that the deed from Harnsberger and wife to Harman acknowledges the receipt of one-third of the purchase money in cash, and two-thirds in due paper, and reserves a lien on the land; that there a number of these bonds transferred to Harnsberger, and he believes the most of them are still unpaid; and he asks

4 that an account may be *ordered to ascertain how much of said four hundred and twenty-two acres of land has been heretofore conveyed to the Valley railroad company, and the relative value thereof as compared with the residue of the tract; and to ascertain whether any, and if so which of the claims assigned by Harman to Harnsberger still remains unpaid.

In November, 1876, the court made a decree referring the cause to Master Commissioner J. W. G. Smith, with directions to take an account showing:

1. Whether there is any lien on the said land on account of the lien reserved in the deed therefor from Harnsberger to Harman, and if any such lien, the amount and extent thereof.

2. Whether there is any deficiency in quantity of land sold by Eve to Jordan; and if there is a deficiency in quantity, he will ascertain the extent thereof, and the abatement to be made in the purchase money by reason of such deficiency.

3. Any other matter deemed pertinent by himself or required by the parties to be so stated. And the commissioner was authorized to require the county surveyor to make such surveys of the land, &c.

In February, 1877, Commissioner Smith returned his report. On the first subject he says that Harnsberger's lien on the land was duly released by deed of record in the clerk's office of the county court of Augusta.

On the second subject he says he directed the county surveyor to make a survey showing what deficiency there was—first, by reason of the conveyance by Eve to the Valley railroad company; and, second, by reason of a portion of the land being occupied by the Valley pike. Upon this survey, and evidence taken before him, he reports that in respect to the railroad, Jordan is short in

5 land to the amount of one *acre, one rood and 5-45 poles, which, at \$55 per acre, would be \$70.60, for which Jordan would be entitled to a credit as of October 29th, 1874.

That Jordan likewise claims credit for the value of the land occupied by the Valley pike or McAdam road. And the commissioner not undertaking to decide the question of law, reports, that if Jordan is entitled to this credit, then he is additionally short of land on this account to the extent of four acres, one rood and twenty-one poles, which, at \$55 per acre, is \$240.

Under the third head, the commissioner says, he deemed it pertinent and he was requested by Jordan to inquire into all judgment or other liens binding on said land as belonging to M. G. Harman at the date of

recording of the deed from Harman and wife to Eve, trustee, viz: December 31st, 1866. Up to this date he found, upon examination, twenty judgments against Harman, regularly docketed. Of these there were twelve marked in the docket satisfied, or for benefit of said Harman. He makes a statement of each of the eight not so marked, the whole amount of which, with interest up to March 1st, 1877, is \$9,845.85. Of these, however, they are in nearly, if not quite all, cases in which Harman was a surety, and one for \$5,188.39, the commissioner says, if not already paid entirely, will be paid out of the assets of J. M. McCue, the principal in the debt; and of another for \$922.05, the owner stated in his deposition the principal in the debt is, he believed, good for the money, and he has no idea that Harman will have to pay the money. These two judgments, amounting to \$6,110.44, the commissioner deducts from the \$9,845.85, leaving only \$3,785.40 as lien indebtedness on the land.

The commissioner further reports that he has been called upon by the plaintiff's 6 counsel to state specially *what real estate, and its value, said M. G. Harman owned on the 31st of December, 1866, other than that conveyed to Eve, trustee. And he finds that exclusive of the land bought by Jordan of Eve, trustee, the said M. G. Harman stood assessed on the commissioners' books of December 31st, 1866, with real property in Augusta county in the value of \$122,201.50; and it was proved that he had in the city of Staunton real estate valued at \$20,000.

It appears from the assessor's land books, that for the years 1867 to 1872, Eve, trustee, is assessed with four hundred and thirty-nine three-fourth acres of land, and for 1873, he is assessed with four hundred and sixteen acres (thirteen acres having been transferred to the Valley railroad company, as per note on assessor's books).

Jordan excepted to the report—

First. Because he should have been allowed a deduction for six acres sold to the railroad company, instead of one acre and a fraction allowed by the commissioner; and for the bed of the McAdam road four acres, making in all ten acres.

Second. That the plaintiff sold to Jordan four hundred and twenty-two acres of land, the title good, and free from all incumbrance. The commissioner reports judgments against M. G. Harman prior to his conveyance to the plaintiff amounting to \$9,845.86, which now stands lien upon the land; and it was the duty of the plaintiff to remove them before he can demand the payment of the purchase money.

Third. The McAdam road, if merely an easement, still it is an incumbrance, and should be removed by the plaintiff, or Jordan should be compensated for it.

The cause came on to be heard on the 16th of June, 1877, when the court 7 overruled all the exceptions of *the defendant and confirmed the report of the commissioner, and declaring that the court proposed to see to the proper disbursement of the purchase money due from Jordan;

that Jordan should pay to the general receiver of the court the purchase money then due, viz: \$4,819.12, with interest on \$4,084.00 from the 20th of October, 1874, subject to a credit of \$70.60 as of that date, for the deficiency on the land, within ninety days from the rising of the court; and if not paid, commissioners named were appointed to sell the land on terms stated in the decree. And Jordan thereupon applied to this court for an appeal; which was allowed.

D. & A. H. Fultz, for the appellant.
G. M. Cochran, Jr., for the appellee.

STAPLES, J., delivered the opinion of the court.

The first ground of error assigned in the petition for an appeal is the refusal of the court below to allow the appellant compensation for an alleged deficiency in the land. It is claimed that the deed of Harman and wife conveyed to the appellee four hundred and twenty-nine and a half acres; that thirteen acres were afterwards transferred to the Valley railroad company, leaving only four hundred and sixteen acres in the tract; whereas the deed to the appellant is for four hundred and twenty-two acres. The survey made in the cause shows, however, there are four hundred and twenty acres, two roods and thirty-four poles in the tract, being a deficiency only of one acre, one rood and five forty-fifth poles; and for this the appellant has been allowed compensation by the decree of the circuit court. The accuracy

of this survey has not been impeached by the appellant. The mistake was probably made by the assessor in his estimate of the quantity transferred to the railroad company. Instead of thirteen acres it ought to have been nine. It is very certain the appellant gets all the land for which he has paid, or has contracted to pay. This ground of error is therefore not well taken.

The next error assigned is in failing to allow the appellant compensation for so much of the land as is occupied by the Valley turnpike, a McAdam road running from Staunton to Winchester. It is insisted that the appellant by the terms of his contract is entitled to all the land purchased by him, within the metes and bounds specified in his deed, free from all incumbrances of every description, and that the road in question is a perpetual easement or incumbrance upon the land.

The deed to the appellant is not in the record, and we have no means of ascertaining the nature of the covenants contained in it. If it be a mere covenant of warranty of seisin, or of a good right to convey, according to all the authorities it is not broken by the existence of a highway upon the land. 2 Lomax Digest, 347; *Whitleck v. Cook & wife*, 15 John. R. 483; *Rawle on Covenants of Title*, p. 80. If on the other hand, the deed contains a covenant against incumbrances, the question is not so free from difficulty. In Massachusetts and in most of the New England states, it is held that a highway constitutes a breach of the covenant against incumbrances. In Pennsylvania, Wisconsin

and other states, the contrary doctrine prevails. In *Whitleck v. Cook & wife*, 15 John. R. 483, 490, the deed contained no covenant against incumbrances, but the reasoning of the court is broad enough to apply to covenants of every description. Spencer, J. said: "It must strike the mind with surprise that a

person who purchases a farm through which a public road runs at the time of purchase, and had run so long before, who must be presumed to have known of the existence of the road, and who chooses to have it included in his purchase, shall turn around on his grantor and complain that the general covenants in the deed have been broken by the existence of what he saw when he purchased, and what must have enhanced the value of the farm. It is hazarding little to say that such an attempt is unjust and inequitable, and contrary to the universal understanding of both vendors and purchasers. If it could succeed a floodgate of litigation would be opened, and for many years to come this kind of action would abound."

In *Patterson v. Arthurs*, 9 Watts R. 152, the purchaser claimed an abatement of the purchase money because of a public road which passed over the lots sold. The court expressed its surprise that a highway should ever have been imagined an incumbrance within the covenant, and its belief that it had been the universal understanding of both sellers and purchasers in Pennsylvania, that the covenant against incumbrances did not extend to public roads. Although a public highway no doubt is in many instances an injury instead of a benefit to the holder or owner of the land upon which it is located, and therefore tends to lessen its value in the estimation of the purchaser, yet it is fair to presume that every purchaser before he closes his contract for his purchase of land, has seen it and made himself acquainted with its locality and the state and condition of it; and consequently if there be a public road or highway open and in use upon it, he must be taken to have seen it and to have fixed in his own mind the price he was willing to give for the land with reference to the road, either making the price less

or more as he conceived the road to be injurious or advantageous to the occupation and enjoyment of the land.

We are of opinion that these views of the New York and Pennsylvania courts are in accord with the general understanding and usage in Virginia on this subject. With us it has never been supposed that the vendor in conveying his land is required to make an express reservation or exception with respect to the highway upon the tract, or else to submit to an abatement of the purchase money. A public highway is generally regarded as a benefit to the land; and whether so or not, the purchaser is presumed to have taken it into consideration and to have fixed the price with reference to its supposed advantages or disadvantages. If it was once understood as the doctrine of this court that the purchaser is entitled to an abatement or damages for an easement or incumbrance of this kind, in the language of

the New York court, it would open the floodgates of litigation in this state. Besides it is difficult to see how the damages in such case can be properly estimated. A public highway is a mere easement. It does not take away the right of freeholder in the soil. That continues in the owner in the same manner it was before the highway was established, subject only to the easement. The owner still retains his property in the mines, quarries, springs of water, timber and earth not incompatible with the public right of way. He may maintain trespass, ejectment, or waste in respect to the same. And upon the abandonment or discontinuance of the way the property and right of enjoyment revert to the proprietor of the soil. *Washburn on Easements and Servitudes*, 228; *Warwick & Barksdale v. Mayo*, 15 Gratt. 545.

These elements must of course be taken into consideration, as also the peculiar benefits the owner derives from the location of the road, in estimating the damages or abatement to which the purchaser may be entitled. It is obvious that these contingencies were never contemplated by the parties, and the most reasonable inference is, that they contracted with reference to the then condition and state of the property as it appeared and was known to both. This ground of error is therefore overruled.

The next error assigned is, that at the date of the conveyance to the appellee, Eve, there were unsatisfied judgments to a large amount against Harman, constituting liens upon the land, which ought to have been removed before any decree for a sale. The commissioner to whom the whole matter was referred for investigation, reports judgments against Harman unsatisfied, and constituting liens on the land to the amount of nine thousand eight hundred and fifty-five dollars and eighty-five cents. The larger portion of these judgments are upon debts for which Harman was bound only as surety, with perfectly solvent principles. One of the judgments, amounting to more than five thousand dollars, the commissioner reports if not already paid will certainly be paid out of the assets of J. Marshall McCue; so that the liens by judgment will not exceed four thousand dollars. To satisfy these, the commissioner reports real estate belonging to Harman in Augusta county of the value of \$122,000, and the testimony shows there is real property in the city of Staunton of the value at least \$20,000. The learned counsel for the appellant insists that this property is shingled over with judgment liens and trust deeds amounting to more than double its value. The true inquiry, however, is as to the liens upon the land at the time of the conveyance to the appellee and his wife in October, 1866. No liens subsequently acquired against Harman could effect the lands in the hands of the appellee, or those claiming under him. The report

of the commissioner already adverted to, showing these liens, was made at the request of the appellant. The examination upon which that report was founded

was at his instance, and he has offered no evidence, documentary or otherwise, invalidating the statements of the commissioner. It must be assumed, therefore, that there is real estate whose value is ten times the amount of the judgments which must first be subjected before the land of appellant can be touched. Besides this, it is provided in the decree that the court will see to the proper disbursement of the purchase money. The purchaser of the land will also have in his own hand the deferred instalments of the purchase money, falling due in six, eighteen, thirty, and forty-two months, for his own indemnity, in the event the parties primarily bound for the debts shall become insolvent, and the real estate of Harman shall be insufficient to satisfy the judgments. Under such circumstances the most timid purchaser could not have the slightest apprehension of a title acquired under the decree of the court.

This disposes of all the errors assigned in the petition and in the argument of the appellant's counsel before this court. For the reasons stated, we are of opinion the decree of the circuit court is plainly right, and must be affirmed.

Decree affirmed.

13

* *Harris v. Harris.*

November Term, 1878, Richmond.

1. *Alimony—Wife in Fault.*—Alimony had its origin in the legal obligations of the husband, incident to the marriage state, to maintain his wife in a manner suited to his means and social position, and although it is her right, she may by her misconduct forfeit it; and when she is the offender, she cannot have alimony on a divorce decreed in favor of the husband. So long as he has committed no breach of the marital duty, he is under no obligation to provide her a separate maintenance, for she cannot claim it on the ground of her own misconduct.

2. *Same—What Principles Govern.*—According to the ecclesiastical law no alimony was allowable on a decree *a vinculo matrimonii*. And if under the Virginia statute the court has a discretion, upon decreeing such a divorce, to allow alimony to the wife, that discretion should be exercised upon the same principles which govern in a case of divorce from bed and board.

3. *Same—Willful Desertion of Wife.*—The circumstances must be very peculiar indeed, if any such case there could be, which justifying a decree for an absolute divorce in behalf of the husband for willful desertion of the wife, would at the same time

* *Divorce—Alimony.*—The principal case is cited in *Cralle v. Cralle*, 79 Va. 182, to support the view that property acquired after the date of the decree *a vinculo* should not be included in estimating the allowance for matrimony. See generally *Cralle v. Cralle*, 84 Va. 198; 1 Min. Inst. (4th Ed.) 294, 298, 302, 308, 309.

† *Same—Same—Wife in Fault.*—A wife having left her husband without good legal ground is not entitled to alimony though the husband may obtain a divorce. *Carr v. Carr*, 22 Gratt. 168. See also *Latham v. Latham*, 30 Gratt. 307, and *note*.

warrant a decree in her behalf, that he should out of his own estate maintain her as long as she lived, although after the divorce she should become the wife of another.

4. Decision in This Case.—The wife having left her husband in 1863, upon the ground that he would not control his servants and maintain her rightful authority as his wife, the husband is entitled to a decree for a divorce *a vinculo matrimonii* on the ground of desertion, on a bill filed by him in 1877. And the wife having left her husband without any sufficient cause, the court upon decreeing the divorce cannot allow her alimony out of the husband's estate.

This case was heard at Staunton, but was decided at Richmond. It was a suit in equity in the circuit *court of Nelson county, brought in July, 1877, by Daniel M. Harris against his wife, Sarah C. Harris, for a divorce *a vinculo matrimonii*, on account of desertion. There was no doubt that Mrs. Harris had left her husband's house some fourteen years before the suit was instituted, and had not returned.

The court below made a decree divorcing the parties and dissolving the marriage; and decree that the plaintiff, Daniel M. Harris, should pay to Mrs. Harris and annuity of \$75 during her natural life, commencing on the 1st of May, 1878, the said annuity to be a continuing charge and lien upon his real estate; and that said annuity should be in lieu of all dower right which Mrs. Harris might otherwise have in his real estate; and liberty was given to Mrs. Harris to sue out her execution of *feri facias* to enforce the collection of her annuity under the provisions of the decree, at any time on default of payment for thirty days by said Daniel M. Harris. And liberty was reserved to Mrs. Harris to apply to the court to subject the real estate, &c. Daniel M. Harris thereupon applied to a judge of this court for an appeal; which was awarded. The case is stated by Judge Burks in his opinion.

Robert Whitehead, for the appellant.
Fitzpatrick, for the appellee.

BURKS, J. The bill in this case was filed by a husband against his wife, praying a divorce from the bond of matrimony on the ground of alleged desertion by the wife for a period exceeding five years. What purports to be an answer to the bill by the wife was filed, depositions were taken by both parties, and at the hearing of the cause there was a decree of *divorce according to the prayer of the bill, and further of an allowance to the wife of an annuity during her life, the payment of which was secured by a charge on the real estate of the husband. The husband is the appellant here, and complains of so much of the decree as makes the allowance to the wife.

By the Code of 1873. ch. 105, jurisdiction of suits for annulling and affirming marriages, and for divorces from the bond of matrimony and from bed and board for causes specified, is vested in the circuit courts and (by subsequent statute) in the corporation courts, on the chancery side thereof.

Section 9 provides, "that such suits shall be instituted and conducted as other suits in equity, except that the bill shall not be taken for confessed; and whether the defendant answer or not, the case shall be heard independently of the admissions of either party in the pleadings or otherwise," and that "costs may be awarded to either party, as equity and justice may require."

Section 12 is in the following words: "Upon decreeing the dissolution of a marriage, and also upon decreeing a divorce, whether from the bond of matrimony or from bed and board, the court may make such further order as it shall deem expedient concerning the estate and maintenance of the parties, or either of them, and the care, custody, and maintenance of their minor children, and may determine with which of the parents the children shall remain; and the court may from time to time afterwards, on petition of either of the parents, revise and alter such decree concerning the care, custody and maintenance of the children, and make a new decree concerning the same, as the circumstances of the parents and the benefit of the children may require."

It will be observed that the court, in the exercise of its jurisdiction over the persons and subjects mentioned in this last-named section, is invested with a very large discretion. We have to consider the nature and extent of that discretion and the exercise of it, so far only as it concerns "the estate and maintenance of the parties." On this branch of the case I do not propose to extend my inquiries beyond this limit.

The exercise of discretionary power by a judge to whom it is confided is always more or less embarrassing, and what is said by an English writer, speaking of the British constitution and jurisprudence, applies as well to ours, that it is a principle consonant to the spirit of our constitution, and which may be traced as pervading the whole body of our jurisprudence, that *optima est lex quae minimum relinquit arbitrio judicis, optimus judex qui minimum sibi*—that system of law is best which confides as little as possible to the discretion of the judge—that judge is the best who relies as little as possible on his own opinion. Broom's Leg. Max. 84.

Discretio est discernere per legem quid sit justum, says my Lord Coke, 4 Ins. 41, and "discretion," says Lord Mansfield, "when applied to a court of justice, means sound discretion guided by law. It must be governed by rule: it must not be arbitrary, vague and fanciful, but legal and regular." *Rex v. Wilkes*, 2 Burr. R. 25, 39.

It is not an unlimited power, but in all cases, where by law, whether statute or common law, a subject is referred to the discretion of the court, that must be regarded as a sound discretion, to be exercised according to the circumstances of each particular case. Daniel, J., in *Commonwealth v. Wyatt*, 6 Rand. 694, 700. And Judge Christian, speaking of the allotment of alimony, citing *Bishop on Mar. & Div.* and other authorities, says, "that it is a matter within the discretion of the court. Yet it is not an arbitrary but

17 a judicial discretion, *to be exercised in reference to established principles of law relating to the subject, and upon an equitable view of all the circumstances of the particular case." *Bailey v. Bailey*, 21 Gratt. 43, 57.

These principles must guide us in the inquiry we are about to make, whether the learned judge of the circuit court, in the exercise of the discretion with which the law invested him, has erred in decreeing maintenance to the appellee during her life out of her husband's estate, after decreeing on his behalf a divorce from the bond of matrimony. Under the English ecclesiastical law as a part of the common law, the court, independently of the section (12) copied from the Code, could not have decreed any such allowance. Alimony, or an allowance for the maintenance of the wife, was never decreed on a divorce a vinculo matrimonii. It was confined to divorces from the bed and board, and was an incident of decrees of that character. It is plain, however, from the language of the section of the Code referred to, that the court may, in the exercise of its discretion, extend it to a decree of divorce from the bond of matrimony.

Alimony had its origin in the legal obligation of the husband, incident to the marriage state, to maintain his wife in a manner suited to his means and social position, and although it is her right, she may by her misconduct forfeit it; and where she is the offender, she cannot have alimony on a divorce decreed in favor of the husband. So long as he has committed no breach of marital duty, he is under no obligation to provide her a separate maintenance, for she cannot claim it on the ground of her own misconduct. 2 Bish. on Marriage & Divorce, § 377; *Carr v. Carr*, 22 Gratt. 168, 173.

By analogy, this rule should be applied to a case of a decree a vinculo matrimonii. In such case, maintenance

18 *should not be allowed her for the same reason that alimony would be denied to her under the same circumstances in a decree from bed and board. This principle would seem to apply strongly to cases under our statutes, by authority of which a decree for divorce from the bond of matrimony may be granted for causes for which under the ecclesiastical law a decree from bed and board only could be granted.

Assuming that the court in this case did not err in decreeing the divorce, it would seem to follow, on principle, that there should have been no allowance of maintenance to the wife; or if principle must be made to bend to circumstances, those circumstances must be very peculiar indeed, if any such there could be, which, justifying a decree for an absolute divorce in behalf of the husband for wilful desertion by his wife, would at the same time warrant a decree in her behalf that he should out of his own estate maintain her as long as she lived, although after the divorce she should become the wife of another.

The reason assigned in the decree for the allowance is, that although "the desertion

and abandonment as charged in the plaintiff's bill is proven by the evidence, the same was not without the fault of the plaintiff."

Without determining whether "the fault of the plaintiff" would alone, in any case, be sufficient reason for making the allowance, if, on the evidence, the plaintiff was entitled to a divorce, let us look at all the circumstances of this case, and, "upon an equitable view," see whether any or all of them combined would be sufficient to justify the allowance, and further, whether the alleged desertion was proven, for if it was not, the plaintiff's bill should have been dismissed.

The answer to the bill was filed at 19 rules. It does *not appear that any replication was put in, but this would seem to be immaterial, as the defendant took depositions as if there had been a replication. Code of 1873, ch. 177, § 4. The answer, although signed by counsel, was never signed by the defendant, nor was it ever sworn to by her, or by any other person. It does not appear whether it was considered by the court as filed, or whether it was treated as an answer at all. It is not referred to specially in the decree. The recital is, that the "cause came on to be further heard on the papers formerly read," &c. There was no former hearing. There was an interlocutory order at a previous term entered "on motion of the defendant, by her counsel," for an allowance to the defendant to enable her to make her defence in the cause and for her support, pendente lite, but no reference is made in that order to the answer or other papers. Although no exception was filed to the answer and no motion made to strike it out, it may very well be doubted whether the paper can be considered as an answer at all. But if it can be so considered, the utmost effect that can be claimed for it, as it seems to me, is that of an answer not under oath. Story's Eq. Plead., §§ 874, 875a, 875c, 876, and notes; 1 Daniel's Ch. Prac. (4th Amer. ed.), 736, 737, and notes. See *Thornton v. Gordon*, &c., 2 Rob. R. 719. I shall treat it, however, in what I have to say, as if it were an answer under oath and regular in all respects. So treated, such an answer (excluding admissions) is entitled to the same weight in the divorce suit as an answer in any other chancery suit would be. As far as responsive, it is evidence for the respondent, and to that extent must prevail, unless overcome by the requisite proof. Affirmative statements must, of course, be proved. *Bailey v. Bailey*, 21 Gratt. 43, 50; *Latham, by, &c., v. Latham*, 30 Gratt. 307; *Shurtz & als. v. Johnson & als.*, 28 Gratt. 657, 661.

20 *The appellant and appellee were married in the spring of the year 1861. The appellant resided in the county of Nelson and is represented by the appellee in her answer as being, at the time of the marriage, "a bachelor of ripe years." He seems to have been well-disposed, and is spoken of by one of the witnesses as "a very amiable man, of kind temper," but close—"penurious and miserly," says the appellee in her answer—"not very dressy," says a witness, and not, in his opinion, "possessing very winning ways

for a young lady." He owned property estimated by one witness as worth from \$15,000 to \$20,000, but by another more accurately, probably, at \$12,000. His property consisted chiefly of slaves and a tract of land, the most valuable portion of his estate being the slaves, some ten in number. The slaves, of course, were lost by the results of the war, and his estate, at the time of the institution of this suit, was considered as worth about \$3,500.

The appellee resided in the town of Williamsburg. It does not appear what her age was, but she is represented by one of the witnesses as "apparently young, moderately handsome"—"moved in good society, and was an accomplished young lady." She seems to have been poor. In response to a question concerning her estate, a witness said, "I have always heard she had some interest in the estate of a relation of hers, but I saw nothing of it to my knowledge."

She first made the acquaintance of the appellant about three months before the marriage, at the house of Mr. John M. Shelton, whither she came on a visit to her sister, who was teaching school in Shelton's family, and, it is said, was well acquainted with the appellant, having known him for about two years. The parties were married at Williamsburg and came at once to

Nelson, and after spending some eight
21 or ten days at *Mr. John M. Shelton's, went to appellant's house to reside. Three of the appellee's sisters, it seems, were with her. In a very short time, a disturbance arose in the family, growing out of alleged disobedience and insubordination of the appellant's servants to the appellee, (of which I shall have more to say presently) which led to the removal, at her request and with her consent, of the appellee and her sisters to a house, leased by the appellant at a place called Faber's mills, some three miles distant from his home. Here she continued to reside with her sisters for nearly two years, the appellant visiting her occasionally. In the mean time, the domestic peace was further disturbed by notices posted in the neighborhood by the appellant forbidding the public to credit his wife for purchases on his account. This induced her to threaten him with a suit for alimony, which caused him, as she says, to supply her with three hundred and fifty dollars. (Confederate currency, I presume). A reconciliation, however, took place, through the intervention of friends, and she and her sisters again returned to appellant's house to reside. Very soon after her return, according to her statement the disturbances which occasioned her first withdrawal from her husband's house were renewed, and she thereupon left his house, went to Norfolk, where she took up her residence, and was never again in Nelson county until after the institution of this suit, her absence extending through a period of more than fourteen consecutive years.

The reasons assigned by her for leaving her husband's house will be best stated in her own language; and at the risk of being con-

sidered tedious, I shall copy from her answer to the bill. After speaking of the pleasant sojourn with her husband at the house of their mutual friend immediately after the marriage, during which their relations were
22 agreeable and cordial *and gave promise of a happy future, "notwithstanding the disparative years." Such is her language. She proceeds: "After a short time, respondent was carried by the plaintiff to his own home, where she undertook faithfully to discharge the duties of a wife by managing the household department, and thus rendering the house of the plaintiff comfortable and agreeable; but it became soon manifest the servants were unwilling to be controlled by her, and ultimately became rebellious. Respondent appealed to the plaintiff either to sustain her authority or to act himself with firmness and decision, so as to enforce obedience to her orders as mistress of the house, but from some cause he failed to do either, and she was rendered powerless to manage and control her domestic affairs, the duties of which devolved upon her by virtue of her marriage. In this state of affairs, she asked the plaintiff to remove her to some convenient point where a home could be rendered agreeable and she could be rid of the annoyance of said servants. It is true, that in answer to such request the plaintiff did rent a house at Faber's mills, which they made their home. Respondent shows further, that their sojourn at Faber's mills at first was pleasant and agreeable, but after awhile the mind of the plaintiff was influenced, as respondent verily believes, by interested and designing parties, through whose officiousness the plaintiff was made to believe that respondent was not only extravagant, but wasteful, and that his means would soon depart from him; these designing persons being none other than the relations of the plaintiff, who had hoped to inherit his estate in the event he had died without being married. Respondent shows that she was not extravagant, but economical and prudent, and careful of the interests of her husband; but he being penurious and miserly, gave credit to
the reports of her extravagance, and
23 *absolutely posted her by hand-bills in the neighborhood, warning all persons against crediting her on his account, and thus cut off from her the necessities of life and the means of living. This was done whilst they were living together as man and wife. So soon as she was informed of this proceeding upon the part of the plaintiff, she declined to recognize him as her husband, as he had denied his obligation in refusing to discharge his duty as such. She has never had occasion to regret her course in that, and feels now an honest conviction that she but discharged a duty to herself as a lady of honor and refinement. Respondent, although thus insulted before the public and her pride wounded, did not abandon the plaintiff or leave his neighborhood, but remained in the rented house at Faber's mills, and employed counsel to institute a suit for alimony, which suit respondent was of opinion had been brought, as she received the sum of three

hundred and fifty dollars and the furniture then in her possession in said rented house, but she is now informed that the records do not show that any such proceedings were ever instituted. She therefore presumes that her counsel obtained that concession from the plaintiff without a resort to a suit. She shows further, that thereafter a reconciliation was reached, the posters being withdrawn by the plaintiff and authority given to the public to sell respondent as his wife such things as she might want. Indeed, the relations between them became so perfectly satisfactory that it was determined she should return to live at his home upon his farm, which she did, taking the furniture with her; but respondent shows that she had been there but a short time when the same rebellious spirit manifested itself upon the part of the servants, who exhibited a determined purpose not to submit to her authority, but to rid themselves of her pres-

24 ence if *possible, and the plaintiff remained from some cause unknown to her, passive and indifferent, and although an assault was made upon her by one of the female servants with a chair, which she was enabled as it were by supernatural strength to fend off, respondent was not and is not now able to account for the reason why the plaintiff did not protect his wife from insult and danger at the hands of his slaves. Whether it was the result of long indulgence or of worse habits, she is unable to divine. She made no charge against his morals then, nor does she now, but his conduct was such as to justify a suspicion which, coupled with recent developments, might almost amount to a reasonable conviction. Yet respondent refrains from making any charge upon this head, save that the plaintiff was unmindful and derelict in his duty, and did not maintain the authority of his wife and sustain her in the discharge of her duty, but permitted her to be insulted in her home by menial slaves. Respondent confesses that being disappointed in the treatment she received at the hands of the plaintiff, with spirits broken, shattered health, mind harrassed and perplexed, and despairing of living with plaintiff as she had hoped, she did leave his house, but not against his consent. She is advised that in the eyes of God and man she was justified in so doing."

I have given this full extract from the answer, because it presents specifically and in detail the only reasons alleged by the appellee for the abandonment charged in the bill. The bill charges briefly, that without fault of the plaintiff, the defendant "wilfully deserted and abandoned him and has not returned, and now resides and has for some time resided in the city of Norfolk." It is obvious, that very little of the answer is responsive to the allegations.

25 Certainly, the specific statements of the reasons for the *appellee leaving her home and her husband, which are given as a justification or excuse for her conduct, are affirmative, and can be of no avail as a defence without proof in support of them. I have looked most carefully through the record to see if there was any such proof, and there is absolutely none. Several witnesses speak

of the appellant as being kind and indulgent to his servants; and one of the witnesses says that he has heard the appellee "make frequent complaints of the servants, and that Mr. Harris did not manage them according to her notions." This testimony alone has little or no force, and if there is anything else in this record that tends in the remotest degree to sustain the statements of the answer in regard to the troubles alleged to have arisen from the disobedience, insolence, and insubordination of appellant's servants and his indifference to their conduct and failure to support the appellee in the exercise of her rightful authority over them, it has entirely escaped my attention. There is no proof in corroboration of her statements in this respect, and the character of this suit and the well established rules of pleading forbid us to assume important facts as true, of which no proof is given or attempted.

It is worthy of notice in this connection that the course of conduct attributed to the appellant and the specific facts which are made the ground of complaint are of such a nature as to be quite susceptible of proof; and if they existed as stated and escaped the observation of persons living in the neighborhood, some of whom testified in the case, still they must have been known to the sisters of the appellee, or to some of them, who seem to have been generally, one of them at least, constantly with the appellee from the time of

her marriage until she left the appel-
26 lant's house; and *yet neither of these sisters is examined as a witness, and no reason is shown why such examination was not had. Besides, if the presence of the servants, and their disobedience, insubordination, and resistance to her lawful authority, and the failure of her husband to interpose for her protection, were the real, and, as to be inferred from the answer, the only causes of the abandonment, these causes must have been removed in a very short time after she left. She quit the place some time in the year 1863. The negroes became free by the result of the war in 1865, and, no doubt, immediately dispersed, as was usually the case. And yet she did not return to her husband nor offer to do so. The suggestion, thrown out in the answer, of a suspicion affecting the moral character of the appellant as to the possible cause of his inactivity and non-interference in behalf of the appellee in her troubles with the negroes, derives no support from the evidence. Indeed, the appellee expressly refrains from making any charge against the appellant affecting his moral character, and the suggestion need not be further noticed.

The conduct of the appellant in forbidding the public to give the appellee credit on his account, may have been reprehensible; but separated from her, as he then was, and she being attended by three of her sisters, his penurious disposition may have impelled him to this course, under apprehension, whether reasonable or not, that his credit might be used in the support of the three sisters. However that may be, the appellee does not in her answer assign this conduct

as one of the reasons for the abandonment. On the contrary, she says that after this "a reconciliation was reached, the posters being withdrawn by the plaintiff and authority given to the public to sell (her) respondent as his wife such things as she might want. "Indeed," *she continues, "the relations between them became so perfectly satisfactory that it was determined she should return to live at his home upon his farm, which she did." &c.

In the absence of all proof touching the only matters alleged by the appellee by way of excuse or justification for the abandonment of her husband, I confess I find nothing in the record that seems to warrant the assumption in the decree, that this abandonment was "not without the fault of the plaintiff." He may have been in fault. If he was, I can only say that it is not shown. He was penurious, it is true. That is proved. But mere penuriousness is no excuse for desertion. If it extends to a persistent denial of necessities, when he has the means to supply them, it may amount to cruelty, and be good cause for abandonment. 1 Bishop on Mar. & Div. § 735. It is not pretended that the appellant ever withheld from his wife anything that was needful for her sustenance and comfort, except that for a time, the occasion before alluded to, he forbade the public to credit her on his account, and this offence seems to have been condoned. It is not pretended that his house was not supplied with the requisite comforts and conveniences, for that is proved. It is not alleged that he ever spoke a harsh or unkind word to his wife, or treated her otherwise than kindly, except in his failure to maintain her authority in the difficulties she had with the negroes, and of that there is no proof. The only matters of excuse or justification alleged for the abandonment have been fully considered, and being without proof, they must, as a defence, be without effect.

It is charged in the answer that the appellant was under the influence of his relatives, who had been looking to inherit his estate, and being disappointed *by his marriage, sought to disturb the domestic peace. There is not the least evidence to sustain this charge.

How far, if at all, the sisters of the appellee may have influenced her conduct in this matter, I will not undertake to say; but the fact is prominent in the record, that one of them, at least, who seems never to have been absent from the appellee, was very hostile to the appellant. On one occasion, during the residence at Faber's mills, the appellant sent a letter to his wife. She was sick and the messenger did not see her. He delivered it to the sister, who took it up stairs to the appellee, and after awhile came down with the letter in her hand, and after calling back the messenger, who had started off, he says she tore the letter in a hundred pieces in his presence, and then told him he might leave. The witness, if he knew, does not state the contents of the letter. It further appears, that after the return from Faber's mills, and while this sister was living in the appel-

lant's house, he swore the peace against her and had her bound with a surety in a recognizance.

But whatever may have been the cause of the appellee's departure and absence, I think, looking to the record alone, we are bound to say that she wilfully deserted her husband without justifiable cause.

Desertion, considered without reference to matter which may exist in justification, is the actual breaking off of the matrimonial cohabitation with an intent to desert in the mind of the offender. 1 Bishop on Mar. & Div. § 777.

A mere separation by mutual consent is not desertion in either party, nor as matter of proof can desertion be inferred against either from the mere unaided fact that they do not live together. The intent to desert may be proved, it is said, by a great variety of circumstances. Among those enumerated in the case *of alleged desertion of the wife by the husband, is absence for a long time, not being necessarily detained by his occupation, business or otherwise.

This protracted absence, without necessary detention, is as potent proof of the intent to desert in case of the wife as of the husband. *Bailey v. Bailey*, 21 Gratt. 43. and cases cited; *Carr v. Carr*, 22 Gratt. 168; *Latham v. Latham*, 30 Gratt. 307.

The authorities are not in perfect harmony on the question as to what constitutes legal justification for breaking off the matrimonial cohabitation. Bishop lays it down as the better doctrine, that "when a husband or wife breaks off cohabitation because of the alleged improper conduct of the other matrimonial partner, such conduct must have proceeded so far as to furnish ground for divorce, or the one so breaking off the cohabitation is guilty of the offence of desertion." 1 Bishop on Mar. & Div. § 569. See also § 795 et seq. and cases cited.

The appellee, in her answer says, that she left the appellant's house, but "not against his consent." She does not say in direct terms that she left with his consent. The fact, nevertheless, stares us in the fact, that she left and went to a distant city and there took up her residence, and there remained for more than fourteen years, never once returning to her husband's home, nor expressing a willingness, wish, or purpose to return. In the mean time, it seems she was made aware of the willingness of her husband to receive her back. A witness, John M. Shelton, is asked, "whether Mrs. Harris has been aware that Mr. Harris could or could not receive Mrs. Harris back to his house, if she chose to return." His answer is, "I feel very sure that she was apprised of the fact of his willingness to take her back, from a conversation I had with her in Norfolk some two or three years ago I think." And about

a *year before this suit was brought, the appellant invited her to return to his house, bought supplies, made arrangements to receive her, and sent her money to bear her expenses home. She received the

money and treated the invitation with indifference—never came, and made no response.

It is true, that after the process in this suit had been served upon her, the appellee appeared in Nelson for the first time after a continuous absence of fourteen years, and sought and had an interview with her husband. Precisely what occurred in that interview has not transpired. We only know the result, that if reconciliation was the object, it was not effected.

In the conclusion of her answer, the appellee says "if respondent could have been made comfortable and protected at home and her health had justified, she would have been willing to live with the plaintiff, and had offered to do so in his present affliction, but he spurns the offer and says the law must take its course," &c.

There is no proof of the "offer," but if made, it is not difficult to surmise why the appellant rejected it. He might, I think, very reasonably have concluded, under the circumstances, that the offer was not prompted by conjugal affection or even a sense of duty; and such is the inference plainly deducible from what she says in her answer. "Whilst respondent did not feel disposed to institute proceedings against the plaintiff in his lifetime and claim a support at his hands, yet she is unwilling to yield that right in his property after his death which the law gives her, or even tacitly to admit a wrongful abandonment of the plaintiff by failure to answer his bill. She is informed that the plaintiff is greatly afflicted in body with an incurable disease, which in the course of nature must soon end his days. She is truly sorry that in that state of health he has resorted to legal process under the hope the law

31 *would sever the bonds which now bind them as man and wife, instead of waiting the inevitable result of time and disease, but as it has been his pleasure to do so, respondent claims for herself all the rights to which she is entitled under the law. She is advised that her departure from his house under the circumstances was right and proper, and her conduct justifiable; that she is now entitled under the law to alimony to be charged on his estate, and that if she should be the longest liver, she will be entitled to dower," &c. If the offer to return was ever made, it came too late to be effectual as a defence. The husband's right to a divorce had long since become fixed, and he had brought his suit to enforce it. An offer to return, made in good faith during the statutory period, will put an end to the desertion and bar the suit, but if the desertion has continued the number of years required by the statute, the deserted party may then refuse to renew the cohabitation; and this refusal will not bar the already existing right. 1 Bishop on Mar. & Div. § 810, and cases cited in note 5.

"There would seem to be nothing in the relative condition, pecuniary or otherwise, of the parties, when the other circumstances of the case are considered, that would justify the allowance made by the decree. There is no issue of the marriage. If the

wife is afflicted in body and mind, as represented, the husband, according to her admission, is also "greatly afflicted in body with an incurable disease," has passed the age of three score years and ten, and "in the course of nature must soon end his days." If she is poor, he is far from being rich. The income, if any, from his small estate is probably not sufficient for his own support. The wife brought nothing to the husband at the marriage, she added nothing to his estate by her earnings, and if during the very brief period of cohabitation, 32 *she did not waste or unnecessarily consume any part of the estate, she did not remain to aid in preserving and taking care of it.

The court having properly, as I think, decreed in behalf of the husband a divorce from the bond of matrimony for the wilful desertion of him by the wife, I see nothing in the circumstances of the case which make it proper to require the husband out of his estate to contribute to her maintenance after the divorce. I find no precedent for such an allowance in the decisions of this court, and I am unwilling to make one.

The unhappy condition of the appellee excites my commiseration; but courts of justice are not allowed to be controlled in their decisions by considerations of that character. "Compassion," said an eminent Virginia chancellor, "ought not to influence a judge, in whom, acting officially, apathy is less a vice than sympathy." Chancellor Wythe, Commentary on Field's *Ex'x v. Harrison & wife*, Wythe's Reports, (Minor's Ed.) 282.

Carr v. Carr, 22 Gratt. 168, was a case which, in its circumstances, appealed strongly for sympathy in behalf of the young wife. The bill was filed by the husband for divorce from bed and board on account of alleged desertion by the wife, and for the custody of their infant child of very tender age. This court held that there was desertion on the part of the wife, and no sufficient cause for it; and in delivering the opinion of the court, Judge Bouldin said: "In holding, as we do, that there was no sufficient cause for the desertion of the husband by the wife in this case, we must add that we are very far from holding the husband blameless. On the contrary, his conduct towards his young and inexperienced wife has in many respects been in the highest degree reprehensible. He

33 *has treated her with too little tenderness and consideration in the new and trying position in which she was placed. He has at times been coarse, rude, and petulant, when he should have been gentle, soothing, and affectionate. He has left her to bear alone burdens and trials which it should have been his highest pleasure to share and relieve; and he has been close, exacting and penurious with her, when he should have been, to the extent of his means, openhanded, liberal, and generous. We think he has much, very much, for which to reprove himself. Both parties have been to blame." Although the husband was thus "not

without fault," the divorce was granted, alimony denied to the wife, and custody of the infant child given to the husband.

I am of opinion to reverse so much of the decree appealed from as makes the allowance to the wife, and affirm the residue, without awarding costs to either party.

After charging the annuity upon the lands of the appellant, the decree further provides, that "the said annuity shall be in lieu of all dower-right which the said Sarah C. Harris (the appellee) might otherwise have in and to the real estate of the plaintiff, Daniel M. Harris (the appellant)."

Upon the principles recognized and acted upon by this court in the case of *Porter v. Porter*, 27 Gratt. 599, it would seem, by analogy, that the effect of a decree of divorce from the bond of matrimony, without any special provision in the decree as to the property rights of the parties, would be to extinguish, or arrest the consummation of the inchoate or incipient right of the wife to dower in the real estate of the husband. See

2 Bishop on Mar. and Div. §§ 706, 34 707, 708 et seq.; *1 Bishop on Law of Married Women, §§ 239, 347, 348 et seq.; 1 Minor's Ins. 292.

If such would be the legal effect of the decree of divorce merely, there might be a question whether the court may not, under the broad and comprehensive discretion given by the statute "concerning the estate and maintenance of the parties, or either of them," counteract this effect by specially providing that, notwithstanding the divorce, the inchoate dower-right shall be preserved to the wife and await the contingency by which it may become consummate.

If, on the other hand, the decree of divorce merely would not per se affect this inchoate right of dower, there might be the further question, whether the court, under the statute, may not control the right, and, as was ordered in the present case, bar it, and substitute, in lieu thereof, a vested interest, as money or other estate of the husband.

But in the view I have taken, it is not necessary to decide any of these questions in the present case, and I express no opinion upon them.

CHRISTIAN and STAPLES, J's, concurred in the opinion of BURKS, J.

MONCURE, P., and ANDERSON, J., dissented.

The decree was as follows:

This cause, which is pending in this court at its place of session at Staunton, having been fully heard but not determined at said place of session, this day came here again the parties by their counsel, and the court, having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel, is of opinion, for

35 reasons stated in *writing and filed with the record, that the said decree, except so much thereof as doth adjudge, order, and decree that the plaintiff, Daniel M. Harris (the appellant here), and the defendant, Sarah C. Harris (the appellee here),

be and they are hereby divorced and dissolved from the bonds of matrimony, and that the marriage between them be dissolved, is erroneous. It is therefore decreed and ordered, that the said decree, so far as the same is hereinbefore declared to be erroneous, be reversed and annulled, and the residue thereof be affirmed, and the court doth not award costs to either party; all of which is ordered to be certified to the said circuit court of Nelson county.

Decree reversed.

36 *Hanna v. Clarke, Miller & Hall.

November Term, 1878, Richmond.

1. For many years E owned a grist-mill and H a saw-mill, both of which were propelled by water power, the water taken from the same dam and when there was not sufficient water in the dam to propel both, the grist-mill had the preference in the use of it. In 1851 E sold his grist-mill, with the preference to a certain quantity of water to C; and C changed it into a paper-mill, and changed the water-wheels from breast to over-shot wheels, which required the taking the water from the dam on a higher level. Soon after the fitting up the paper-mill C filed his bill alleging that H was running his saw-mill so as to interfere with the work of his paper-mill, and asking for an injunction; and H replied that C was using more water than had been used by the grist-mill.—HELD:

1. **Decision in This Case.**—That the relative rights of the respective proprietors of the grist and saw-mill to the water power, continued the same after the sale to C that it was before that sale.

2. **Same.**—C had a right to convert his grist-mill into a paper-mill, and was entitled to the same priority over the owners of the saw-mill in the use of the water power for the operation of the paper-mill, to which they were previously entitled in the use of the water power for the operation of the grist-mill, but to no greater extent.

3. **Equity Jurisdiction.***—The case is one for the equitable jurisdiction of the court; and the court should proceed to ascertain, define and settle the rights of the parties to the use of the said water power.

This case was heard in Staunton, but was decided at Richmond.

Edwin Erwin, of the county of Augusta, died prior to February, 1816. At the time of his death he owned, among other prop-

37 erty, about eight acres of *land lying on Mossey creek in said county, on which he had erected a grist-mill and saw-mill, both of them operated by water from a dam built across the creek, and drawing the water by separate channels. By his will, which was published in January, 1813, he gave one-half of this property to his son James, and the other half to his wife and small children, of whom there were two, one named Hannah, who afterwards married Abraham Hanna, and the other named John. In September, 1818, James Erwin sold and conveyed to

***Equity Jurisdiction.**—See *Switzer v. McCulloch*, 76 Va. 777, citing the principal case; 2 Min. Inst. (4th Ed.) 23.

John Landes his half of this property. In January, 1827, John Landes sold and conveyed to Abraham Hanna "one-half of a certain lot of ground, including one-half of the interest of the saw-mill, forebay and part of the tail race; also the use and benefit of the water for said saw-mill, when it can be conveniently spared from the grist-mill so as not to do it any injury—that is, the grist-mill—said lot of ground to be occupied for no other purpose than for saw-logs and planks." This gave to Hanna in his own right one-half and in right of his wife one-sixth of the saw-mill property. In February, 1835, Landes sold and conveyed to John Erwin his half of the mill property, except what he had conveyed to Hanna. And in September, 1836, Hanna and wife conveyed to said Erwin the interest of Mrs. Hanna in all the property except the saw-mill property. Mrs. Erwin died in 1851, and by her will gave her interest in the whole property, mill and saw-mill, to John Erwin; so that John Erwin then owned the whole of the grist-mill property, and two-sixths of the saw-mill; and Hanna and wife owned the other four-sixth in the saw-mill property.

When Edward Erwin died there was one pair of burrs and one pair of choppers in the mill, and this continued until the purchase by John Erwin from Landes *and Hanna and wife. He then put in another pair of burrs, and probably added other improvements. But although it had always been the case that the mill was understood to have the preference to the water when there was not enough for both, no difficulty seems to have occurred between the owners of the mill and saw-mill in relation to it.

By deed bearing date January, 1851, John Erwin and wife conveyed to James T. Clarke, Anthony Miller and Jefferson Miller "all their right, title and interest, both present and prospective, to and in a certain merchant-mill property and saw-mill property situated upon Mossey creek, in the county of Augusta, bounded as follows, viz: setting out the boundaries, "containing eight acres, more or less, with all and singular the appurtenances thereto belonging or in anywise appertaining to said interest conveyed in the above premises." And they set out the interest conveyed as five-sixths of the mill property, the other sixth on the death of Mrs. Erwin; and one-sixth of the saw-mill property and another sixth on Mrs. Erwin's death, and in the meantime they were to hold this interest without rent. "The water right conveyed with the said merchant-mill property to be not less than the quantity of water which a chute five feet two inches by three and a half inches under a three feet head of water or the equivalent, would discharge—the preference to the above extent over other right, in point of water, having always been conceded to said merchant-mill property, both before and since the death of the testator, from whom the rights were derived."

The vendees, Clarke, Miller and Hall, purchased this property for the purpose of establishing a paper-mill, and soon after their

purchase they proceeded to convert the mill into a paper-mill. In doing this they changed the large water wheels which propelled the machinery *of the mill, which had been breast wheels, into over-shot wheels, which required the water to be taken from the dam at a higher level, and which therefore were more readily affected by the lowering of the water in the pond; and very soon a controversy arose between those parties and Hanna, who was operating the saw-mill. In August, 1851, they filed their bill in the circuit court of Augusta county, in which they set out their right to the water as granted by Erwin and wife, and alleged that this preference of the mill to the water had always been recognized, and was recognized in the deed from Landes to Hanna; and that said Hanna was so using the water at his saw-mill as to interfere most materially with the work of their paper-mill, and inflicting upon them irreparable damage. And they prayed that he might be enjoined from using the water from said dam in such way as to stop or obstruct their machinery. And as some of the purchase money had not been paid, they prayed that Erwin might be restrained from collecting it until he can clearly establish plaintiff's right under his deed to the use of the water as provided.

Hanna answered the bill at much length. He denied that there ever had been a usage giving preference to the water to the grist-mill to the extent Erwin had undertaken to convey to the plaintiffs. He says that the parties being interested in both mills, it was usual in seasons of extreme drought, and when water was scarce, and both mills could not run at the same time, to give preference to the grist-mill. These occasions, however, were very rare, the supply of water being sufficient at almost all seasons for both mills. Under these circumstances and with this understanding respondent accepted the deed from Landes. He insists that the provision in that deed was intended to express

nothing more than that, for the *benefit of the grist-mill, a sufficient supply of water to keep it running, as it then was, should be yielded to it; so that the grist-mill might not be injured in the business it was then doing. He says that since the year 1827 and down to the obtaining the injunction in this suit, he has enjoyed the uninterrupted use of such a supply of water from the dam, which supplied both the grist and saw-mill, as to keep his saw-mill constantly at work, except at rare and remote intervals of time, when extreme drought had so reduced the flow of water, as that it became necessary for a short time to suspend sawing, in order that a head of water might be accumulated. He insists that the paper-mill requires much more water than was required by the merchant-mill under any of the arrangements of wheels and machinery that has existed since 1829. And he insists that the water right granted by John Erwin to the plaintiff, to use as much water as a chute five feet two inches wide and three and a half inches deep under a head of three feet, is a direct infringement of the rights of respondent; that such a

chute will discharge more water than ordinarily flows in the stream. And he asks that commissioners may be appointed to fix and establish a permanent water mark to regulate the rights of the parties.

A great many depositions were taken by both parties, and of course their views and opinions were conflicting. The cause came on to be heard on the 7th of July, 1856, when the court perpetuated the injunction as to Hanna, with costs; but dissolved it as to Erwin, and dismissed the bill as to him. But the decree was to be without prejudice to the right of Hanna to sue at law, &c. And thereupon Hanna applied to this court for an appeal.

Hugh W. Sheffey, for the appellant.
 41 *No counsel for the appellees.

MONCURE, P., read the decree.

1. The court is of opinion that the relative rights of the respective proprietors of the grist-mill and saw-mill, in the proceedings mentioned, to the water-power capable of being derived from the dam on which the said mills were dependent for their operation, continued to be the same after the execution of the deed of the 2d day of January, 1851, from John Erwin and wife to Clarke, Miller and Hall, in the proceedings mentioned, as they were at the time of the execution of that deed.

2. The court is further of opinion that the said right of the proprietors of the grist-mill were prior and paramount to the said right of the proprietors of the saw-mill; so that whenever and while there was not more than water-power enough for the operation of the grist-mill, the proprietors of the saw-mill had no right to use the water-power so as to obstruct or affect the operation of the grist-mill.

3. The court is further of opinion that the proprietors of the grist-mill had a right, after they acquired the same, to convert it into a paper-mill, and were entitled to the same priority over the proprietors of the saw-mill in the use of the water-power for the operation of the paper-mill to which they were previously entitled in the use of the water-power for the operation of the grist-mill; but were so entitled only to the same extent to which they were so previously entitled to the use of the water-power.

4. The court is further of opinion that the controversy in this case was a proper subject of equitable jurisdiction; and the circuit court, therefore, instead of rendering the decree which it did, thus turning the parties out of a court of equity, in which their controversy was pending and might have been settled in a single suit, and leaving them to their remedy at law, where a multiplicity of suits would have been necessary, ought to have proceeded, according to the prayer of the bill, to "ascertain, define and settle the rights of all parties to the use of the said water, and grant such other and further relief as is suited to equity and the nature of the case, &c."

5. The court is, therefore, further of opin-

ion that the said decree of the circuit court is erroneous; and it is decreed and ordered that the same be reversed and annulled, and that the appellant recover against the appellees his costs by him expended in the prosecution of his appeal aforesaid here. And it is further decreed and ordered that the cause be remanded to the said circuit court for further proceedings to be had therein in conformity with the foregoing opinion and decree.

Which is ordered to be certified to the said circuit court of Augusta county.

Decree reversed.

43 *Wine v. Markwood & als.

November Term, 1878, Richmond.

I. P, by his will, gave to his four sons, George, Joseph, James and Sampson, each a parcel of land; to George and Joseph in fee, and to the other two each devise is, except as to the land devised, the same; and it as follows: 4th. I will and bequeath to my son Sampson the use and benefit of the home place which I now occupy, containing about 300 acres, during his natural life. He then says: Should my sons George, Joseph, James and Sampson, or either of them, die without issue, I direct that what has been bequeathed to them shall be equally divided between the surviving brothers—James and Sampson for their use and benefit during their natural lives—HELD:

1. Executory Limitations—Life Estate.—

That Sampson took but a life estate in the land devised to him.

2. Same—Issue Defined.—The term issue in the limitation over, under the Virginia statutes, means issue living at the death of the first taker, or born within ten months thereafter.

3. Same—This Case.—If Sampson has issue living at his death or born within ten months thereafter, his issue will take the land devised to Sampson by implication.

II. Sampson sells in fee simple a part of the land devised to him. The purchaser must elect to give up the land, or take such title as Sampson can give him to it.

This case was heard at Staunton, but was decided at Richmond. It was a suit in equity in the circuit court of Augusta county, brought in February, 1875, by John Wine against R. M. Markwood, John Landes and Sampson Pelter, to enforce a judgment which the plaintiff, as assignee of Pelter, had recovered against Markwood and Landes.

44 The bill alleged that *the plaintiff's debt was given for part of the purchase money of a tract of twenty-two acres of land sold by Pelter to Markwood; that a vendor's lien was reserved in the contract; and that Pelter was ready to convey the land to Markwood upon payment of the purchase money. And the prayer was for the sale of the land and payment of the plaintiff's debt, and for general relief.

Markwood answered, admitting the purchase of the land from Pelter, and that plain-

*Executory Limitations.—See for a discussion of this question, 2 Min. Inst. (4th Ed.) 456-463.

tiff's debt was for part of the purchase money. He says he is ready to pay all the purchase money due on the land on getting a good title to it, but since making the first payment he has been advised that Pelter cannot make a good title in fee simple to the land; that it is a part of the land devised to said Pelter by his father, Sampson Pelter, and that said defendant Pelter did not take a fee simple title under the will.

The case turns upon the construction of the will of Sampson Pelter, deceased; and that, or so much of it as is material to the question in issue, is given in the opinion of Judge Moncure.

The cause came on to be heard on the 20th of June, 1878, when the court held that Sampson Pelter, Jr., was only vested with a life estate in the land sold to Markwood; and that, or so much of it as is material to the to a specific performance of the contract of sale at the time of the decree; but that Markwood was entitled to an election to perform or disclaim the contract. And it was ordered that Markwood should, within sixty days from the entry of the decree, file in the papers of the cause his election in writing to take the title of the said Sampson Pelter, Jr., and perform the contract, or to disclaim it. And if he should disclaim the contract, certain accounts were ordered.

45 *And Wine thereupon applied to a judge of this court for an appeal; which was awarded.

J. M. Quarles, for the appellant.

There was no counsel for the appellees.

MONCURE, P., delivered the opinion of the court.

This case involves a question as to the construction of the will of Sampson Pelter, deceased, who died in December, 1865, leaving a will bearing date the 24th day of November, 1856, which was recorded on the 26th of March, 1866, in the county court of Augusta county, in which county he resided at the time of his death. The question is, whether Sampson Pelter, Jr., son of the said testator, was entitled under the said will to a fee simple estate, or only to a life estate, in the land given him by his father by the said will. The court below, in the decree appealed from, decided that he was only entitled to a life estate in the said land under the said will. Is that decision correct, or is it erroneous?

It seems that the testator had four sons and one daughter, and devised his land in several portions to his four sons, giving his daughter a nominal legacy only. The portions of the will which seem to be material to be stated, are as follows:

"I, Sampson Pelter," &c., "do make this my last will and testament," &c.

"1st. I will and bequeath to my son George the Aud Farm," &c.

"2nd. I will and bequeath to my son Joseph the Old Thomas Farm," &c.

"3rd. I will and bequeath to my son James the use and benefit of the farm on South

river, known as the Thomas or Croft Place," &c., "during his natural life."

46 *"4th. I will and bequeath to my son Sam'l (that is Sampson), the use and benefit of the Home Place which I now occupy, containing about three hundred acres, during his natural life. I will and bequeath to my daughter, Nancy Kremer, the sum of five dollars."

Then follow various other provisions of the will, none of which are material to be stated here except the following, viz:

"Should my sons George, James, Joseph and Samuel, or either of them, die without issue (issue), I direct that what has been bequeathed to them shall be equally divided between the surviving brothers—James and Samuel for their use and benefit during their natural life."

Thus we see that by the first and second clauses of the will, an estate in fee simple is given to each of the sons, George and Joseph, while by the third and fourth clauses, an estate for life only is given to each of the sons, James and Samuel or Sampson; and that by the subsequent provision before stated of the will, there is a limitation over of the portion of each at his death on the contingency of his dying without issue (issue).

An estate in fee simple is given to each of the sons, George and Joseph, as aforesaid, although the gift to them is without any words of limitation thereto annexed, it being provided by law that "where any real estate is conveyed, devised, or granted to any person without any words of limitation, such devise, conveyance or grant, shall be construed to pass the fee simple or the whole estate or interest which the testator or grantor had power to dispose of in such real estate, unless contrary intention shall appear by the will, conveyance or grant." Code, p. 889, ch. 112, § 8.

In this case it seems the testator owned the absolute fee simple estate in the lands 47 devised by him to *his sons, George and Joseph, respectively, and therefore his devise of the said lands to them was of the said fee simple estate therein, subject only to the limitation contained in the will as aforesaid, on the contingency of their dying without issue respectively, which means a dying without issue living at the time of the death of the first taker, or born to him within ten months thereafter. It being further provided by law that "every limitation in any deed or will contingent upon the dying of any person without heirs, or heirs of the body, or issue, or issue of the body, or children, or offspring, or descendant, or other relatives, shall be construed a limitation to take effect when such person shall die not having such heir or issue, &c., as the case may be, living at the time of his death or born to him within ten months thereafter, unless the intention of such limitation be otherwise plainly declared on the face of the deed or will creating it." Id. § 10. The intention of such limitation is not, in this case, otherwise declared.

But the devise by the testator to his two

sons, James and Sampson respectively, was expressly of the use and enjoyment of the land for their natural life only, and not in fee simple. and there is nothing in any other part of the will which enlarges this life estate into a fee simple estate or any estate longer than a life estate; for the contingent limitation to the surviving brothers in the event of the death of his four sons, or either of them, without issue as aforesaid, is expressly declared as to James and Samuel or Sampson, to be "for their use and benefit during their natural life" only. If the word issue in this case had been intended to mean issue indefinitely as aforesaid, instead of issue living at the death of the first taker, as under the statute aforesaid, even then the life estate of the first taker would not have been enlarged

48 *by the effect of the limitation over into an estate in fee simple. It being further provided by law that "where any estate, real or personal, is given by deed or will to any person for his life, and after his death to his heirs or the heirs of his body, the conveyance shall be construed to vest an estate for life only in such person and a remainder in fee simple in his heirs or the heirs of his body." Id. § 11.

The court is therefore of opinion that Sampson Pelter, Jr., was entitled under the said will only to a life estate in the land therein devised to him.

But another question is raised in the argument of the learned counsel for the appellant in this case: Whether, at the death of the said Sampson Pelter, leaving issue living at his death, such issue would be entitled under the said will to the land given thereby to the said Sampson for life, or whether George Pelter would be entitled to it as residuary devisee under the will; the said counsel contending that the said George Pelter would be so entitled, and not such issue of the said Sampson Pelter.

The court is of opinion that such issue would be so entitled, and not the said George Pelter.

The residuary devise under which it is contended that the said George Pelter would be so entitled is in these words:

"The balance of my estate of whatever character or kind it may be, at the expiration of the ten years before mentioned, I will and bequeath to my son George."

This clause was not intended to embrace any interest in any of the lands devised to the testator's four sons respectively by the first four clauses of the will. After making these devises the testator, by his will, creates a trust for the purpose of paying his debts,

49 by directing that his son George shall have the full possession, *use and benefit of all the estate, real and personal, of which he may die possessed, except certain of the farms devised to some of his sons as designated in the will; and he directs that all of his personal property shall be inventoried and valued by five disinterested freeholders, and at the expiration of the said term of ten years, shall be accounted for and disposed of as thereafter named, except what may perish or naturally decay and wear

out. He then directs that his executors shall sell at public sale all the personal estate that may be left after the expiration of the ten years, except his slaves, which "shall be valued as the personal property above named, by five disinterested freeholders, and equally divided between George, Joseph, James and Samuel—James and Samuel only to have the use and benefit of said slaves during their natural life"—except John, Junius and Abraham, whom he, in effect, emancipates, and in whose favor he creates a trust.

Then immediately follows the residuary clause hereinbefore inserted.

The testator then expresses a desire and wish that his son George should never let his daughter, Nancy Kremer, "suffer or want for the necessities of life while he may live." After which immediately follows the clause hereinbefore inserted in these words: "Should my sons George, James, Joseph and Samuel, or either of them, die without issue, I direct that what has been bequeathed to them shall be equally divided between the surviving brothers—James and Samuel for their use and benefit during their natural life." And then follow several other clauses which need not be inserted or stated here.

Now, it is expressly declared by the clause twice hereinbefore stated that in the 50 event of the death of *either of the four sons of the testator without issue, that is, issue living at such son's death, the estate given by the will to him "shall be equally divided between the surviving brothers." In that event, therefore, there can be no doubt or difficulty. The language of the will is express and the meaning is plain.

But who will be entitled to the estate given to Samuel or Sampson Pelter in the event of his death leaving issue then living? Will such issue be entitled, or will George Pelter as residuary devisee be entitled, or will the heirs-at-law of the testator be entitled? Clearly, we think, such issue will be entitled by plain implication of the will. Can there be a doubt that the testator so intended? and is not such intention sufficiently expressed, or at least implied, in the will? Why did the testator give the portion of his son Sampson to his surviving brothers only in the event of his dying without issue? Why but because in the only other possible event, to-wit: the death, of his said son leaving issue living at such death, he intended that such issue should have the said portion? There is no real or necessary conflict between such intention and the preceding clause containing the residuary devise to George Pelter as aforesaid. They are rendered perfectly consistent by the context.

It would make no difference in the result of this suit if in the event of the death of Sampson Pelter leaving issue living at his death the heirs-at-law of the testator should be entitled to the said portion, instead of such issue under the will; for such issue would be a part of the said heirs-at-law.

The learned counsel for the appellant, in his argument of this case, referred to a great many books and cases in support of his views, which we do not consider it nec-

essary to review in this opinion. They would, no doubt, be conclusive in his favor, if the case had occurred before the revision of our statute law in 1819; but as it occurred after the said law was then amended, embracing in the amendments §§ 9 and 10, ch. 112, p. 189 of the Code before referred to, we think the law is clearly the other way. Before those amendments were made, a devise to A for life, and if he died without issue then to B, created an estate tail in A, under the rule in Shelley's case, and the issue of A was thus provided for. But when, by one of those amendments, it was declared that "every limitation in any deed or will contingent upon the dying of any person without heirs," &c., "shall be construed a limitation to take effect when such person shall die not having such heir," &c., as the case may be, living at the time of his death, or born to him within ten months thereafter, the issue if living at the time of his death or born to him within ten months thereafter, would be wholly unprovided for, unless they can be considered as tenants in remainder at the death of A by implication of the will; and such would seem to be its plain implication in such a case. There is no decision of this court to the contrary; and although some of the decisions cited by the learned counsel for the appellant may seem to be to the contrary, yet such decisions, if there be any such, are not binding authority upon this court, and do not, in our opinion, expound the law correctly.

We are therefore of opinion that there is no error in the decree appealed from, and that it ought to be affirmed.

Decree affirmed.

52 *Harshberger's Adm'r & als. v. Alger & Wife & als.

November Term, 1878, Richmond.

1. In 1851, H and his wife E enter into an agreement by which they agree to a separation, and they unite in a deed by which certain real estate and \$900 in money is conveyed to S, for the express use, support and maintenance of the wife, and if she should die before the whole of said \$900 was paid to her she might by will or gift dispose of the remainder of it as she should think proper. He covenants that E may live separate from him, and that he will not claim any property of hers. And E renounced all claim on him for support, &c., and to his property. This deed is executed by the trustee S. In a short time after making this deed H removes to the West, and never returns. He dies in 1875. E lived until 1871, having been helpless for the last year of her life, and unable to do any but very light work for two or three years previous. During this period she is nursed and attended to by her daughter A, who lives with her and attends to her land as well as her own. E dies without disposing of the remainder of the \$900, amounting to \$500 or \$600, which is paid to H's administrator. In 1877 A sues the administrator of H for compensation for services rendered E in her lifetime—HELD:

1. Deeds of Separation—Validity.—

Quære: Whether deeds for voluntary separation of husband and wife are valid?

2. **Same—Same—Vesting of Property.**—If such deeds are valid, the deed in this case vests the property conveyed in the trustee for the separate use of the wife.

3. **This Case—Husband's Liability for Wife's Debt.**—Under the circumstances of this case, the husband was not liable for any debt contracted by the wife.

4. **Wife's Separate Estate—Power to Charge.**—If A can maintain this suit it must be on the ground that the remainder of the \$900 was the separate estate of E, the wife, charged by her in her lifetime with the payment of these services.

5. **Same—Same—Intention.**—The liability of a married woman's separate estate for her engagements depends upon her intention to charge it. Her intention to charge it must be made to appear.

6. **Parent and Child—Compensation for Services.**—As between parent and an adult child, whenever compensation is claimed in any case by either against the other for services rendered, or the like, it must be determined from the particular circumstances of that case whether the claim should be allowed or not. There can be no fixed rule governing all cases alike. In the absence of direct proof of any express contract, the question always is, can it be reasonably inferred that pecuniary compensation was in the view of the parties at the time the services were rendered; and that depends upon all the circumstances of the case; the relation of the parties being one.

7. **This Case—Decision.**—In this case there having been no express contract proved, and so far as appears, no claim or mention of such compensation by either the mother or daughter during the mother's life, and the services having been such as any child, prompted by filial affection and im-

*Husband and Wife—Deed of Separation.

—See 1 Min. Inst. (4th Ed.) 312 *et seq.* This question is fully discussed in *Switzer v. Switzer*, 26 Gratt. 574. See also 22 Am. & Eng. Enc. Law 66.

†Same—Conveyance by Husband to Wife.

—See 1 Min. Inst. (4th Ed.) 347; *Garland v. Pamplin*, 32 Gratt. 305 and *note*.

‡**Wife's Separate Estate—Power to Encumber.**—See 1 Min. Inst. (4th Ed.) 355; *Frank v. Liliensfeld*, 33 Gratt. 397, and *note*; *Garland v. Pamplin*, 32 Gratt. 305 and *note*; *Ropp v. Minor*, 33 Gratt. 97 and *note*; *Miller v. Miller*, 92 Va. 515.

§**Parent and Child—Compensation for Services.**—See *King's ex'ors v. Malone*, 31 Gratt. 158, approving principal case. See also 1 Min. Inst. (4th Ed.) 437.

Distinguished in *Hauser v. King*, 76 Va. 731, where a brother, having been appointed committee for his insane sister, supported her and was allowed to recover therefor. In *Plate v. Durst*, 42 W. Va. 36, a minor residing with her brother-in-law was led to believe by words (claimed by defendant to have been spoken in jest) of such brother-in-law that she was to receive compensation for her future services: *Held*, she was entitled to recover. Other cases approving the view taken by the principal case are: *Thompson v. Holstead*, 44 W. Va. 398; *Jackson v. Jackson*, 96 Va. 173; *Stansbury v. Stansbury*, 20 W. Va. 31; *Hurst v. Hite*, 20 W. Va. 205; *Riley v. Riley*, 38 W. Va. 290. See generally 17 Am. & Eng. Enc. Law 336.

pelled by a sense of duty, might be expected under the circumstances, to render cheerfully to an aged mother, a contract cannot be implied; and A cannot recover.

8. Statute of Limitations—Running of Statute.—If A had a valid claim to compensation for her services, it accrued during the lifetime of E, and the statute of limitations then began to run, and this suit not having been brought until 1877, the statute is a bar to it.

This case was heard at Staunton, but was decided at Richmond.

In February, 1851, Samuel Harshberger, of the county of Rockingham, sold to five of his children his tract of land in said county, supposed to contain about one hundred and eighty acres, at \$40 per acre, and upon long credits, reserving a small lot and house, and some privileges. On the 12th of April, 1855, Harshberger, his wife Elizabeth, and the said five children, entered into an agreement under seal, in which it was recited that an unpleasant state of things has existed between said Harshberger and his wife

54 Elizabeth, *and a difficulty has arisen in regard to the sale of said Harshberger's land to his children; and it was agreed that articles of perpetual separation between said Harshberger and his wife Elizabeth should be executed between them, by which he should not be responsible in any manner for the debts or support of the said wife. It then provides that the five children should pay \$900 more for the land than they had agreed to give; which was to be paid in eighteen equal annual payments of \$50 each, for which the five said children were to execute their notes to the said Elizabeth for her use and benefit; and she was to have twenty acres of the land during her lifetime, including the ground on which the loom-house stands, &c. In pursuance of this agreement Harshberger and his wife, by deed dated the 10th of April, 1855, conveyed to the said five younger children the said land upon the considerations and with the reservations aforesaid. And by deed of the same date, to which Samuel Harshberger, Jacob Shanks, and Elizabeth Harshberger, wife of Samuel, were parties, after referring to the difficulties between said Harshberger and his wife, and the facts as to the twenty acres reserved and the \$900 to be paid in annual instalments of \$50 to Mrs. Harshberger, the deed provides that the bonds for this \$900 shall be placed in the hands of said Shanks for the express use, support and maintenance of the said Elizabeth, wife of said Samuel; and if she should die before the whole of said \$900 are due and paid, then she may by will or gift dispose of the remainder as she thinks proper. And Harshberger covenanted with the said Shanks that he would permit his said wife Elizabeth to live separate and apart from him, and that he would claim no property put into her possession under this deed, or that

she might acquire by purchase or bequest. And in consideration *of these provisions, said Elizabeth renounced all right to support and maintenance by said Harshberger, and to dower or alimony in his estate.

After this deed was made, and before the late war, Samuel Harshberger removed to the western country, and never returned. After the war all of his daughters, except Elizabeth the eldest, also went west. Said Elizabeth and one grand-daughter, a young girl about seventeen years of age in 1871, remained, and they and Mrs. Harshberger lived together, whether on the land sold to the children or on the twenty acres in which Mrs. Harshberger had a life interest, is not clearly stated. Both parts of the land were cultivated or rented together, the daughter Elizabeth attending to it, as she did to all the housekeeping, cooking, washing, &c.; generally doing the work herself with the help of the grand-daughter. For upwards of a year before her death, which occurred in 1871, Mrs. Harshberger was helpless, requiring constant attention and nursing; and for two or three years previous she could do only light work, such as sewing or knitting.

At the death of Mrs. Harshberger, there was left of the \$900 settled on her by the deed of separation, some six or seven hundred dollars; and as she died without having made a will, and her husband survived her, it reverted to him. He died in 1875, and his estate in Virginia was committed to D. H. Ralston, sheriff of Rockingham, to whom the administrator of Mrs. Harshberger, J. P. Ralston, paid over the said fund.

The daughter, Elizabeth, having married Abraham Alger after the death of her mother, in April, 1877, they instituted their suit in equity in the circuit court of Rockingham county against D. H. Ralston, as administrator of Samuel Harshberger, and the

56 other distributees of said Harshberger, and Jacob *Shanks, and in their bill they claimed that Mrs. Harshberger was indebted to the plaintiff Elizabeth for services rendered to her during her life, equal to \$500; and that the balance of the said \$900 was liable for her debts. And they prayed for the payment of this claim, and that the estate of Samuel Harshberger might be distributed among his distributees.

It was not alleged in the bill, nor was there any proof, that there was any agreement between Mrs. Harshberger and her daughter Elizabeth that the daughter should be paid for her services; nor does it appear that any such claim was set up by the daughter until after the death of her father, Samuel Harshberger. What these services were are sufficiently stated in the opinion of Judge Burks.

At the August term, 1877, the bill having been taken for confessed as to all the defendants, the court made a decree referring it to one of the commissioners of the court to ascertain and report what estate there was in Virginia belonging to the estate of Samuel Harshberger, deceased, within the jurisdiction of the court and liable to distribution among

*Statute of Limitations—Running of Statute.—See *Handy v. Smith*, 30 W. Va. 197, citing principal case and *Jones v. Lemon*, 26 W. Va. 629; *Wilson v. Harper*, 25 W. Va. 179.

his heirs; also, how much of the \$900 in the bill and proceedings mentioned, remains in the hands of Jacob Shanks, the trustee, and what debts of said Harshberger and his wife Elizabeth remain unpaid, and their priorities.

Commissioner Bryan took several depositions as to the services rendered by the plaintiff, Mrs. Alger, to Mrs. Harshberger, and in November, 1877, made a report, by which he made her an allowance of \$4 a week for the last year of Mrs. Harshberger's life; for the year previous, \$1 per week, and for three years before this last, of 75 cents per week, making in the whole, including interest to the date of the report, \$350.41. And he reported that there was of the estate

57 *of Samuel Harshberger, \$1,624.41; and after paying Mrs. Alger's claim of \$550, there would be \$1,074.

Harshberger's administrator excepted to the report of the commissioner—

First. Because there is no proof in the cause to sustain the claim allowed the complainants, Alger and wife, for services rendered Mrs. Harshberger.

Second. On the ground that there is no evidence to sustain said alleged claim against Samuel Harshberger, deceased, he being separated from his wife at the time said alleged services were rendered

Third. The statute of limitations is a conclusive bar to said claim of the plaintiffs. Elizabeth Harshberger died in the spring of 1871, and this suit was brought on the 19th of March, 1877, more than five years after her death.

In January, 1858, Harshberger's administrator filed his answer in the cause. He questions the allegations of the bill as to the services of Mrs. Alger to her mother, Mrs. Harshberger. He denies that complainants have a right to recover of the estate of Samuel Harshberger, whether the daughter lived with the mother and worked for her, or the mother lived with the daughter. He insists that the law will not imply a contract for pay for such services rendered, and there was no allegation in the bill, or proof of any express contract. He denies that Samuel Harshberger, who lived separate from his wife under articles of separation, could in any event be liable for his wife's debts; and he also pleads the statute of limitations.

The cause came on to be heard on the 12th of March, 1879, when the court overruled the exceptions to the report, and decreed that Ralston, administrator of Samuel Harshberger, should out of the assets in his hands pay the plaintiffs \$504.51, and

60 to the different *distributees the sums reported by the commissioner. And thereupon the said administrator applied to a judge of this court for an appeal, which was awarded.

William B. Compton, for the appellant.
G. W. Berlin, for the appellees.

BURKS, J. When the services were rendered, as claimed, for which payment is demanded in this suit by the appellees, Alger and wife, Mrs. Harshberger, the alleged beneficiary, was a married woman living

apart from her husband under a deed of separation executed many years before. On no conceivable ground can it be successfully maintained that the husband was ever personally liable for these alleged services. It is not pretended that they were rendered under any express contract made with him, or that he ever became bound by any subsequent ratification or acquiescence. He resided in a distant state, to which he removed soon after the agreed separation from his wife. He never returned to this state, and after his removal there was never any correspondence or communication, so far as appears, between him and his wife or his daughter, Mrs. Alger, both of whom continued to reside in Virginia. It is equally plain that there was no implied contract on his part to pay for the alleged services, and this is so, whether the deed of separation be treated as partially valid or wholly void. If the deed be considered as valid and binding on him, to the extent of the covenants and assignments made by him, he was not bound even for necessities furnished to the wife after the separation; for provision was made for her support and maintenance, with which provision she and her trustee were satisfied, and it was *sufficient, as the large residuum of the trust fund undisposed of at her death clearly shows. Moreover, it was expressly stipulated in the deed that he was not to be bound for the payment of any debts subsequently contracted by the wife. This covenant, to which the trustee was a party, was pursuant to a preliminary written agreement containing a stipulation of like character to which Mrs. Alger, then unmarried and sui juris, was also a party, she having an interest in the subject matter. If the husband was bound by his covenants, she was also bound by the agreement referred to, and, in such case, there can be no implied obligation on his part to discharge any liability on account of dealings or transactions between her mother and herself.

60 If, on the other hand, the deed be regarded invalid as to all the parties, in all respects and for every purpose, still it is apparent that the services for which claim is made were not rendered in reliance upon the personal credit of the husband. The presumption that the credit of the husband was the basis of the services is rebutted by all the circumstances; such as the absence and permanent non-residence of the husband, the agreed and actual separation from the wife, the possession by her, under a contract fully executed by him, of means provided by him for her continuous support and maintenance and sufficient for that purpose, and the perfect knowledge by Mrs. Alger of all these facts.

Of course there could be no contract, express or implied, by which the wife could be personally bound; for, although by consent living apart from her husband, she remained subject to the disabilities of coverture. She could contract no debt for which she could be personally liable, either at law or

60 in equity. *There could be no personal judgment or personal decree against her on such debt.

From what has been said, it is obvious that if the decree of the circuit court in behalf of the appellees, Alger and wife, for the amount allowed for services, can be sustained at all, it must be on the ground that the fund subjected to the decree was the separate estate of Mrs. Harshberger, charged by her in her lifetime with the payment for these services.

This fund is the remnant of what was settled by Samuel Harshberger to the use of his wife under the deed of separation, and it may be conceded, for the purposes of this suit, that the deed, to the extent of the provision therein made by the husband for the wife, was a valid instrument.

I do not deem it necessary in this case to enter at large upon the discussion of the general question of the validity of deeds of voluntary separation between husband and wife. The books abound in discussion of this question by judges and law-writers, and the weight of authority would seem to be, that while courts will give no countenance or aid to either party in carrying into execution an independent executory agreement to live apart, because such an agreement is considered as against public policy, yet they will generally uphold and enforce against the husband such conveyances and covenants as he may have made for the maintenance of his wife, provided the separation has actually taken place, or is contemplated as immediate, and the provision for the wife is made through the intervention of a trustee, and the parties have not subsequently come together again. Notes to Stapilton v. Stapilton, 2 Lead. Cas. Eq. (4th Amer. Ed.) Part 2, top pages 1675, 1696 to 1702, inclusive; 2 Bright's Husband and Wife. 307; 2

Story's Eq. Juris. § 1418; 1 Bishop on Marriage and Divorce, (5th Ed.) *ch. 37, § 630 to § 656 inclusive, and the numerous authorities cited by these authors; Walker v. Walker, 9 Wall. U. S. R. 744, and cases there cited.

The case of Switzer v. Switzer, 26 Gratt. 574, is the only case, as far as I know, ever before this court, in which the validity of a deed of separation was drawn in question. In that case, the court set aside the deed, on a bill filed by the wife, but expressly waived the decision of the general question as to whether any deed of separation was valid to any extent or for any purpose.

The question need not be decided now. I only state what seems to be the weight of authority and as a concession to the appellees, let it be that the deed is valid to the extent before indicated. This conceded, it is quite plain that the estate acquired by the wife under the deed is a separate estate. It is not so declared in express terms. That may not be necessary; no particular phraseology is necessary to create such an estate. As in all instruments to be construed, the controlling test is the intent of the parties. Prout v. Roby, 15 Wall. U. S. R. 471, 474; Bank of Greensboro v. Chambers & als., 2 Va. Law Journal, 469. The conveyance and assignment were by the husband for the wife's "express use, support and maintenance,"

and the deed contains a covenant of indemnity to the husband against the wife's debts. Such a deed necessarily excludes the husband's marital rights, and of itself imports a separate estate of the wife in the property set apart to her use; otherwise it would be ineffectual for the purposes manifestly contemplated. Leake, trustee, v. Benson & als., 29 Gratt. 153, 156; Steel & als., v. Steel & als., 1 Ired. Eq. R. 452, 455; 1 Bishop on Law of Married Women, § 838, citing Gaines' adm'r v. Poor, 3 Metc. Ky. R. 503. In that case the words were "in trust for Mrs. Gaines." Bullitt, J., is reported

62 *as saying: "In the case before us, though the contract does not employ any of the usual technical words to create a separate use, yet as it shows that a separation was intended between Gaines and his wife, and the property was conveyed to Poor, in trust for her, in view of such separation, it is clear a separate use was intended."

It may be further conceded that Mrs. Harshberger had the power to charge this separate estate with the payment of any debt she might create, restrained perhaps from anticipating any instalments of the money secured to her use before they became due, and that when the services were rendered for which a claim is asserted, the amount subject to be charged exceeded the estimated value of the services.

And it may be further conceded that if Mrs. Harshberger contracted any debt or liability to her daughter, Mrs. Alger, for services rendered, such debt or liability was a charge on the separate estate.

The liability of a married woman's separate estate for her engagements depends upon her intention to charge it. Her intention to charge the estate must be made to appear. It may sometimes be implied. For example, if she execute a bond or note, whether as principal or surety, she must be presumed to have intended a charge on her estate, since in no other way can the instrument be made effectual. Burnett & wife v. Hawpe's ex'or, 25 Gratt. 481; Darnall & wife v. Smith's adm'r & als., 26 Gratt. 878.

If the husband and wife are living together, and the wife, having a separate estate, purchase goods for herself or her family, or contract for services, it is not necessarily implied that she intends a charge upon her estate. It is rather to be inferred, in the absence of proof, direct or circumstantial, to the contrary, that in making the purchase or contracting for the services, 63 *credit was given to the husband, and that she was acting as his agent. If, however, she is living apart from her husband, with a separate estate, and especially if, under articles of separation, it has been stipulated that the husband is not to be bound for her debts, it must be inferred, I admit, that she intended to charge her own estate.

In Johnson v. Cummins, 1 C. E. Green's R. 97, the chancellor said: "The general principle is that a married woman is enabled in equity to contract debts in regard to the separate estate, and the estate will be sub-

ject in equity to the payment of such debts. In order to bind the separate estate it must appear that the engagement was made in reference to and upon the faith and credit of the estate. But where a married woman, living apart from her husband and having a separate estate, contracts debts, the court will impute to her the intention of dealing with her separate estate, unless the contrary is shown." Notes to *Hulme v. Tenant*, 1 Lead. Cas. Eq. (4th Amer. Ed.) Pt. 2, top p. 679, 760.

With the concessions already made, that the deed of separation, to the extent of the estate settled to the use of the wife was valid, that the estate thus created was the separate estate of the wife, that she had the power to charge it with her debts to the extent indicated, and that if she contracted any debt or liability to her daughter for services, she must be presumed to have intended such debt or liability as a charge on her estate, the case is narrowed down to the single question, Did she ever contract any such debt or liability? I am free to say that I do not think she ever did.

Soon after the separation of Harshberger and his wife, as before stated, he left the state and never returned. All of the daughters, except Mrs. Alger, left soon after the termination of the war. Mrs. Alger

64 *remained, and also a grand-daughter of Mrs. Harshberger. They all lived together, whether in the house of the old lady, or in Mrs. Alger's house, does not distinctly appear. For about two months before her death, Mrs. Harshberger was confined to her bed by sickness and was helpless, and for some ten or eleven months immediately preceding, she could not rise from her bed without assistance, but when assisted she could get up and walk about the house. Before that time, it seems, she went about and did light household work. Her daughter and grand-daughter, the latter being some seventeen or eighteen years old when her grand-mother died, waited upon and nursed her while sick; and during the period of her sickness and before that time, the two attended mostly to the household work, the daughter taking the chief management and also directing the farming and out-door business. Some of the witnesses speak of her chopping firewood, but Mrs. Blosser, who had the best opportunity of knowing, says "that they had people hired to chop wood." Supplies were derived in common from the land of Mrs. Harshberger and the land owned by her daughters, these lands being, it would seem, sometimes kept and cultivated, and at other times rented out.

The commissioner allowed Mrs. Alger for her services \$4 per week for the last year of her mother's life, \$1 per week for the year next previous, and 75 cents per week for the three preceding years, with interest on the several annual sums from the end of each year, making in the aggregate \$550.41 as of the 19th November, 1877.

Although these charges run through the last five years of Mrs. Harshberger's life,

she was never heard once to allude to any agreement or understanding of any sort looking to compensation being made 65 for these *services. Had it been contemplated that the services should be paid for, some arrangement, no doubt, to that end would have been entered into, and would most probably have been spoken of. It might be reasonably expected that there would have been some writing between the parties showing the contract, or at least some verbal agreement made or acknowledged in the presence of witnesses; or, as the old lady had the power under the deed to dispose of the residuum of her property by will, she might have bequeathed it or a part of it to her daughter. Nor did Mrs. Alger ever assert any claim for these services during the lifetime of her mother, or, so far as appears, ever mentioned the subject to her mother; nor did she ever assert any such claim against her mother's personal representative, who qualified some three years after her mother's death, and proceeded to collect what was due to the estate; nor did she assert a claim against any one until after the death of her father in the year 1875, and the qualification of an administrator of his estate in the year 1876, after which she and her husband filed their bill in this case against that administrator, seeking a distribution of the estate and payment for the services aforesaid.

Thus, it seems to me, there is not only no express contract for the services proved, but no contract can be justly implied. The evidence rebuts the presumption of any contract. The services were just such as any child, prompted by filial affection and impelled by a sense of duty, might be expected, under the circumstances, to render cheerfully and gratuitously to an aged mother; and I am of opinion that the services in this case proceeded from these praiseworthy motives, and from no expectation, at the time they

were rendered, either on the part of 66 the mother or daughter, *that they were to be paid for. As said by a Pennsylvania judge in a like case. "they were the results of the relation, not the fruits of a contract." *Agnew, J., in Leidig v. Coover's ex'ors*, 47 Penn. St. R. 534.

As between parent and child (adult), the common law imposes no obligation upon either to support the other, not even to furnish necessities in the strictest sense of that term; but there is a high moral duty on each to render the other all needful assistance. In England and in some of the American states there are statutes enforcing that duty. 2 Kent's Com. 207, 208 (side pages). We have no such statute in Virginia.

Whenever, therefore, compensation is claimed in any case by either against the other for services rendered, or the like, it must be determined from the particular circumstances of that case whether the claim should be allowed or not. There can be no fixed rule governing all cases alike. In the absence of direct proof of any express contract, the question always is, Can it be reasonably inferred that pecuniary compensation

was in the view of the parties at the time the services were rendered? and the solution of that question depends on a consideration of all the circumstances of the case, the relation of the parties being one of these circumstances.

In *Williams v. Stonestreet*, 3 Rand. 559, a charge by a son-in-law for nursing his father-in-law in his last illness was rejected, Judge Cabell, delivering the opinion of the court, saying, "that there was no contract, express or implied; and considering the relation between the parties, the services were such that no compensation ought to have been expected." See 2 Parsons on Contracts (5th Ed.) 46; Schowler on Domestic Relations, 372; Bump. on Fraudulent

67 Conveyances, 257; and the *numerous authorities cited by these authors on the doctrine of presumption in cases like the present.

If there had been a contract for compensation in this case, it is difficult to perceive how the bar of the act of limitations, relied on by the administrator, could be avoided. In demands strictly legal, of which equity has jurisdiction concurrent with the law courts, equity follows the law literally in applying the statute of limitations, acting according to what would seem to be the better opinion, in obedience to the requirements of the statute; while in cases of claims of an equitable nature, it acts by analogy; that is, it applies the same bar to such claims that would be applied at law, under the statute, to legal claims of analogous character. To some cases this rule has no application. It is never applied to controversies between trustee and cestui que trust in cases of subsisting technical trusts cognizable only in courts of equity; and in cases of concealed fraud or mistake, the act is not allowed to run except from the discovery of the fraud or mistake. *Rowe v. Bently & als.*, 29 Gratt. 756, 759 et seq., and cases there cited.

If Mrs. Alger had any valid claim, it accrued in the lifetime of her mother, was a claim against her mother's separate estate, and was therefore an equitable demand. It could have been enforced only in a court of equity. A legal claim of like character must have been asserted within five years from the time right of action accrued thereon. The running of the statute, commencing in the lifetime of Mrs. Harshberger, would not have been suspended by her death, or because of the lapse of time before there was an administrator of her estate. 1 Rob. Prac. (New Ed.) 591, and cases there cited. And so, on principle, of the equitable demand against her estate.

68 Upon the death of Mrs. Harshberger, her estate was *devolved by operation of law on her administrator, whose duty it was to administer it, and after the payment of funeral expenses, charges of administration, and all debts against the estate, to pay over the surplus to her surviving husband, who was her sole distributee under the law (Code of 1873, ch. 119, § 10), or after his death, to his administrator. The ad-

ministrator of Mrs. Harshberger, therefore, should have been made a party to this suit; but inasmuch as it appears that pending the suit he had his accounts as administrator stated and settled by a commissioner of the court, and he then paid over the balance in his hands to the administrator of the husband, which balance was thus brought under the control of the court in the cause, and this proceeding seems to have been acquiesced in by the parties, his presence as a party was, perhaps, not indispensable.

In any view I can take of this case, I am of opinion that the decree of the circuit court is erroneous and should be reversed; that the exceptions of the appellants to the report of the commissioner allowing the claim of the appellees, Alger and wife, for the services of Mrs. Alger should be sustained, and that the cause should be remanded to the circuit court for further proceedings to be had therein, in order to a final decree in conformity with the views herein expressed.

The other judges concurred in the opinion of BURKS, J.

The decree was as follows:

This cause, which is pending in this court at its place of session at Staunton, having been fully argued but not determined at said place of session, this day came here again the parties by their counsel, and 69 the *court having maturely considered the transcript of the record of the decree aforesaid, and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the said circuit court erred in its said decree in overruling the exceptions filed to the report of commissioner Bryan by the defendants' counsel and in confirming said report, and consequently further erred in its said decree in ordering payments to be made by the administrator of Samuel Harshberger based on said report as confirmed. The said circuit court should have sustained the said exceptions to said report, and have wholly disallowed and rejected the claim for services preferred by the complainants, Abraham Alger and Elizabeth, his wife, and have caused said report to be reformed so as to make it conform to the action of the court disallowing and rejecting said claim, and as reformed should have confirmed it, and proceeded to decree thereon as thus reformed and confirmed according to the rights of the parties respectively. It is therefore decreed and ordered, that the said decree be reversed and annulled, and that the appellees, Abraham Alger and Elizabeth, his wife, pay to the appellants their costs by them expended in the prosecution of their appeal aforesaid here; and the cause is remanded to the said circuit court for further proceedings to be had therein to a final decree in conformity with the opinion and principles herein expressed and declared: which is ordered to be certified to the said circuit court of Rockingham county.

Decree reversed.

70 *Warwick v. Warwick & als.

November Term, 1878, Richmond.

D and J, in 1858, sold and conveyed to W a tract of land for \$42,500, payable in fifteen years, with interest payable annually; and on the same day W conveyed the land and another tract called R, in trust to secure the payment of the debt, and it was provided in the deed that when \$15,000 of the principal of the debt was paid, the lien on R should cease and be released. In 1862, W, having ascertained that J, the holder of his bond, would receive Confederate money in payment of his debt, sold land he held as trustee of his wife and children, and paid J \$21,000. One payment of \$2,900 was made by W on the 2d of May, 1863, on the principal of the debt, out of the trust fund of his wife and children. Between the recording of the deed of trust and said payment by W four judgments had been recovered against W—HELD:

1. **Constructive Trusts—Payment out of Trust Fund.**—For the payment of the principal of the debt made by W out of the trust fund of his wife and children, there is an implied trust in their favor on the tract called R.
2. **Same—Priority over Creditors.**—This implied trust refers back to the date of the trust deed to secure the payment of the debt, and has priority over the judgment creditors, though the judgments were recovered before the money was paid.
3. **Same—Extent of Trust.**—The trust extends to the interest as well as the principal of the payment made out of the trust fund, and the interest commences from the time of the payment.
4. **Same—Payment in Confederate Money.**—Though the payment by W was made in Confederate money, yet it having been received by J at par for his good debt, the payment is not to be scaled.
5. **Husband and Wife—Witnesses—Competency.**—W is not a competent witness to prove his payments of the debt made out of the trust fund of his wife and children; and this, though the objection to his competency was not made until four questions had been put to him on his examination-in-chief.

71 *This case was heard at Staunton, but was decided at Richmond.

By deed bearing date the 22d of November, 1858, Daniel and James Warwick, in consideration of the sum of \$42,500 payable in fifteen years, with interest payable annually from its date, conveyed to Jacob Warwick a tract of land lying in the counties of Amherst and Nelson, and containing sixteen hundred and seventy-two acres. And by deed of the same

***Constructive Trusts.**—See *Marks v. Spencer*, 81 Va. 751; 2 Min. Inst. (4th Ed.) 223 *et seq.*; *Tabb v. Tabb*, 82 Va. 48; *Miller v. Blose*, 30 Gratt. 745; *Kane v. O'Connors*, 78 Va. 76; 15 Am. & Eng. Enc. Law 1179.

†**Husband and Wife—Witnesses—Competency.**—Though the wife be dead, the husband is not competent to prove what was the consideration of a post-nuptial settlement on her. *Marks v. Spencer*, 81 Va. 751. See also *Lindsay v. McCormick*, 82 Va. 479; *Radford v. Fowlkes*, 85 Va. 820; *Witz v. Osburn*, 83 Va. 227.

See *Witt's adm'r v. Warwick*, 83 Va. 699, which grows out of the principal case.

date Jacob Warwick and Ellen, his wife, conveyed this land and another tract of eight hundred and fifty acres lying on Rockfish river in the county of Nelson, to Henry Loving, Robert A. Coghill and N. F. Cabell, in trust to secure said debt. And it was provided in this deed that the land on Rockfish river was to constitute a security to the extent only of \$15,000 of the said principal sum of \$42,500, and when that amount of said principal sum was paid, the lien of the deed was to cease as to said tract of land, and should be released. Both of these deeds were admitted to record on the 28th of February, 1859. The bond recited in this deed was for \$42,500, and by a subsequent arrangement bonds were given for the interest, payable as it should fall due. This bond and some of the bonds for interest were assigned to John M. Warwick of Lynchburg.

In July or August, 1862, William Massie, of Nelson county, the father of Mrs. Jacob Warwick, departed this life, leaving a will and a number of codicils, which in the last named month were duly admitted to probate, and Mrs. Massie, his widow, qualified as his executrix.

By his will William Massie gave to Jacob Warwick, in trust for his daughter Ellen, the wife of Jacob Warwick, and her children, one-eleventh of his estate, the same to be divided among the children at the death of Mrs. Jacob Warwick. And he made a like bequest upon the same trusts to Joseph Ligon, who had married his daughter Virginia.

Soon after the death of William Massie a suit in equity was instituted for the administration and division of the estate, and commissioners were appointed to divide the real estate among the devisees. Whilst the matter was before these commissioners, they suggested to Ligon and Jacob Warwick that one of them should purchase the share of the other; and Jacob Warwick professed his willingness to sell if John M. Warwick, who held his bond, would receive Confederate money in payment on the land. The division was postponed for some ten days to enable him to ascertain this fact, and when the commissioners met again Jacob Warwick expressed his willingness to sell his share of the land directed to be divided, and a contract was made between said Warwick and Ligon for the sale of said interest to Ligon, in consideration of the addition of \$300 to the valuation put upon it by the commissioners; making the price amount to about \$20,000. The commissioners reported their decision to the court; but owing to the condition of the country during the war, the report was not acted on by the court until 1866, when a decree was made by which it was ascertained that Ligon had paid to Jacob Warwick \$15,455.98, and that there was yet due from Ligon to said Warwick \$6,000 as of the 1st day of January, 1867.

In August, 1870, Jacob Warwick for himself, and as trustee for his wife and children, filed his bill in the circuit court of Nelson county, in which after setting out the fore-

going facts, he alleged that from the money he had received from Ligon he had paid to John M. Warwick more than the \$15,000 for which the Rockfish land was bound for his debt to Warwick, and he insisted that

73 the trust money having been applied *to discharge that lien, his wife and children were entitled to be substituted to it for the money so paid. He states a number of judgments which had been recovered against him, constituting liens upon all his property, so that he could not dispose of it for his relief, and he therefore, after giving a statement of all his property, asks that all his lien creditors be made parties to the suit, their rights ascertained, and his property sold for their payment.

John M. Warwick, the trustee in the deed, Mrs. Warwick and her children, all of whom but one were infants under the age of twenty-one, a number of his judgment creditors and others, were parties defendants to the bill.

In September, 1870, the court referred the cause to a commissioner with directions to take five different accounts; but the only questions before this court refer to the second and fifth. The second was an account of the trust fund belonging under the will of William Massie, deceased, to Mrs. Ellen Warwick and her children, which was used by the plaintiff in paying off, in part, the Warwick debt secured by the deed of trust aforesaid. 5th. An account of all liens, whether by deed of trust, judgments, decrees or otherwise, on the real estate of Jacob Warwick, or the proceeds of any sale or sales thereof made by him, and the order of priority among them, either generally, or with reference to any part of said property or proceeds.

The commissioner made his report, but it is only necessary to state such facts as concern this case. It appears from the report that Jacob Warwick paid of the principal of his debt in April, 1863, \$11,000, and in May following \$9,000. He claimed to have paid more, in paying the whole

74 amount of the bonds given *for the interest, after these payments reducing the principal were made.

To prove how much of the trust fund in his hands Warwick had applied to pay the principal of his bond, he was introduced as a witness in behalf of his wife and children before the commissioner; but after the fourth question had been put to him the counsel for his creditors objected to the reading of his evidence in behalf of his wife. This objection the commissioner was of opinion was well founded, and excluded it from his consideration in ascertaining the amount of the trust fund he had applied to the payment of the principal of the debt; and excluding this testimony, the other evidence, he held, showed but one payment out of that fund. That was a payment of \$2,900 made May 2d, 1863, upon which the commissioner only allows interest from the 12th of September, 1873, the time when the other land embraced in the deed of trust was sold.

The commissioner reported numerous judgments, and to a large amount, recovered against Jacob Warwick, but none of these

judgments were rendered before the beginning of the year 1861, and only four of them before May 2d, 1863, but these four amounted to \$9,407.28.

Mrs. Jacob Warwick excepted to the report for the rejection of the evidence of Jacob Warwick; and also to the sum of \$3,164.86 allowed by the commissioner as having been paid out of the trust fund, which she insisted should have been \$17,400. The judgment creditors insisted that the \$2,900 allowed by the commissioner as aforesaid having been paid in Confederate money should have been scaled.

The cause came on to be heard on the 5th of July, 1875, when the court overruled the exceptions, and held that the sum of

75 \$2,900, with interest from the *12th of September, 1873, should be a lien on the Rockfish tract of land. But the court held further, that the four judgments recovered before that money was paid by Jacob Warwick to John M. Warwick, constituted prior liens on said land, and were to be first paid out of its proceeds. And thereupon Mrs. Warwick, by her next friend, obtained an appeal to this court.

D. Fultz, for the appellant.

R. Whitehead and T. P. Fitzpatrick, for the appellees.

MONCURE, P., delivered the opinion of the court.

1. The court is of opinion that there is a lien by way of implied trust on the tract of land in the county of Nelson on the south fork of Rockfish river, containing about eight hundred and fifty acres, included in the deed of trust dated the 22d day of November, 1858, by and between Jacob Warwick and wife of the first part, Henry Loving, Robert A. Coghill and N. F. Cabell, of the second part, and Daniel Warwick and James Warwick, of the third part, of which a copy is filed as "Exhibit B" with the original bill in this case, for the security and payment of so much of the trust fund created by the will of William Massie, deceased, of which a copy is filed as "Exhibit C" with the said bill for the benefit of the said wife of said Jacob Warwick, who was a daughter of said William Massie, and her children, as was applied by the said Jacob Warwick, who was trustee under the said will for the benefit of his said wife and children, to the payment of that portion of the debt secured by the said deed for the security of which the said tract of land was conveyed by said deed. This fully appears

from the authorities on the subject cited

76 by the *counsel for the appellant; among which are, 2 Story's Eq. Juris. §§ 1210, 1211, and the cases cited in the notes thereto; 1 Leading Cases in Equity, 3d American from the 2d London edition, Dyer v. Dyer, top pages 266, 276 et seq., and cases, English and American, therein cited; Buckeridge v. Glasse, 1 Craig and Phillips, 18 Eng. Ch. R. p. 126; Bank U. S. v. Carrington, 7 Leigh 566; Heth, &c., v. Richm'd. Fred'g & Pot. R. R. Co., 4 Gratt. 482; Cook v. Tullies, 18 Wall. U. S. R. 332. See also Borst v. Nalle,

28 Gratt. 423, 434; *Snavely v. Pickle*, 29 Id. 27, 31.

2. The court is further of opinion that it sufficiently appears from the evidence in this cause that the sum of \$2,900, received by the said Jacob Warwick on the 2d day of May, 1863, as trustee, for the benefit of his said wife and children, under the will of her father, the said William Massie, was, on the same day and year, applied by the said trustee to the payment of the said portion of the said debt secured by the said deed, in order to establish a lien therefor, by way of implied trust on the tract of land aforesaid.

3. The court is further of opinion that it does not sufficiently appear that any other portion of the said trust fund than the said sum of \$2,900 was applied to the payment of the said portion of the said debt secured by the said deed, in order to establish a lien therefor, by way of implied trust or otherwise, on the tract of land aforesaid.

Jacob Warwick was an incompetent witness to prove that money received by him as trustee as aforesaid was applied to the payment of the said portion of the said debt, because his wife was interested in that question, and his evidence was excepted to on that ground by his creditors, who were parties to the suit. The cases relied on by the counsel for the appellees in support of this

77 ground fully sustain it; among *which are the following: *Johnson & wife v. Slater & als.*, 11 Gratt. 321-323; *William and Mary College v. Powell & al.*, 12 Id. 372, 382, 383; *Septeoe v. Read, &c.*, 19 Id. 1, 12; *Murphy's adm'r & als. v. Carter & als.*, 23 Id. 477, 488; *Hord's adm'r v. Colbert & als.*, 28 Id. 49, 55. That his competency as a witness was not excepted to by them until four questions had been propounded to him on his examination in chief was no waiver of their right to make such exception. *Hord's adm'r v. Colbert & als.*, 28 Gratt. 49, supra; see also *Neilson & als. v. Bowman & als.*, 29 Id. 732. The question therefore, depends upon the other evidence in the case, independently of the testimony of the said Jacob Warwick; and upon the said other evidence the opinion of the court upon the said question is as aforesaid.

4. The court is further of opinion that the circuit court did not err in refusing to scale the said sum of \$2,900, as insisted by the judgment-lien creditors, and in holding that there is a lien on the said tract of land for that amount of good money in favor of the wife and children of the said Jacob Warwick as beneficiaries under the will of the said William Massie as aforesaid; for, although the said sum was received by the said Jacob Warwick on the 2d day of May, 1863, as trustee for the benefit of his said wife and children under the said will, in Confederate money at par, and was on the same day and year paid by him in the same depreciated currency on account and in part of the debt secured by the said deed of trust on the said tract of land, yet the said debt was due in good money, and as so much of it as was so paid was acquired by such payment, by way of implied trust, for the use of the said benefi-

ciaries, a good money, and not a Confederate money, debt to that amount was thus acquired. Moreover, Jacob Warwick, as

78 *trustee for his wife and children, refused to receive Confederate money for the sale of her interest in the estate of her father, the said William Massie, until he ascertained that the same kind of money would be received in part payment of the debt for which the land of the said Jacob Warwick, including the said Rockfish tract, was bound by deed of trust as aforesaid; and it does not appear that he sold the said interest for more than its value in good money; though that fact is immaterial, as the money applied by him to the payment of his debt secured by the said deed of trust was worth to him the same amount in good money; and to the extent to which such payment was made out of the trust fund held by him for the benefit of his wife and children they are entitled to a lien on the said tract of land for the same amount of good money, by way of implied trust.

5. But the court is further of opinion that the circuit court erred in postponing the lien thus acquired in favor of the said wife and children to the four judgments obtained against the said trustee, Jacob Warwick, in his individual capacity, between the date of the said trust deed, or the time of its recordation, and the time of its redemption. Certainly the lien of the trust deed was prior in point of right as well as time to that of the said judgments as between the said trust-creditors and the said judgment-creditors. And to the extent to which the said lien of the trust-creditors was acquired, by way of implied trust, for the benefit of the said wife and children, its priority over that of the said judgment-creditors still continued. There was certainly nothing in the transaction which could impair the said lien in favor of the said wife and children or postpone it to that of the said four judgments.

6. The court is further of opinion 79 that the circuit *court erred in not extending the lien of the said deed of trust on the said Rockfish tract of land in favor of the said wife and children to interest on the said \$2,900 from the time of the application of the said sum to the payment of the trust debt, to-wit: the 2d day of May, 1863, instead of from the 12th day of September, 1873. So much of the trust fund was on the former day applied by the trustee to the payment of so much of the principal sum of \$15,000, for the security of which the Rockfish tract of land was bound by the said deed of trust. Why does not the lien of the said deed enure to the benefit of the said wife and children, as well for the security of interest on the said sum of \$2,900 from the date of its application aforesaid as for the security of the said principal sum itself? The Rockfish tract of land is ample for the security of both, as well of the interest as the principal. Certainly, if the trustee, Jacob Warwick himself, were the only person besides the said beneficiaries interested in that question, the said tract of land would stand as a security for both. Who else can be in-

terested therein? It is not pretended that any other person has any such interest than the judgment creditors of the said Jacob Warwick, whose judgment liens were acquired before such application was made. But certainly those judgment liens bound only what belonged to the judgment debtor, and did not bind what was not his, whether at law or in equity. When those judgments were obtained the Rockfish land was bound at law for \$15,000 by means of the deed of trust aforesaid. Of course the lien of that deed on the said land was paramount to the said judgment liens thereon, which bound only the equity of redemption therein. Afterwards, to-wit: on the 2d of May, 1863, \$2,900 of the principal of that prior lien was

paid out of the trust fund of the said
80 wife and children *in the hands of the said husband and trustee. Although the legal lien of the said deed of trust ceased to exist on the full payment of the amount secured thereby, yet to the extent to which such payment was made out of the said trust fund, to-wit: \$2,900, with interest from the time of such payment, an equitable lien was thereby immediately acquired for the benefit of the said wife and children on the said tract of land, which stands in the place of the said legal lien to that extent, and is just as paramount to the said judgment liens as was the legal lien of the said deed of trust. The judgment creditors are certainly not injured by this operation. Their liens were subject to a legal lien for \$15,000. That legal lien was discharged by a payment on the 2d day of May, 1863, of \$2,900 out of the trust fund held by Jacob Warwick for the benefit of his wife and children, in addition to payment made out of his own individual funds. How can the judgment creditors be injured by an equitable lien of the said beneficiaries for the said sum of \$2,900 with interest from the time of its application aforesaid, to-wit: the 2d day of May, 1863, when it is the only prior lien now standing in the place of the said legal lien for \$15,000?

It was agreed between Jacob and Daniel Warwick that payments might at any time be made, in part of the principal of the purchase money of the land in Amherst sold by the latter to the former, in advance of the period when such money would become payable by the terms of the bond, provided that such payments amounted to not less than \$1,000 each. And at all events, such advance payments were made and received to the extent of the whole \$15,000, for which the said Rockfish tract of land was bound by the said deed of trust, in part of which advance payments was the said sum of \$2,900, paid on the 2d day of May, 1863.

81 out *of the trust fund held by the said Jacob Warwick for his wife and children as aforesaid.

7. The court is therefore of opinion that so much of the decree appealed from as is in conflict with the foregoing opinion is erroneous and ought to be reversed and annulled, and that the residue thereof is not erroneous and ought to be affirmed: and that the appellant, as the party substantially prevailing,

recover against the appellees, the plaintiffs in the said four judgments, to-wit: Narcissa E. Dillard, J. N. Gordon & Son and J. L. Harris, her costs by her expended in the prosecution of her appeal in this case; and the cause is remanded to the court below for further proceedings to be had therein in conformity with the foregoing opinion.

The decree was as follows:

1. The court is of opinion, for reasons stated in writing and filed with the record, that there is a lien, by way of implied trust, on the tract of land in the county of Nelson, containing about eight hundred and fifty acres, called in the proceedings in this case "the Rockfish tract of land," included in the deed of trust dated the 22d day of November, 1858, of which a copy is filed as "Exhibit B" with the original bill in this case, for the security and payment of so much of the trust fund created by the will of William Massie, deceased, of which a copy is filed as "Exhibit C" with the said bill, for the benefit of the appellant, Ellen Warwick, who was a daughter of said William Massie, and her children, as was applied by Jacob Warwick, who was trustee under the said will, for the benefit of his said wife and children, to the payment of that portion of the debt secured by the said
82 deed, *for the security of which the said tract of land was conveyed by said deed.

2. The court is further of opinion that it sufficiently appears from the evidence in this cause that the sum of \$2,900 received by the said Jacob Warwick on the 2d day of May, 1863, as trustee, for the benefit of his said wife and children, under the will of her father, the said William Massie, was, on the same day and year, applied by the said trustee to the payment of the said portion of the said debt secured by the said deed of trust, in order to establish a lien therefor, by way of implied trust, on the said tract of land.

3. The court is further of opinion that it does not sufficiently appear that any other portion of the said trust fund than the said sum of \$2,900 was applied to the payment of the said portion of the said debt secured by the said deed of trust, in order to establish a lien therefor, by way of implied trust or otherwise, on the tract of land aforesaid—the court being of opinion that the said Jacob Warwick was an incompetent witness to prove that money received by him as trustee as aforesaid was applied to the payment of the said portion of the said debt because his wife was interested in that question, and his evidence was excepted to on that ground by his creditors who were parties to the suit, and did not waive the right to make such exception.

4. The court is further of opinion that the circuit court did not err in refusing to scale the said sum of \$2,900, as insisted by the judgment-lien creditors, and in holding that there is a lien on the said tract of land for that amount of good money in favor of the said wife and children of the said Jacob Warwick as beneficiaries under the will of the said William Massie.

5. But the court is further of opinion that the circuit court erred in postponing the lien thus acquired in favor of the said wife and children to the four judgments obtained against the said trustee, Jacob Warwick, in his individual capacity, between the date of the said trust deed, or the time of its recordation, and the time of its redemption, and in sustaining the first exception of the defendants, Narcissa E. Dillard and M. C. Massie, to Commissioner Brown's third report, so far as to give preference to the lien of the said four judgments, being the first four judgments mentioned in the said report, over the lien acquired in favor of the said wife and children as aforesaid.

6. The court is further of opinion that the circuit court erred in not extending the lien of the said deed of trust on the said Rockfish tract of land in favor of the said wife and children to interest on the said \$2,900 from the time of the application of the said sum to the payment of the trust debt, to-wit: the 2d day of May, 1863, instead of from the 12th day of September, 1873.

7. The court is therefore of opinion that so much of the decree appealed from as is in conflict with the foregoing opinion is erroneous; and it is decreed and ordered that the same be reversed and annulled, and the residue thereof affirmed, and that the appellees, the plaintiffs in the said four judgments, to-wit: Narcissa E. Dillard, J. N. Gordon & Son, and J. L. Harris pay to the appellant, Ellen Warwick, by Henry Loving, her next friend, her costs expended in the prosecution of her appeal aforesaid here. And it is further decreed and ordered that the cause be remanded to the said circuit court for further proceedings to be had therein in conformity with the foregoing opinion and decree; which is ordered to be certified to the circuit court of Nelson county.

Decree reversed.

84 *Watkins & als. v. Young & als.

November Term, 1878, Richmond.

1. **Advancements—Presumption.**—If a gift unexplained in the lifetime of a father who dies intestate, to one of his children, is to be presumed in law to be an advancement, this presumption may be repelled by evidence.
2. **Same—Intention—Evidence.**—Whether a gift by a father in his lifetime to a child is an absolute gift or an advancement depends upon the intention of the father; and his statements or declarations made at the time of the gift, or subsequently, are competent evidence to show what was his intention in making the gift. In this case the evidence is conclusive to prove it was an absolute gift, and not an advancement.

***Parent and Child—Advancements.**—Principal case cited with approval in *McDearman v. Hoddnett*, 83 Va. 281. See also 2 Min. Inst. (4th Ed.) 515, 516; *Bruce et ux. v. Slomp et ux.*, 82 Va. 352; *Darne v. Lloyd*, 82 Va. 859; 1 Am. & Eng. Enc. Law 776; *Roberts v. Coleman*, 37 W. Va. 148; *McClanahan v. McClanahan*, 36 W. Va. 44.

3. **Province of Court.**—The only issue in the cause being whether the gift of the father was intended to be absolute or an advancement, and all the evidence having been taken with reference to that issue, it was proper for the court to decide it without a reference to a commissioner to inquire and report upon the question.

This case is fully stated by Judge Christian in his opinion.

S. F. Beach, for the appellants.

Claughton and Stuart, for the appellees.

CHRISTIAN, J. This is an appeal from a decree of the corporation court of Alexandria. The object of the suit was to compel the appellee, Mrs. Virginia Young, to bring into hotchpot an alleged advancement made to her by her father, John T. Evans, in his lifetime, of the sum of about \$14,000.

John T. Evans died intestate in the year 1875, seized and possessed of real estate of considerable value, and of a large personal estate amounting to at least \$100,000. He left surviving him three children, Mary C., who intermarried with D. S. Watkins, and Maria, who intermarried with John Ellis, and the appellee here, Mrs. Virginia Young. The bill was filed by Watkins and wife and Ellis and wife, in which they allege that the said John T. Evans, during his lifetime, made large advances out of his personal estate to his said daughter, Virginia Young; that on the 20th February, 1872, he gave to her fifty shares of the capital stock of the Citizens National Bank of Alexandria, and on the 1st of March, 1872, he gave to her eighty-five shares of the capital stock of the First Na-

*Equity Practice—Order for an Account.

—*Bank v. Parsons*, 42 W. Va. 144, citing the principal case states the rule that an order for a decree of an account is not to be made merely because asked for but the cause must be so far developed by the pleadings and proofs as to demonstrate the propriety of an account citing also 4th Min. Inst. 1357; *Neely v. Jones*, 16 W. Va. 625; *Allen v. Smith*, 1 Leigh 252; *Corbin v. Mills*, 19 Gratt. 465; *Lee Co. v. Fulkerson*, 21 Gratt. 182. See also *Neal v. Buffington*, 42 W. Va. 331, where principal case is distinguished; *Poage v. Wilson*, 2 Leigh 490; 1 Enc. Pl. & Pr. 94.

ADVANCEMENTS GENERALLY.

Definition.—In *Darne v. Lloyd*, 82 Va. 859, advancement is defined as a gift, by anticipation of the whole or part of what it is supposed a child will be entitled to on the death of the giver intestate. See also *Chinn v. Murray*, 4 Gratt. 397.

Requisites—Must Be a Completed Transfer.—In *Darne v. Lloyd*, 82 Va. 859, it was said that it is clear that there is embraced in every definition of an advancement the idea that the parent has irrevocably parted from his title in the subject advanced. Citing *Ison v. Ison*, 5 Rich. Eq. 19; *Miller's appeal*, 31 Penn. 338; *McCaw v. Blarrett*, 2 M. Ch. 91.

The Donor Must Die Intestate.—In order that the child may be compelled to account for advancements, the parent by the common-law rule must have died wholly intestate and in those states in which the word "intestate" is used that term is construed to mean wholly intestate. *Wilson v. Miller*, 1 Pott. & H. 353. But sec. 2561, Va. Code 1878 provides that the

tional Bank of Alexandria; that the value of the Citizens National Bank stock at the date of said gift was not less than \$5,000, and the value of the First National Bank stock, at the date of said gift, was not less than \$10,000, and that this property was given to and received by the said Virginia Young by way of advancements to her.

The bill after alleging that the debts of the decedent are small and few, and that the personal estate is now ready for distribution, prays that a distribution of said personal estate may be made, and that the said Virginia Young may be required to bring into hotchpot the advancements made to her as aforesaid; and there is a prayer for general relief, and that the defendants, Evans' administrator and the said Virginia Young, may answer all the allegations of the bill on their several corporal oaths.

This bill was filed on 20th October, 1876; and on the 6th December, 1876, Mrs. Young filed her sworn answer, responding to the allegations of the plaintiffs' bill, as follows:

This respondent, for answer to the 86 complainants' bill, or to so much thereof as she is advised it is material for her to answer, answers and says, as follows:

1st. This respondent denies the truth of the allegations in the said bill contained, to-wit: that the respondent ever received an advancement from her late father during his lifetime.

2nd. The respondent admits that her late father, during his lifetime, did assign to her fifty shares of the capital stock of the Citizens National Bank of Alexandria, Virginia,

doctrine of hotchpot shall apply whether the intestacy be whole or partial.

Of What Advancements May Consist.—In Virginia by statute advancements may consist of both real and personal property. In *Williams v. Stonestreet*, 3 Rand. 589, the court construing the act of 1785 (12 Hen. Stat. 139 146) held that where the statute provides that real estate received by way of advancement shall be brought into hotchpot with "estate descended" and personal estate with "distributable surplus" the two kinds of property must be kept separate, the real being applied in the distribution of the realty and the personal in the distribution of the personality.

Real Property—Conveyance from Father to Child—Recital of Nominal Consideration.—There is a presumption of an advancement where there is recital of a nominal consideration in a conveyance of real property from a father to a child. *McClanahan v. McClanahan*, 36 W. Va. 43; *Kyle v. Conrad*, 25 W. Va. 760. And though, where a substantial consideration is recited, the transaction is supposed to be a purchase, this presumption may be rebutted and for this purpose parol evidence is admissible. *Bruce v. Slemp*, 82 Va. 352.

Rents and Profits Used by Heirs.—In *Williams v. Stonestreet*, 3 Rand. 559, it was held that where a father permitted his son to rent out his land, and receive the rent for his use, he will be required to bring such rents into hotchpot as an advancement. But in *Christian v. Coleman*, 3 Leigh 50, a mother, herself tenant for life of lands gives separate parcels

and eighty-five shares of the capital stock of the First National Bank of Alexandria, Virginia, and that she has from the date of said assignment held the certificates of said stock as her own absolute property.

3rd. But this respondent saith that such assignment was not an advancement, but that it was made upon good and meritorious consideration recognized and acknowledged by her late father, and that the said assignment when made to the respondent was so done as an absolute gift, in fulfillment of his repeated promises, based upon the good and meritorious consideration aforesaid.

And this defendant, having fully answered the said bill of complaint, prays to be hence dismissed with her reasonable costs in this behalf sustained. And she will ever pray, &c.

To this answer the plaintiffs excepted because it does not set forth the facts which constitute "the good and meritorious consideration" upon which it is said the certificates of stock in the bill mentioned were assigned to her.

This exception was sustained by the court, and it was ordered "that the defendant, Virginia Young, on or before the first day of the next term, do answer and set forth the facts which constitute the good and 87 *meritorious consideration upon which the certificates of stock are alleged to have been assigned to her."

In obedience to this order of the court Mrs. Young filed her amended answer, in which, after repeating what she had affirmed in her original answer, declares:

This defendant further answers and says, that there were divers good reasons for this

thereof to several of her children allowing them to cultivate them and use the proceeds without requiring rents. Held not an advancement.

Personal Property—Gifts to Child.—The principal case is authority for the rule that while gifts of personalty of large value may *prima facie* create an advancement yet such presumption may be rebutted and the intention of the intestate allowed to govern.

Payment of Gaming Debts.—In *Carter v. Cutting*, 5 Munf. 223, where a father made payment of his son's gaming debt it was held that an advancement was created.

Between Whom Advancements May Be Made—Parent and Child.—The doctrine of advancements is of most common application in cases of transactions between parent and child. Whenever a father makes to a child a transfer of property, either real or personal, or whenever he furnishes the purchase price of property, title to which is taken in the name of the child a presumption of advancement arises. *Watkins v. Young*, 31 Gratt. 84; *Gregory v. Winston*, 23 Gratt. 102; *McDeaman v. Hodnett*, 83 Va. 281.

But Such Presumption May Be Rebutted.—Evidence of the real intention of the ancestors may be brought to rebut this presumption and for this purpose his statements and declarations made at the time of the gift, or subsequently are competent evidence as well as the circumstances of the ancestor and the affectionate relations existing between him and the child. *Watkins v. Young*, 31 Gratt. 84; *McDeaman v. Hodnett*, 83 Va. 281. But in *McClintock v. Loiseau*, 31 W. Va. 865, it was held that the heirs will not be

gift from her late father, and that the defendant should have this said gift without any reference to the distribution of her father's estate at the time of his death.

This defendant was a dutiful and faithful child, whose conduct and deportment was a comfort and consolation to her father; and in this particular there was a difference between her and the other children.

The defendant further says that she was living in the country comfortably, when her late father told her that if she would break up housekeeping and come to the city of Alexandria and take care of his father-in-law, who was imbecile from old age, and Miss Carrie Hewitt, who was insane, that he would reward her well. At his request, and upon this assurance, the defendant broke up her housekeeping in Fairfax county at great inconvenience and loss, and came to Alexandria and nursed and cared for the imbecile old gentleman and the insane lady for more than two years. The defendant states these facts in order to show that there were good and sufficient reasons for the declarations made by her late father at the time of the assignment and delivery of the stock, that he assigned it to her absolutely, and not by way of an advancement. And the defendant says that the stock given to her by her father was intended by him, and so declared at the time, to be an absolute gift, and not by way of advancement.

To this amended answer the plaintiffs filed a general replication, and the whole issue made by the *pleading and passed upon by the court below was whether the stock transferred and assigned to Mrs.

Young by her father in his lifetime was intended as an advancement to her, for which she was to account on the distribution of his estate, or whether it was an absolute gift to her. Upon this issue all the depositions were taken, and the case coming on to be heard on the bill, amended answer and depositions, with certain admitted statements of the cashier of the Citizens National Bank and the cashier of the First National Bank of Alexandria read as evidence by agreement of counsel, the said corporation court was of opinion that the transfer of stock to the defendant, Virginia Young, in the bill and proceedings mentioned, was not by way of advancement, but was an absolute gift to her; and the plaintiffs' bill was accordingly dismissed.

From this decree an appeal was allowed by one of the judges of this court.

I am of opinion that there is no error in this decree.

Questions of advancement are always question of intention, and the difficulties of solving them are generally found in the kind of evidence by which such intention is to be proved.

In some of the states it is held that a gift of any considerable amount is *prima facie* an advancement, and is to be treated, in case the party to whom the advancement was made comes in for a distributive share, as a debt due from him to the estate. *Grattan v. Grattan et al.*, 18 Ill. R. 170; 11 John. R. 91; 16 Mass. R. 200. In other states it has been held that the mere gift, unexplained, by father to child, does not make even a *prima facie* case in favor of an advancement; but

permitted in order to rebut this presumption to show that a conveyance to his son was made by the father with fraudulent purpose.

Parent-in-Law and Son-in-Law.—A gift by the wife's father to the husband during coverture is deemed an advancement to the wife. *Bruce v. Slemph*, 82 Va. 352. An advancement may be created by the payment of the husband's debts by his father-in-law. *Peale v. Thurmond*, 77 Va. 753, and this was not affected by the Married Women's Act (Acts 1876-77). *McDearman v. Hodnett*, 83 Va. 281. See also *Roberts v. Coleman*, 37 W. Va. 143.

When Advancement Deemed Satisfaction of Devise or Bequest—General Rule.—An advancement to a child, made subsequent to a will, is to be taken as a satisfaction of a legacy to that child *pro tanto* or *pro toto*, according to the amount. *Jones v. Masen*, 5 Randall 577; *Moore v. Hilton*, 12 Leigh 1; *Hansbrough v. Hode*, 12 Leigh 316. But where a gift is made prior to a will the subsequent legacy though of a similar nature will not be adeemed. *Strother v. Mitchell*, 80 Va. 149. See also sec. 2522, Va. Code 1887.

Intention of Testator.—The intention of the testator, however, governs and it may be shown that the gift was intended to be absolute. *Lee v. Bank*, 11 Gratt. 182. Or that the advancements are to be brought into the division of the real estate only. *Lewis v. Henry*, 28 Gratt. 192.

Change of Gift to Advancement.—A donor may change a gift or debt to an advancement. *Darne v. Lloyd*, 82 Va. 859. See also *Arnold v. Barrow*, 2 Pott. & H. 1.

Widow's Right of Dower.—Advancements to children are not brought into hotchpot for the benefit of the widow. She is only entitled to share in the estate of the intestate of which he died possessed. *Knight v. Oliver*, 12 Gratt. 33.

Equity and Defective Advancements.—Although it is a general rule that a court of equity will not aid a defective advancement yet in *Ward v. Wever*, 1 Wash. 274, it was held that where there is a defective advancement to younger children otherwise unprovided for a court of equity will supply such defects.

Valuation of Advancements—Rents and Profits—Interest.—An advancement is reckoned at its value when made, unless it was one to take *in futuro* when it is to be computed at its value at the time the donee came into actual possession and enjoyment. *Knight v. Yarborough*, 4 Rand. 566; *Kyle v. Conrad*, 25 W. Va. 760; *Chinn v. Murray*, 4 Gratt. 348; *Isbell v. Butler*, Jeff. 10; *Hudson v. Hudson*, 3 Rand. 117; *Williams v. Stonestreet*, 3 Rand. 559; *Puryear v. Cabell*, 24 Gratt. 260; *West v. Jones*, 85 Va. 616. The above authorities also establish the rule that rents and profits to the donor's death cannot be charged as part of the advancement, though interest from the date of donor's death to the distribution is usually required. See *Knight v. Oliver*, 12 Gratt. 33; *Kyle v. Conrad*, 25 W. Va. 760.

While it is a fact that in order to share in the distribution the one advanced must bring the property into hotchpot yet though such a one has refused to come in at the original division he may do so at a subsequent division. *Knight v. Oliver*, 12 Gratt. 33; *Persinger v. Simmons*, 25 Gratt. 238.

that there must be evidence of intention, to treat it as an advancement, beyond the unexplained act. The mere gift furnishes
 89 no prima facie case of an intention to constitute an advancement. *Johnson v. Belden*, 20 Conn. R. 322; *Hatch v. Straight*, 3 Conn. R. 31; 2 Pick. R. 337; 10 Paige's Ch. R. 618.

But whatever conflict may seem to exist on this question, all the cases agree that a gift in the lifetime of the intestate, unexplained, is only a presumption in favor of an advancement, and makes only a prima facie case, which, with the legal presumption, may be rebutted by evidence.

In the case before us it is clearly proved by disinterested and unimpeached witnesses that the gift by her father to Mrs. Young was not made by way of advancement, but as an absolute gift, independent of her right to share in the distribution of his estate. It is proved that he had a motive for making this discrimination in favor of this daughter. He was a man of wealth, his personal estate being worth at least \$100,000. She was a widow, while his other two daughters were married. She was evidently his favorite child. He said of her to one witness: "She has done a great deal for me; indeed, she has done more than any one could have done for me, and is the only child I have that has given me any comfort." Surely the father had a right to dispose of his own as he thought proper, and the gift of \$13,500, as he estimates the value of the stock assigned to his widowed daughter, was not, out of personal estate worth \$100,000, an unreasonable gift to a dutiful and favorite daughter, who he declares was the only child he had who had given him any comfort. He repeatedly declared that this gift was independent of what Mrs. Young would be entitled to at his death. This declaration was made certainly to three wit-

90 nesses who are disinterested and unimpeached. It is well settled that the declarations of the decedent made at the time and subsequent to the gift may be given in evidence to show that the gift was not made as an advancement, but as an absolute gift, and vice versa. Whether the gift was an advancement or an absolute gift being a question of intention, the declarations of the donor made at the time or subsequently is competent evidence to show such intention. 19 *Mary*. R. 332; 23 *Penn.* Sta. R. 85; 29 *Ind.* R. 249; 20 *Cow.* R. 322; 16 *Geo.* R. 16; 23 *Cow.* R. 516; 16 *Mass.* R. 108; 4 *Abbott's P. R.* 5; 2 *Phil. Ev.*, *Cowan & Hill's Notes*, ed. 1859, p. 705.

But the evidence further conclusively shows not only that the decedent recognized Mrs. Young as a faithful, dutiful daughter, in whom alone (as he expressed it) of all his children he had any comfort, and therefore designed to give to her a larger portion of his estate than his other children; but it is proved that there were special considerations which induced him to make her this gift by way of compensation for services rendered. In her answer Mrs. Young says (and it is uncontradicted by a single witness, except as to the precise period during which services were

rendered to Miss Carrie Hewitt) "that she was living in the country comfortably, when her late father told her that if she would break up housekeeping and come to the city of Alexandria and take care of his father-in-law, who was imbecile from old age, and Miss Carrie Hewitt, who was insane, that he would reward her well. At his request and upon this assurance she broke up her housekeeping in Fairfax county, at great inconvenience and loss, and came to Alexandria and nursed and cared for the imbecile old gentleman and the insane lady for more than two years."

It is proved beyond all question or doubt that her father recognized these services, which she engaged to perform, and did perform up to the death of the parties named, as in part, if not in full, consideration of his act in assigning to her the stock referred to.

One witness (Mrs. Mary E. Williams) says: "I had a conversation with him (Mr. Evans) in reference to the stock. He said he had given it to her (Mrs. Young) for her services. To use his own words, that he had paid her for waiting on Carrie Hewitt and grandfather—that was Mr. Blue, who was living at that time. He said he had given it to her to pay her for her services, and that it was to be independent of anything she would get at his death."

To another witness (Miss Jane Smith) Evans said, speaking of this gift to Mrs. Young: "She left her home and came and attended to mine—attended to Miss Carrie—and she is kind to Grandpa Blue; that I gave her this bank stock for services she rendered to others. She has done a great deal for me; indeed, she has done more than any one could have done for me, and is the only child I have that has given me any comfort. I said: 'Mr. Evans, how much have you given Mrs. Young?' He said he had given her so much of one portion (of stock) and so much of another portion, the whole amounting to \$13,500; that (he said) I have given her in her own name, independent of what she shall have at my death—that is hire-money, and she can do as she pleases with it. She earned it, and I have paid her."

To another witness (Miss Lizzie Cannon), speaking of this gift to Mrs. Young, Evans said: "She is a good, deserving girl, and she has earned it. He also said this was to be independent of what she would have when he died. He also said he had made it over in her name for spending-money, to do as she liked with. He told me this was for services rendered him in taking care of Miss Carrie and Grandpa Blue, and

92 that he wanted Mrs. Young to remain with him as long as he lived, for he could not get along without her."

This positive evidence of three witnesses is confirmed (if confirmation were necessary) by the statements admitted, by agreement of counsel, of the cashiers of the Citizens Bank and First National Bank of Alexandria, showing that the stock held by Evans in said banks, respectively, had been transferred on the books, by him, to Mrs. Virginia Young, and the dividends paid to her; one

of them stating that at the time of the transfer in the Citizens Bank Evans remarked "he had given the stock to Jenny"—meaning his daughter, Mrs. Young.

To the sworn answer of Mrs. Young, sustained by the evidence of these five witnesses, so positive and conclusive, we have opposed but the testimony of one witness—and he is the son of one of the plaintiffs—who has the deepest interest in proving that this gift of between thirteen and fourteen thousand dollars was intended as an advancement. He testifies to transactions and declarations occurring when he was a mere boy, and altogether, if the utmost credit is given to his evidence, it cannot outweigh the testimony of five witnesses and the sworn answer of Mrs. Young, to all of which it is a positive contradiction. The answer is sustained by the overwhelming proof in the cause, and cannot be overthrown by the vague and uncertain statements of a single witness, and must therefore stand as true.

It has been urged, however, that the amount given was altogether disproportionate to the services rendered; that the insane lady died a few months after the services began, and that the imbecile old man, known as Grandpa Blue, lived only two years after Mrs. Young's services commenced.

But surely it is not for this court to place any limit upon the liberality or generosity of a father of affluent means and large wealth towards a loved and favorite daughter, of whom he said: "She was the only child who had given him any comfort." It is not for us to say what compensation is just and fair. He had a right to fix that compensation. He was dealing with his own property and with his own favorite child, towards whom he had a right to be liberal and generous. But considering his estate and the circumstances of the case it was not an unreasonable gift to his daughter. His personal estate alone was valued at at least \$100,000. It was held in Pennsylvania that a gift to a son (where the three other children were married daughters) of \$2,500 out of an estate of \$25,000 was not an extravagant provision for the son. 23 Penn. St. R. 87, Lawson's appeal. Surely thirteen or fourteen thousand, under the circumstances of this case, was not an extravagant or unreasonable allowance. It is true the insane lady whom Mrs. Young left her home to attend and nurse, together with the imbecile old man, died very soon after her services commenced. But she might have lived for many years—no one could tell how long. Mr. Blue, the imbecile father-in-law, in his dotage, blind and helpless, and who had to be attended to as a child, did live for two years. Was the compensation unreasonable under the circumstances? But who shall limit the compensation which a father chose to give of his own to his own child? If he chose to be generous and liberal towards his own favorite child, who has authority to gainsay or limit such generosity? Certainly this court has no such authority. I fully concur with the court below in the opinion, expressed in the decree, "that

the transfer of the stock of the First National Bank of Alexandria and of the stock of the Citizens National Bank of Alexandria, in the bill and proceedings mentioned, to the defendant, Virginia Young, was not by way of advancement to her," for which she has to account to the other heirs in the distribution of her father's estate, and that the court below was right in dismissing the plaintiffs' bill.

It has been suggested, though not stated as ground of error, in the petition of appeal, that the decree was premature, and that the matter ought to have been referred to a commissioner of the court for inquiry and account. I can conceive of no reason why an account should have been ordered in this case. There was but one issue, and that distinctly made by the bill, the amended answer, and replication thereto; and that single issue was whether the assignment of the stock in the bill and proceedings mentioned was an advancement to Mrs. Young or an absolute gift to her by way of compensation for services rendered. All the depositions were taken with reference to this issue. Nobody asked for an account; but this sole question was submitted to the court and decided.

This court has held in *Lee County v. Fulkerson*, 21 Gratt. 182, that a court of equity will not decree an account for the purpose of furnishing evidence in support of the allegations of a bill. Judge Staples, delivering the unanimous opinion of the court in that case, said: "This court has repeatedly decided that an account should not be ordered in any case unless shown to be proper and necessary by the pleadings and proofs in the cause."

Surely it cannot be said that there is anything in the pleadings and proofs in this case to make an account proper and necessary. In 2 Rob. Pract. (old), p. 359, the learned author says: "In Virginia nothing in chancery practice has been productive of so much mischief as orders of account unwisely made. Cases have frequently arisen in which, if a particular point were determined one way, an account would be proper; if determined the other way, an account would not be required. In such cases the court has often directed an account before it decided the point upon

the decision of which the propriety of taking the account depended. After much time consumed and much money expended in obtaining the account there would be a decree in the cause ascertaining that the account which had been ordered was wholly unnecessary. The court of appeals has discountenanced such a practice."

I think the case before us is exactly a case in which such a practice ought to be discountenanced, especially where no account is asked by any party to the cause, but where all parties submit their case to be determined upon the pleadings and proofs. To reopen it now, and send the case back for an account by a commissioner, would be to encourage a mischievous practice, which has so repeatedly been discountenanced and reprobated by this court.

Upon the whole case I am of opinion that there is no error in the decree of the cor-

poration court of the city of Alexandria, and that the same ought to be affirmed.

The other judges concurred in the opinion of CHRISTIAN, J.

Decree affirmed.

96 *Haynes v. The Commonwealth
for, &c.

November Term, 1878, Richmond.

By the Charter of the city of Portsmouth, which was passed March the 11th, 1873, commissioners of the revenue for the city were to hold their office for two years from a day named, on which they should enter on their office. By the act approved March 16th, 1875, ch. 206, p. 215, it is provided that there shall be commissioners of the revenue for every county and one for each city, which said commissioners of the revenue shall hold their office for four years from a day named, on which they should enter upon their office—Held:

1. **Statutes—Repeal by Implication.**—

Upon a consideration of said last act, that it applies to all cities as well as counties, including the city of Portsmouth, and was a repeal by implication of the provision of the charter of the city of Portsmouth in relation to the duration of the office of commissioner of the revenue.

2. **Same—Same—Effect in This Case.**—That

a commissioner of the revenue for the city of Portsmouth, who was elected, and who qualified in 1876, was entitled to hold his office for four years, unless sooner removed.

The case is fully stated by Judge Moncure in his opinion.

Steward, Godwin & Crocker, for the appellant.

Holladay & Gayle, for the appellee.

MONCURE, P., delivered the opinion of the court.

This is a writ of error to a judgment of the court of hustings for the city of Portsmouth rendered on the 10th day of July, 1878, in a case of an information, in the *nature of a quo warranto, filed in the name of the Commonwealth of Virginia, at the suggestion of E. W. Maupin, against the plaintiff in error, V. A. Haynes. It was charged in the information that the said V. A. Haynes, on the 1st day of July, 1878, and continuously since that time, in the said city of Portsmouth, did, without any legal authority, exercise the office of commissioner of the revenue of said city against the peace and dignity of the Commonwealth of Virginia and to the special prejudice of E. W. Maupin, who, at a general election held in the said city on the 23d day of May, 1878, was duly elected commissioner of the revenue of said city for the term of two years commencing on the 1st day of July,

1878, and who has duly qualified as commissioner of the revenue for said city for said term of two years. The defendant plead "not guilty" and also filed a special plea, in which, in substance, he claimed to have been duly elected as commissioner of the revenue of said city for four years from the 1st day of July, 1876; that he had duly qualified as such by giving bonds, with sureties, and taking the oath as required by law; that he duly entered upon the duties of the office, and had continued to perform them since his qualification aforesaid, and would continue to perform them until the termination of his office, on the 1st day of July, 1880, unless sooner removed; and that the election for commissioner of the revenue for said city held on the 23d day of May, 1878, at which the said Maupin claims to have been elected as such commissioner, was held without authority of law and was illegal and void.

And the said defendant waived all matters of formal procedure and a jury and submitted all matters of law and fact to the court; and the court having maturely considered the same and the agreed statement of facts,

which was filed, was of opinion, and so
98 adjudged, that *the said V. A. Haynes is guilty of exercising the office of commissioner of the revenue for the city of Portsmouth without legal authority, as alleged in said information, and therefore ordered and adjudged that he be ousted from said office.

There was a bill of exceptions taken by the defendant to said judgment, in which bill the court certified that the cause was heard upon the following agreed statement of facts, which were all the facts proved on the trial, to wit:

"That at the general election held for the city of Portsmouth on the 29th day of May, A. D. 1876, the defendant, Virginus A. Haynes, was duly elected commissioner of the revenue for said city; that he received the certificate of said election from the proper officers authorized to declare and certify his said election; that on the 10th day of June, 1876, he duly qualified as such commissioner of the revenue before the court of hustings for the city of Portsmouth, and gave the bond of office, with approved sureties, and took and subscribed the several oaths as prescribed by law; that he also gave to the city of Portsmouth the official bond prescribed by the ordinances of said city, with sureties approved by the council of said city, and did all other acts of necessary qualification to said office; that he entered upon the discharge of the duties and the exercise of the rights of said office on the 1st day of July, 1876, and that he has since continued to exercise the rights and discharge the duties of said office, and is still exercising and discharging the same, and that he declines to surrender the said office under the claim that he was elected commissioner of the revenue of the said city as aforesaid for the term of four years commencing from the 1st day of July, 1876; that at the general election held for the said city on the 23d day of last May E. W. Maupin was elected commissioner

Reviewed and distinguished in *Branham v. Long*, 78 Va. 352.

***Statutes—Repeal.**—See *Moses v. Cromwell*, 78 Va. 671; *Justices v. Com.*, 81 Va. 209; *Branham v. Long*, 78 Va. 352.

of the revenue for said city; that
 99 *he was duly declared elected, and has received the certificate of his election from the proper officers; that he duly qualified as such commissioner on the 13th day of June, 1878, before the court of hustings for said city, gave the official bond, with approved sureties, and took and subscribed the several oaths of office as prescribed by law, and also gave a proper official bond to the city of Portsmouth, with sureties approved by the council of said city, and did all other acts of qualification of said office, and on the 1st day of July, 1878, he made formal demand of the said V. A. Haynes for the surrender of the official books and papers held by him as commissioner of the revenue of the city, which the said V. A. Haynes refused to do, and still refuses to do; that the said E. W. Maupin claims title to said office by virtue of his said election and the provisions of the thirty-third section of the act of the general assembly of Virginia entitled 'an act to provide a new charter for the city of Portsmouth,' approved 11th March, 1873, which said act was given in evidence on the trial."

The relator, Maupin, claims to be entitled to the said office by virtue of an election held under the thirty-third section of the act entitled "an act to provide a new charter for the city of Portsmouth," approved March 11th, 1873, ch. 152, pp. 133-34.

The defendant, Haynes, claims to be entitled to it by virtue of an election held under the first section of the act entitled "an act prescribing general provisions in relation to commissioners of the revenue and the assessment of taxes on persons, property, income, licenses, &c.," approved March 16, 1875, ch. 206, p. 215. And he contends that the latter act repealed the former as to the election of commissioner of the revenue for the city of Portsmouth.

Upon that question alone this case depends. If there was such a repeal, Haynes is entitled to the office in controversy;
 100 *if there is no such repeal, Maupin is entitled to it.

Was there such a repeal or not?

The first section of the said act, approved March 16, 1875, among other things not material to be noticed, substantially enacts that "there shall be four commissioners of the revenue for each of the counties of Bedford," &c.; "three for each of the counties of Fauquier," &c.; "two for each of the counties of Accomack," &c.; "and one for every other county now existing or which may be hereafter created; and one for each city and town now authorized by law to elect a commissioner of the revenue, which said commissioners shall be elected, give bond, and qualify as prescribed by law." &c. "The term of office of the commissioners of the revenue shall commence on the 1st day of July next after their election, and continue for four years from the day when their term of office, respectively, commenced, unless sooner removed. Each commissioner shall reside in the district for which he was elected, and his removal therefrom shall vacate his office: provided that the voters residing

within any corporation, who are hereby authorized to elect a commissioner of the revenue for such corporation, shall not vote for the commissioners of the revenue for the county within the limits of which such corporation may lie."

The thirty-third section of the said act, approved March 11th, 1873, among other things not material to be noticed, enacts that there shall be elected by the qualified voters of the city of Portsmouth, on the fourth Thursday in May, 1874, and every two years thereafter, one commissioner of the revenue, who shall hold his office for the term of two years, and until his successor shall be elected and qualified, unless sooner removed from office. He shall give bond, with sureties to be approved by the city council, in the penalty of not less *than

two thousand dollars, said bond to be filed in the office of the city clerk. He shall perform such duties, have such powers, and be liable to such penalties as are now or may hereafter be prescribed by laws or ordinances," &c.

Now, is the said act of March 11th, 1873, repealed by the said act of March 16th, 1875, as to the duration of the term of office of a commissioner of the revenue of the city of Portsmouth? The duration of such term by the former act being two years, whereas by the latter act the duration of the term of office of a commissioner of the revenue is four years.

If the clause in the latter act which provides that "the term of office of the commissioners of the revenue shall commence on the 1st day of July next after their election, and continue for four years from the day when their term of office, respectively, commenced, unless sooner removed," applies to a commissioner of the revenue for the city of Portsmouth, then, clearly, there is such a repeal. As to this there can be no doubt or difficulty. The two acts, in that view, are irreconcilably in conflict, and the latter, of course, repeals the former, by necessary implication, which is just as effective as an express repeal would be.

It now only remains to inquire, Does not the latter act apply to a commissioner of the revenue of the city of Portsmouth? Why does it not, just as much as to any other city of the commonwealth? No other city is named in the latter act any more than Portsmouth. Do the general words of the latter act, "and one for each city and town now authorized by law to elect a commissioner of the revenue," which in terms apply to all cities and towns authorized by law to elect a commissioner of the revenue, in fact apply to no such city and town? If they apply to some and not to all, to which do they apply?

There is at least as much reason for
 102 their application *to the city of Portsmouth as to any other city of the state. The following words, in the said first section of the act of March 16, 1875, to wit: "the term of office of the commissioners of the revenue shall commence on the 1st day of July next after their election, and continue for four years from the day when their term

of office, respectively, commenced, unless sooner removed," plainly embrace a commissioner of the revenue for the city of Portsmouth, because they plainly embrace a commissioner of the revenue for each city and town authorized at the date of the act to elect a commissioner of the revenue, and the city of Portsmouth was certainly then so authorized. That these words apply as well to such cities and towns as to counties plainly appears from the fact that such cities and towns no more than counties are excluded from their operation; and such cities and towns as well as counties being the common antecedents of the said words in the same section, they relate to the whole of the said antecedents by the plain rule of grammatical construction. That the legislature had in its mind in framing the whole of the said first section commissioners of the revenue for such cities and towns as well as counties is manifest not only from the express words of the previous part of the section, but also from the following words in the subsequent part thereof, viz: "provided that the voters residing within any corporation, who are hereby authorized to elect a commissioner of the revenue for such corporation, shall not vote for the commissioners of the revenue for the county within the limits of which such corporation may lie."

The first section of the act of March 16th, 1875, is very similar in its terms to the first section of chapter 35 of the Code of 1860, page 187. In the latter, the words in regard to the duration of the term of office are: "The term of office of the commissioners of the revenue shall commence on the 1st day of February next after their *election, and continue for two years from the day when their term of office, respectively, commenced, unless sooner removed." In the former, the corresponding words are: "The term of office of the commissioners of the revenue shall commence on the 1st day of July next after their election, and continue for four years from the day when their term of office, respectively, commenced, unless sooner removed." These words in the two statutes are identical except as to the commencement and duration of the term. Nobody ever doubted but that these words in the Code of 1860 applied to commissioners of the revenue as well of corporations as of counties; and for the same reason the same or similar words in the act of March 16, 1875, must have the same application. The new constitution made a radical change in the old county and town organizations: retaining the office of commissioner of the revenue as to towns, but abolishing it as to counties. This made it necessary to have different laws on the subject in carrying out the new constitution. But when, recently, the new constitution was so amended as to restore the office of commissioner to the counties, and place them on the same footing in that respect with the towns, it was deemed fit to re-enact the same form of legislation on the subject of commissioners of the revenue that existed before the new constitution was adopted. It follows that the construction must also be the same.

There is nothing in any of the cases cited by the learned counsel of the appellee which is in conflict with the foregoing views, and it is unnecessary to review them here.

The court is therefore of opinion that the judgment of the court below is erroneous and ought to be reversed and annulled, and in lieu thereof a judgment rendered that the said V. A. Haynes has legal authority to exercise the office of commissioner of the revenue for the *city of Portsmouth until the expiration of the term of four years from the 1st day of July, 1876, the day on which his term of office commenced, unless sooner removed, and that he continue to hold and exercise the said office accordingly.

The judgment was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the said plaintiff in error, Virginus A. Haynes, was duly elected to the office of commissioner of the revenue for the city of Portsmouth for the term of four years from the 1st day of July, 1876, and duly qualified as such commissioner, and will be entitled to continue to hold said office until the expiration of said term, unless sooner removed; and that the said judgment is erroneous. Therefore it is considered that the said judgment be reversed and annulled, and that the said Virginus A. Haynes recover of the relator in this case, the said E. W. Maupin, the costs by him, the said Haynes, expended in the prosecution of his writ of error aforesaid here. And this court, proceeding to pronounce such judgment as the said hustings court ought to have rendered, it is further considered that the said Haynes is not guilty of exercising the office of commissioner of the revenue for the city of Portsmouth without legal authority, as alleged in the said information, and that he be not ousted from the said office, and that he recover of the said relator, Maupin, the costs by him, the said Haynes, about his defence to the said information in the said hustings court expended; which is ordered to be certified to the said hustings court for the city of Portsmouth.

Judgment reversed.

105

*Ratcliffe v. Anderson.

[31 Am. Rep. 716.]

November Term, 1878, Richmond.

1. Statutes—Unconstitutionality.—The act of March 25, 1873, amending § 3 of the act of March 3, 1866, so far as it authorizes the reopening of a judgment rendered since said March 3, 1866, is unconstitutional and void, both because it is an infringement upon the powers of the judicial department of the government; and because it impairs the obligation of contracts.

This was a petition to the judge of the circuit court of Fairfax county, filed in January, 1874, by Charles W. Ratcliffe, to have a judg-

*Approved in *Marpole v. Cather's adm'r*, 78 Va. 239 and *Martin v. Land Co.*, 94 Va. 37.

ment by default which had been recovered against him in said court in November, 1866, by C. F. Anderson, reopened and scaled. The judgment was for \$300 with interest from June 6th, 1833, and was founded on a bond for that sum, which the petitioner alleged was given on a Confederate contract. The court below refused to open the judgment, and Ratcliffe obtained a writ of error from a judge of this court.

Thomas & Wells, for the appellant.

M. D. Ball, for the appellee.

CHRISTIAN, J. At the November term of the circuit court of Fairfax county in the year 1866 Anderson recovered a judgment by default against Ratcliffe upon a bond executed by said Ratcliffe, and payable on demand, and bearing date the 6th day of June, 1863, for the sum of \$300.

106 *On the 4th day of February, 1874, more than seven years after the judgment was rendered, Ratcliffe filed his petition in said circuit court asking the court to reopen said judgment and scale the amount of the same according to the depreciation of Confederate money, he alleging in his petition that the bond upon which the judgment was rendered was given for Confederate currency.

This petition of the appellant was filed under the act of the general assembly, approved March 25th, 1873, amending the act passed March 3d, 1866, which is in the following words:

1. Be it enacted by the general assembly, That the third section of the act passed March 3, 1866, in relation to contracts made between January 1, 1862, and April 10, 1865, be amended and re-enacted so as to read as follows:

§ 3. Where any judgment or decree has been recovered for a specific sum, or for damages, between the said 1st day of January, 1862, and the said 10th day of April, 1865, or shall have been recovered after the said 10th day of April, 1865, and before the 3d day of March, 1870, or if any judgment or decree shall have been rendered or recovered by default since the said 3d day of March, 1866, or shall hereafter be rendered or recovered by default upon a cause of action arising within the period from the 1st day of January, 1862, to the 10th day of April, 1865, and such judgment or decree remain unpaid, it shall be lawful for the courts, in a summary way, on motion, after ten days' notice, either before or after the issue of execution, to fix, settle and direct at what depreciation, or how, the said judgment or decree shall be discharged, having regard to the provisions of this act, to the cause of action for which the judgment or de-

107 cree was recovered, *and any other proof or circumstance that, from the nature of the case, may be admissible.

It is under this provision of the act of March, 1873, that it is proposed to reopen and annul in whole or in part a judgment rendered by a court of competent jurisdiction in favor of the appellee in November, 1866. I am of opinion that this cannot be done,

and that the act of assembly above quoted is not only an attempted invasion of judicial authority, but is in contravention of that provision of the constitution of the United States and of this state which declares that the state shall pass no law "impairing the obligation of a contract."

First, the act is an attempted exercise of judicial power because it authorizes a court to reopen and review a case which has already passed into judgment. It is now too well settled to admit of serious dispute that the legislative department can no more exercise judicial power than that the judicial department can exercise legislative power. Each is supreme in the exercise of its own proper functions within the limits of its authority. The boundary line of these powers is plainly defined in every well-ordered government; and in this country it is now a well-established principle of public law that the three great powers of government—the legislative, the executive, and the judicial—should be preserved as distinct from and independent of each other as the nature of society and the imperfections of human institutions will permit. That system which best preserves the independence of each department approaches nearest to the perfection of civil government and the security of civil liberty.

The province of the courts is to decide what the law is or has been, and to determine its application to particular facts in the 108 decision of causes. The province *of the legislature is to declare what the law shall be in future; and neither of these departments can lawfully invade the province of the other. This not only results from the nature of our institutions, but it is enjoined by the express provisions of the constitution; which declares that "the legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers belonging to either of the others. See Griffin's ex'or v. Cunningham, 20 Gratt. 31, and cases there cited.

I do not deny the power of the legislature to pass statutes in aid of judicial proceedings and which tend to their support by precluding parties from taking advantage of errors apparent on the face of the proceedings which do not affect their substantial rights—such a statute, for instance, as is found in our Code, ch. 177, § 3, which permits a court in which a judgment has been rendered, on notice and motion within five years, to correct any mistake, miscalculation, or misrecital of any name, sum, quantity, or time, when the same is right, in any part of the record or proceedings, &c.

Such, also, is the statute which authorizes a court, or judge in vacation, to reverse a judgment by default, or a decree on a bill taken for confessed, for any error for which an appellate court might reverse it.

Statutes such as these are not regarded as an interference with judicial authority, but only in aid of judicial proceedings for the purpose of correcting errors, such as are mentioned in the statute. See Cooley's Const.

Limit., p. 107; Griffin & Cunningham, *supra*, and cases there cited.

Now, it is to be observed in respect to the judgment under consideration, that it was recovered in a suit brought after the passage of the act of March 3, 1866, to-wit: at the November term, 1866, of the circuit
 100 *court of Fairfax. Under the act referred to it would then have been competent for Ratcliffe to show that the contract between him and Anderson was "according to the true understanding and agreement of the parties, to be fulfilled or performed in Confederate States treasury notes, or was entered into with reference to such notes as a standard of value"; and upon such evidence the court then had authority to reduce the debt from its nominal amount according to the scale of depreciation. But no such defence was then made, and no evidence supporting such defence was offered; and a judgment was properly rendered for the whole amount of the bond. That judgment, not appealed from, was final, and adjudicated the rights of the parties forever, unless the judgment can be reopened under the act of March 25, 1873. The proceeding under which it is now attempted to reopen this judgment was not had under the act of March, 1866, nor could it be; and it is not so claimed on the petition for a writ of error. The third section of that act plainly refers to judgments rendered before its passage, and not to judgments thereafter recovered. The language of that act plainly shows this; and the fact that the act of 1873 was passed for the purpose of extending the provisions of the act of 1866 plainly indicates that this was the legislative construction given to that act. The petition for a writ of error concedes this by admitting that the proceedings in this case were had under and by virtue of the act of March 25th, 1873. It is to the construction and constitutionality of that act, and not the act of March 3d, 1866, that my opinion is confined. The single question, therefore, we have to determine is whether this last-named act is constitutional. My opinion clearly is that upon the principles already adverted to, and for other reasons to be assigned, that said act so
 110 far as it authorizes *the reopening of a judgment rendered after March 3d, 1866, is in contravention of the constitution, and therefore void.

When the act under which the claim in this case is asserted was passed, the defendant in error (Anderson) had recovered a judgment against Ratcliffe. That judgment was a final adjudication of the rights of the parties, and had so stood for nearly seven years before the passage of the act. The rights of Anderson and those claiming under him had become fixed and vested; and any attempt on the part of the legislature to impair these vested rights was an invasion of judicial authority, and must be treated as unconstitutional and void.

As was well said by Chief Justice Mellen in *Lewis et al. v. Webb*, 3 Greenl. R. 326, 332, whose language, with slight modifications, we may adopt in this case: "Can the legis-

lature, by a mere resolve, set aside a judgment or decree of a judicial court and render it null and void, or authorize such court to reopen a judgment already final and annul the same in whole or in part? This is an exercise of power common in courts of law a priori, not questioned in a proper case, but it is one purely judicial in its nature and consequences." Such an act "professes to grant to one party in a cause which has been, according to existing laws, finally decided, special authority to compel the other party, contrary to the general law of the land, to submit his cause to another court for trial; the consequence of which may be the total (or partial) loss of all those rights, or all that property which the judgment complained of had entitled him, and those claiming under him, to hold and enjoy; that is, it accomplishes that which the existing law forbids, and which by direct and legal course cannot be attained. * * *

It is the province of the legislature to make and establish *laws; it is the province and duty of judges to expound and apply them."

In the case before us the legislature interfered to provide a new remedy for the benefit of a class of persons to obtain a rehearing in suits in which judgments and decrees had been made, and became final against them. At the time the act under review was passed the money adjudged to be paid to the defendant in error was his property in a legal sense, and of this he could not be deprived, and his vested right therein could not be impaired by subsequent legislation. See 30 Barb. 10 New York 396; 15 Id. 600; 11 Paige 400; 2 Allen 361; 27 Barb. 154; 7 Johns. R. 490. In the last-named case Spencer, J., said: "It is not necessary to inquire whether a legislature can, by the plentitude of its power, annul an existing judgment. This power I should undoubtedly deny because there then immediately arises a contract against the party adjudged to pay a sum of money in favor of him to whom it is awarded."

Both upon principle and authority I conclude that the legislature has no right, directly or indirectly, to annul in whole or in part a judgment or decree of a court already rendered, or to authorize the courts to reopen and rehear judgments and decrees already final, by which the rights of the parties are finally adjudicated, fixed and vested; and that every such attempt of legislative action is plainly an invasion of judicial power, and therefore unconstitutional and void.

But there is another ground upon which, I think, under the settled law and decisions of this court, the act of March 25th, 1873, must be held to be unconstitutional and void. I think it is plain that the act in question is in contravention of that provision of both the federal and state constitution which declares void all laws "which impair the obligation of a contract."

112 *The judgment recovered by Anderson against Ratcliffe, and which was recovered seven years before the passage of the act authorizing a reopening of that judgment and rehearing of that case, already

passed to final judgment, was certainly a contract, and one of the highest nature.

Blackstone in his Commentaries divides contracts of debt into three classes—debts of record, debts by special, and debts by simple contract. "A debt of record (he says) is a sum of money which appears to be due by the evidence of a court of record. Thus, where any specific sum is adjudged to be due from the defendant to the plaintiff in an action or suit at law, this is a contract of the highest nature, being established by the sentence of a court of judicature. 1 Chitty's Black., book 2 (marg.), page 455. See also opinion of Spencer, J., 7 Johns. R. 489, 490.

The judgment recovered by Anderson against Ratcliffe was a contract of the highest nature, and any legislature which authorizes a court to reopen that judgment and reduce it in amount necessarily impairs its obligation.

This court held in *Roberts' adm'r v. Cocke*, and *Murphy v. Gaskins' adm'r*, that the act of the legislature found in ch. 173, § 14, Code 1873, p. 1120, which empowers courts or juries in all suits for the recovery of money founded on contracts, express or implied, where the original consideration accrued prior to the 10th day of April, 1865, to remit the interest found to be due, or any part thereof, for the period between the 17th April, 1861, and 10th April, 1865; and which also empowers the court in which any judgment or decree has been rendered prior to the passage of the act, on motion to review such judgment or decree, and abate the same to the extent of the interest aforesaid, to

113 be unconstitutional and void. *This act was declared to be in contravention of the constitution because it impaired the obligation of a contract and interfered with vested rights. It is sufficient on this branch of the case to refer to the able and elaborate opinion of Judge Burks in these cases, and the authorities cited by him. It is enough to say, upon the authority of these recent cases, that if an abatement of a part of the interest for which the judgment is rendered is declared to impair the obligation of the contract, then a fortiori an abatement or reduction of the principal, for which a final judgment has been recovered, is certainly an impairment of the obligation of the contract, and the statute which authorizes this to be done must, in like manner as the statute authorizing an abatement of interest, be declared to be unconstitutional and void. Upon the whole case I am of opinion, for the reasons stated, that there is no error in the judgment of the circuit court of Fairfax, and that the same must be affirmed.

The other judges concurred in the opinion of CHRISTIAN, J.

Judgment affirmed.

114 *Price's Ex'or & als. v. Harrison's Ex'or & als.

November Term, 1878, Richmond.

P, who is trustee under a will for the benefit of infant children, died in June, 1865, indebted to the trust, and his executor pays to the other trustee in

the will a part of that debt. Upon the settlement of P's estate, in 1877, it appears that he is largely indebted for more than his assets. HELD:

1. **Administration—Preferences—Trustees.**—Under the statute in force at the time of P's death his debt as trustee was not embraced in the third class of creditors provided for in that act; but must be placed in the fourth class, with the general creditors of P; and his executor is not entitled to a credit in his administration account for the amount of the trust debt he had paid. See Code of 1860, ch. 131, § 25.

2. **Statutes—Retrospective Effect.**—The act of July, 1870, Code of 1873, ch. 126, § 25, which amends the former law by inserting in the third class "debts of trustee for persons under disabilities," is only prospective in its operation, and will not authorize the placing of P's debt as trustee in the third class, though the estate is not distributed until this last act went into operation.

This case was before this court in 1874, and is reported in 25 Gratt. 553. When the cause went back to the circuit court of Brunswick that court referred it to a commissioner to take an account of the administration of the executor, John H. Lewis, upon the estate of William B. Price, and of the debts of Price with their priorities. The commissioner returned his report in April, 1877, with exceptions thereto filed by the plaintiffs and two other parties creditors of Price. The questions arising out of these exceptions will appear from the following facts: Wm.

115 *B. Price died in June, 1865. In his lifetime E. B. Hicks died leaving a will, by the fourth codicil of which he gave to his son David S. Hicks and his son-in-law Wm. B. Price all that part of his estate which in the will he had given to his daughter Rebecca in trust for her four children, all of whom were infants, to be divided among them as they come of age or marry. It appears that Price and David Hicks accepted the trust. Lewis, the executor of Price, paid at different times to David S. Hicks the amount of \$2,097.53, and there was still due to these children from Price's estate, as reported by the commissioner, \$9,612.87, principal and interest up to the date of the report. The commissioner allowed to Lewis a credit for the

See 25 Gratt. 553 where this case is reported.

***Administration—Preferences—Trustees.**—See *Brown v. Lambert's adm'r*, 33 Gratt. 256; 3 Min. Inst. (2nd Ed.) 581.

†**Statutes—Retrospective Effect.**—See *Peters v. The Auditor*, 33 Gratt. 368; *Crigler's Com. v. Alexander's ex'or*, 33 Gratt. 674 and note; *Campbell & Co. v. Nonpareil F. B. & K. Co.*, 75 Va. 291; *City of Richmond v. Sup'rs of Henrico County*, 83 Va. 204; 1 Min. Inst. (4th Ed.) 26 et seq. *States v. Mines*, 38 W. Va. 134, states the rule to be that *prima facie* statutes are to have no retrospective effect citing in support the principal case, and *Elliott v. Lyell*, 3 Call. 268; *Warder v. Arell*, 2 Wash. 282; *Com. v. Hewitt*, 2 Hen. & M. 181; *Day v. Pritchett*, 4 Munf. 109; *Williams v. Lewis*, 5 Leigh 686; *McCance v. Taylor*, 10 Gratt. 580; *Duval v. Malone*, 14 Gratt. 24; *Ryan's Case*, 80 Va. 385; *Robertson v. Gillenwaters*, 85 Va. 116; *Tennant v. Brookover*, 12 W. Va. 343; *Hoge v. Brookover*, 28 Va. 304; *Thornburg v. Thornburg*, 18 W. Va. 526.

If the decision in the case of *Mechanics* \$2,097.53, but placed the debt due to these children in the fourth class of debts. The amount of the debts of Price exclusive of the debt as trustee for the Hicks' was reported by the commissioner at \$57,565.62.

The plaintiffs excepted to the report because the commissioner had allowed the executor for the moneys he had paid to Hicks. David S. Hicks excepted to it because the debt due to him as trustee was put into the fourth class with the general creditors of Price. There were other exceptions, which were not noticed in this court.

The cause came on to be heard on the 1st of May, 1877, when the court sustained the exception of the plaintiffs to the credit to the executor of \$2,097.53, and overruled the exception of Hicks, the trustee; and having had a statement made in conformity to the views of the court, showing the amount of Price's estate then to be distributed among his creditors to be \$7,069.88, and that there was one debt of the third class amounting to \$689.53, a decree was made for the payment

of that debt in full, and for a ratable distribution *of the balance of the fund among all the other creditors. And thereupon Price's executor and Hicks, the trustee, applied to a judge of this court for an appeal; which was allowed.

Leigh R. Page and Wm. L. Royall, for the appellants.

J. Alfred Jones, for the appellees.

BURKS, J., delivered the opinion of the court.

The first assignment of error by the counsel for the appellants presents the main question for decision in this case, and that is, whether in the payment of the debts of the decedent, William B. Price, out of the assets in the hands of his personal representative, priority is accorded by law to the debt owing by said decedent as trustee for the children of E. B. Hicks, the assets being insufficient to discharge all of the debts.

Price died in June, 1865, and the statute then in force provided that where the assets of the decedent in the hands of his personal representative, after the payment of funeral expenses and charges of administration, were not sufficient for the satisfaction of all demands against him they should be applied:

First. To debts due to the United States.

Secondly. Taxes and levies assessed upon the decedent previous to his death.

Thirdly. Debts due as personal representative, guardian, or committee, where the qualification was in this state, in which debts shall be included a debt for money received by a husband acting as such fiduciary in right of his wife.

Fourthly. All other demands ratably, except those in the next class.

117 *Fifthly. Voluntary obligations. Code of 1860, ch. 131, § 25.

This section of the Code was amended and re-enacted July 11, 1870; Acts 1869-70, p. 428; Code of 1873, ch. 126, § 25. The only alteration made in the phraseology by the

amendment was the insertion of the words "trustee for persons under disabilities" in the clause describing the debts of the third class.

The argument was advanced by the learned counsel for the appellants in the petition for appeal, and repeated at the bar, that it was a matter of grave doubt whether a debt due by the decedent, "as trustee for persons under disabilities," was not within the equity of the statute as it stood before it was amended, and it was suggested that the phraseology was changed by the legislature merely to make more certain the benign purpose of the law in favor of those already entitled to its benefits. It was argued that the purpose of the legislature in giving priority to the debts of the third class was to favor the helpless and dependent, and this provision of the law being humane and remedial in its nature, should be liberally construed, and that William B. Price, although technically styled "trustee," was, except in name, actually guardian of the property devised for the support, maintenance, and education of the minor children of E. B. Hicks.

This argument of the learned counsel is plausible, but to us not convincing. In the construction of statutes the primary object is to discover the intention of the legislature, and where that intention can be indubitably ascertained, the courts are bound to give it effect, whatever they may think of its wisdom or policy. Where the language is free from ambiguity, and the intention plainly manifested by it, there is no room for construction. The general rule is, that a

118 legislative *act should be read according to the ordinary and grammatical sense of the words, but if terms of art are used, which have a fixed technical signification, they should be generally construed according to the known meaning. Broom's Leg. Max. 576 (side p.). Words of known legal import are to be considered as having been used in their technical sense, or according to their strict acceptation, unless there appear a manifest intention of using them in their popular sense. Potter's Dwar. 199.

It was observed by Lord Tenderden that "there is always danger in giving effect to what is called the equity of a statute; it is much safer and better to rely on and abide by the plain words, although the legislature might have provided for other cases, had their attention been directed to them. 6 B. & C. 475.

The terms employed in the statute descriptive of the preferred debts of the third class are legal terms of definite import, and well understood. The words "personal representative" are especially defined by the Code (Code of 1873, ch. 16, § 9), and "guardian" and "committee" are words of a restricted technical signification. Of the great multitude of obligations and liabilities arising from trusts, public and private, expressed and implied, the legislature deemed three classes only worthy of priority in the payment of a decedent's debts, where there was a deficiency of assets, and these three classes are specifically enumerated and accurately

described in well-known legal language, carefully selected, it would seem, to prevent any misconception of the meaning. Persons answering the description "personal representative," "guardian," "committee," are certainly trustees in a general sense, but these legal terms do not import a technical trust, such as was conferred on William B. Trice by

the will of E. B. Hicks. Such was no doubt the *legislative understanding of the statute implied by the amendment of 1870; for there is nothing in the amendatory act from which it can be inferred that it was intended as merely declaratory or explanatory of the meaning of the statute which it purports to amend, and the just construction is, that the object was to extend the law so as to embrace other debts theretofore excluded.

But it is earnestly contended by the learned counsel for the appellants, that if the priority claimed is not accorded by the statute in force at the death of Price, it was given by the act of 1870. To maintain this view two propositions must be established: First, that the act is retrospective in its nature and operation; and, second, that the rights of the creditors of the decedent to payment of their debts in the order fixed by the law in force at his death were not so vested as to be beyond legislative interference; for it was conceded in the argument that if these rights had become vested under the law by the death of the decedent, they could not be divested by the subsequent enactment.

The first proposition raises a question of construction merely. There is no doubt the legislature has the power to enact retrospective laws, provided those laws are not in conflict with the federal or state constitutions, are not ex post facto in their nature or operation, do not impair the obligation of contracts, nor disturb vested rights, which do not come within the proper limits of the law-making power, nor otherwise contravene the fundamental law. *Town of Danville v. Pace*, 25 Gratt. 1, 19. While this power is conceded, however, its exercise is universally admitted to be liable to great abuse, and some of the states deny the power to their legislatures by express constitutional amendments.

120 *Legislation generally looks to the future, and hence in seeking the legislative intent in the statute law, it is laid down by an eminent jurist as a sound rule of construction, deduced from the great mass of authorities, "that a statute should have a prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively." *Cooley Con. Lim.* 370 (side p.) and cases cited in note.

It was said by Chancellor Walworth to be "a general rule in the construction of statutes that they are not to have a retroactive effect, so as to impair previously acquired rights. And courts of justice will apply new statutes to future cases which may arise, unless there is something in the nature of the new provisions adopted by the legislature, or in the language of such new statutes, which shows that they were intended to have a retrospective operation." Authorities to the same effect might be indefinitely multiplied. See

Potter's Dwarr. 162-166; *Sedgwick on Stat. & Con. Law*, 161-172.

In the same spirit is the canon of construction adopted by the legislature of this state. Code of 1873, ch. 15, § 13.

According to the requirements of this statutory rule, "no new law shall be construed to repeal a former law * * * as to any right accrued, or claim arising under the former law, or in any way whatever to affect * * * any right accrued, or claim arising before the new law takes effect;" and this rule of construction is to be observed, "unless such construction would be inconsistent with the manifest intent of the legislature."

By the terms "right accrued or claim arising," could hardly have been intended rights

and interests so vested as to be beyond

121 legislative interference, for "as these no saving was necessary; but such rights and claims must have been intended as might be affected by ordinary legislation. If, therefore, as contended, the rights of creditors of a decedent to payment of their debts in the order prescribed by the statute are not vested rights, they are, we think, within the rule of construction provided by the Code.

Several cases have been decided by this court, to which it was held this statutory provision did not apply; but on examination they will be found to be cases involving questions of remedy merely. *McGruder v. Lyons*, 7 Gratt. 233, 374; *Yarborough & wife v. Deshazo*, Id. 374; *Crawford v. Halsted & Putnam*, 20 Gratt. 211, 225, 226; *Town of Danville v. Pace*, 25 Gratt. 1. The case under consideration is one not of remedy, but of right.

Under the rules stated and the well settled principles already enunciated, it seems plain to us that the act of 1870 was designed by the legislature to be wholly prospective—to be applied only to cases of administration of the estates of persons dying after the passage of the act. There is nothing in the nature of the act, or in its terms, showing a different intent in its enactment, and the presumption, as we have seen, is against such intent.

No inference of an intended retroactive operation is to be drawn from the mode of amendment; that is, by re-enacting the existing statute as amended "so as to read," &c. This mode of amendment was adopted pursuant to the requirement of the constitution of the state. Art. 5, § 15.

A like mode of amending the Code of Procedure and Revised Statutes seems to prevail in New York; and it was held by the

122 court of appeals of that state, **Denio*, C. J., delivering the opinion, that where particular sections are amended and re-enacted the portions of the amended sections which are merely copied without change are not to be considered as repealed and again enacted, but to have been law all along; and the new parts, or the changed portions, are not to be taken to have been the law at any time prior to the passage of the amended act. *Ely and others v. Holton*, 15 New York R. 595, 598. *

and Farmers Bank of Albany, 31 Conn. R. 63, so much relied on by the counsel for the appellants in support of the second proposition, hereinbefore stated, but cited also as a precedent for the construction contended for in this case, could be regarded as in conflict with the well-settled rule to which we have referred, it would not control our decision, for it is not an authority binding on this court. But, on examination, we do not discover any such conflict.

It is not necessary to encumber this opinion with the details of that case. It is sufficient to remark that it rose under the insolvent laws of Connecticut, and one of the questions was, whether an act amending the former law was confined in its operation to estates of insolvents which should be in settlement after the passage of the act. The language of the act was "estates in settlement," and it was held that these words were broad enough to include estates in settlement at the date of the act as well as future ones.

Whether the construction given by the court was the proper one or not, it seems to have been based chiefly on the terms of the statute as indicating an intention of the legislature that it should operate in existing as well as in future cases.

123 *The construction contended for in this case by the counsel for the appellants, if adopted, would bring about, generally, much embarrassment and confusion in the administration of decedents' estates, and, in many cases, be productive of great mischief, hardship, and injustice.

Take the case in judgment as one of the many illustrations that might be given. The estate of William B. Price at his death was worth about \$10,000. His debts amounted to upwards of \$50,000. Among these were debts owing to Mary E. Price and others for whom he had been guardian, which were preferred under the statute as it then stood; and the estate was sufficient to discharge them and leave a balance of about \$5,000, as of the date of the decree appealed from, to be apportioned among the general creditors of the fourth class, whose debts at the same date, with accumulated interest, amounted to upwards of \$73,000. Among these general creditors is included the debt due by the decedent as trustee for the children of E. B. Hicks. If this last-named debt is entitled to priority, as claimed, the other preferred debts will be paid in part only, and the general creditors will get nothing.

But suppose, after Price's death, the executor had collected all the assets and converted them into money, and having ascertained the names of all the creditors and the amounts due to them respectively, he had commenced to pay over to each his ratable share of the money in his hands as executor, and they being numerous, dispersed, and some of them perhaps not accessible, he had paid only one-half of them the shares due them and he had retained in his hands the residue of the money for the other half, intending to pay as soon as he could communicate with them, and before this was done, or could be done, the act of

124 1870 *had been passed. So far as payments had been made, as admitted in the argument, they could not be disturbed, because the money paid would become at once the absolute property of those to whom it was paid; and the consequence would be, that, giving effect to the act as contended for, one-half of the general creditors of the fourth class would receive their full share of the assets, a single creditor would receive all that was left or share it with other preferred creditors, and the remaining creditors of the fourth class would receive nothing. Such gross inequality and injustice, easily foreseen, could not have been contemplated by the legislature in the enactment which it passed.

This conclusion renders it unnecessary to decide the question mostly argued in this case and with signal ability, whether the rights of creditors of a decedent to payment of their debts out of his estate according to the order prescribed by the law in force at the death of such decedent are so far vested as to be beyond legislative interference. The difficulties inherent in the subject of what is denominated vested rights, it is truly said, have led to frequent contradiction; and there is perhaps no subject, it is further said, of equal importance, on which there are greater incongruities than on the point, what rights are vested so as to be beyond legislative action, and what are within its proper and regular control. Sedgwick on Stat. & Con. Law, 650.

It is a sufficient answer to the second assignment of error by appellants' counsel, based on the action of the court overruling the first exception of Price's executor to Commissioner Turnbull's report, to say that we find no evidence in the the record to sustain it.

It is also objected that the allowance of thirty dollars to Commissioner Turnbull **125** for making out statement "X," on which the decree appealed from was based, is excessive. It would seem to require some care and skill to make the statement, including the apportionment among the numerous creditors. The circuit judge, who was cognizant of all the facts, must have thought the allowance reasonable. We have no means of determining whether it was reasonable or not. At all events, the amount is too small to be a matter of much consequence to the parties.

The court is of opinion, for the reasons stated, that there is no error in the decree appealed from, and that it should be affirmed. Decree affirmed.

126 *Kirkland, Chase & Co. v. Brune & als.

November Term, 1878. Richmond.

1. Trust Deeds—Recording Acts.—The words "goods and chattels" in §§ 4, 5 and 6 of the registry acts, Code of 1873, p. 897, do not include a

***Trust Deeds—Recording Acts.**—The leading case was cited in Gregg v. Sloan, 76 Va. 497, to sustain the proposition that the recording acts do not

mere chose in action, as a debt, or claim on another for money due; and the assignment of such debt or claim for value, though not recorded, will be good against a subsequent attachment upon such debt or claim.

2. Recording Act—"Goods and Chattels" Defined.—The words "goods or chattels" in §§ 4, 5 and 6 of the registry act refer to and only include personal property which is visible, tangible, or movable.

This was an appeal from the decree of the corporation court of the town of Danville made on the 6th of August, 1873, in a cause in which Kirkland, Chase & Co. were plaintiffs and William H. Brune and others were defendants. The plaintiffs sought to attach the effects of Brune in the hands of parties in Danville, and among these was a claim upon the Danville Manufacturing Company, which had been assigned to Brune, and by Brune to L. Whitridge in trust for Brune's creditors. The only question in this court was whether the attachment of the plaintiffs or the assignment to Whitridge had preference as to this claim. The plaintiffs, Brune and the trustee, lived in the city of Baltimore. The court below decided that the trustee, Whitridge, was entitled to the fund; and the plaintiffs obtained an appeal. The facts are stated in the opinion of Christian, J.

Cabell & Peatross, for the appellants.

Robertson and Green, for the appellees.

137 *CHRISTIAN, J., delivered the opinion of the court.

The point of controversy in this case arises between the attaching creditors, Kirkland, Chase & Co., and the appellee, Brune, who claims to be the assignee of a chose in action. The solution of the question raised by the pleadings and evidence in the cause depends upon the true construction to be given to those provisions of the registry laws contained in the fourth, fifth and sixth sections of ch. 114, Code of 1873, p. 897; and which, so far as they relate to the question under consideration, are as follows:

§ 4. Any contract in writing made in respect to real estate or goods and chattels, in consideration of marriage, or made for the conveyance or sale of real estate, or a term therein of more than five years, shall, from the time it is duly admitted to record, be as against creditors and purchasers as valid as if the contract was a deed conveying the estate or interest embraced in the contract.

§ 5. Every such contract, every deed conveying any such estate or term, and every deed of gift, or deed of trust, or mortgage, conveying real estate or goods and chattels, shall be void as to creditors and subsequent purchasers for valuable consideration with-

out notice, until and except from the time that it is duly admitted to record in the county or corporation wherein the property embraced in such contract or deed may be. * * * * *

§ 6. Notwithstanding any such writing shall be duly admitted to record in one county or corporation, wherein there is real estate or goods or chattels, it shall nevertheless be void as to such creditors and purchasers in respect to other real estate or goods or chattels without the same, until it is duly admitted to record in the county or corporation wherein such other real estate or goods or chattels may be.

These are the only sections of the act necessary now to be considered and construed in fixing the rights of the parties in this case.

It is proper and convenient, first, however, to give a brief statement of such of the facts disclosed by the record as are necessary to a proper understanding of the claims of the contesting parties. It seems that Kirkland, Chase & Co. instituted their suit by way of foreign attachment in the corporation court of Danville, against William H. Brune, and the said Brune trading as F. W. Brune & Sons, for the sum of \$28,000, with interest thereon from February 1st, 1872. An attachment was issued directing the sergeant of the city of Danville to attach the effects and estate of said Brune and Brune & Sons in Danville, or any estate or debts due him in the hands of or under the control of the Danville Manufacturing Company, or their trustee, Harrison Robertson. The sergeant levied upon the property of said company, and delivered copies of process to Robertson, trustee, and Voss, president of the company. All this was done on the 14th day of February, 1872, at 10½ o'clock A. M., as shown by the sergeant's return.

It further appears that sometime in May, 1866, the Danville Manufacturing Company, which had been doing a very extensive business, became insolvent and conveyed to Harrison Robertson large and valuable property, consisting of real estate, water-power, machinery, fixtures, stock of manufactured goods, money in the hands of its treasurer, bonds, open accounts, debts, choses in action, and indeed all its property, real, personal and mixed, in action or possession, and wherever situate or found. This conveyance was made for the benefit of the numerous creditors of said company.

Among those creditors, and perhaps the largest, was the firm of John T. Barry & Co., of the city of Baltimore. The trustee, Robertson, had in execution of the trusts created by said deed, and in accordance with its provisions, sold a considerable portion of the trust property and distributed the proceeds among the creditors. There was still, however, a large portion of the property unsold and a large part of the claim of Barry & Co. still unpaid.

On the 1st of June, 1871, Barry sold and transferred for value received this claim, being the balance due him from the Danville Manufacturing Company, to William H. Brune. The writing transferring this claim

embrace assignments of choses in action, whether such assignments be special or general, as by deed of trust. See *Gorden v. Rixey*, 76 Va. 694; *Bockover v. Life Ass'n*, 77 Va. 85; *Daily's ex'or v. Warren*, 80 Va. 512; 2 Min. Inst. (4th Ed.) 944; *Bickle v. Chrisman*, 76 Va. 678; *Renick v. Ludington*, 20 W. Va. 511; *Bank v. Geltinger*, 3 W. Va. 317; *Fleshman v. Holyman*, 27 W. Va. 738; *Tingle v. Fisher*, 20 W. Va. 497.

by Barry to Brune was recorded in the clerk's office of the circuit court of the town of Danville on the 9th day of February, 1872. This was the debt which it was sought to reach by the attachment sued out by Kirkland, Chase & Co.

But it further appears that on the 13th February, 1872, Brune made a deed of trust for the benefit of his creditors, by which he conveyed to Whitridge, trustee, "all his estate and property, real, personal and mixed, and all claims and debts due to him and to the firm of F. W. Brune & Sons," the deed containing only certain exceptions of wearing apparel and personal effects, portraits, &c. This deed was recorded in Baltimore on the 16th February. It does not appear ever to have been recorded in Danville. It was not acknowledged by Brune until between 12 and 3 o'clock on the 14th February. It will be observed that in this deed of trust the claim or debt transferred from Barry to Brune is not mentioned *eo nomine*. But it appears that on the same day on which the deed was written, to-wit: on the 13th
130 February, *1872, the following paper was signed and sealed by Brune, and immediately sent by mail to Danville:

To H. Robertson, Esq., trustee, &c., &c.,
Danville, Va.:

Sir—I hereby, for value received, assign and transfer to Horatio L. Whitridge, of this city, trustee for the benefit of my creditors and of the creditors of my firm of F. W. Brune & Sons, of this city, equally, all right, interest and claim in and to the claim of John S. Barry & Co. against the Danville Manufacturing Company, at Danville, Virginia, which was assigned to me by said Barry in May or June in the year 1871.

In witness whereof I have hereunto set my hand and seal at Baltimore, Maryland, on this the 13th day of February, A. D. 1872.

William H. Brune, [Seal.]

This paper was received by Robertson, to whom it was addressed, by due course of mail, on the morning of the 15th February, about 10 o'clock A. M., as shown by endorsement made on the envelope containing it by said Robertson.

Now, it is under this special assignment, executed on the 13th of February, 1872, that Whitridge, the trustee for the creditors of Brune, claims the debt due from the Danville Manufacturing Company to Barry, and which had been assigned to Brune; while the appellants claim this same debt by virtue of their attachment, levied on the 14th February, 1872. These conflicting claims can only be determined by the construction to be given to the registry law above referred to.

If the transfer or assignment of a mere chose in action comes within the purview of the statute, then any instrument creating such transfer or assignment must be recorded to give it validity against creditors,
131 and not being *recorded in Danville, the attaching creditors must prevail against the trustee of Brune.

But if the assignment of Brune's claim, which he purchased from Barry, and which was a mere right to assert Barry's claim, whatever it was, against the Danville Manufacturing Company, and which is in its very nature a mere chose in action, does not come within the terms or evident meaning of the registry act, then the attaching creditors must fail in their demand; because at the time of the levy of their attachment the claim asserted against the Danville Company was no longer due to Brune, or one which he could assert, but belonged to the creditors of Brune, assigned and transferred by him for a valuable consideration the day before the attachment was levied.

Now, referring again to the registry acts, we find the language to be "every deed of gift, or deed of trust, or mortgage, conveying real estate or goods and chattels, shall be void as to creditors and subsequent purchasers for valuable consideration, without notice, until and except from the time it is duly admitted to record in the county or corporation wherein the property embraced in such contract or deed may be."

Now, the thing assigned, and sought to be reached by attachment upon the ground that the deed transferring it was not recorded, cannot be said to be property or goods and chattels within the meaning of this act. It is a mere chose in action; a claim of uncertain amount; a debt due (as claimed) as a balance on open account; a mere right to sue for and recover whatever balance may be due to Barry & Co. from the Danville Company. The act plainly does not embrace such a claim as this. It manifestly refers to such property and such goods and chattels as are visible, tangible or movable. While the word chattels is one of very large significance, and generally includes choses in action as well as all species of personal property,

yet it is plain it is used in a more
132 *restricted sense in this act; its meaning being limited by the terms which follow it. It is provided in the same section that a deed conveying such "real estate, goods and chattels" shall be recorded "in the county or corporation wherein the property embraced in such contract or deed may be." Can it be told wherein a debt or claim "may be?" Has such property (if it may be called property in the sense of the statute) any situs, any locality? What is the place "wherein it may be?" Does it follow the debtor or the creditor? If either, does it change its situs every time there is a change of residence? If it follows the creditor, then the proper place to record the deed conveying it was Baltimore, and not Danville, for the creditor lives in the city of Baltimore. I think the very language of the section quoted shows conclusively that it has no reference to such an invisible, intangible thing as a debt claimed to be due, and the right to sue for and recover it if established.

But this construction is made the more apparent by reference to the eighth section of the same act. That section provides that—

§ 8. "If any goods or chattels mentioned in said writing be removed from a county or corporation in which it is admitted to record, the said writing shall, within one year after such removal, be admitted to record in the county or corporation to which the property is so removed; otherwise the same, for so long as it is not admitted to record in such last-mentioned county or corporation, shall, as to the property so removed, be void as to such creditors or purchasers."

Now, how can it be predicated of an invisible, intangible thing like a chose in action that it may "be removed from one county or corporation to another?"

If its locality is to be determined by the residence of the creditor, or party claiming to be entitled to it, then it must be held to

133 be removed every time the owner *removes his residence. In the case before us, as was before said, the residence of Whitridge being the city of Baltimore, that would be the place of recordation, or the place "wherein the property may be"—a place beyond the jurisdiction of the state, as to which there could be no legitimate legislation in this state.

These views, founded on the language and plain meaning of the statute, I think will demonstrate the absurdity of the construction contended for, and makes it plainly appear that the words "property, goods or chattels" as used in the registry acts do not include mere choses in action, but such property, goods or chattels as are visible, tangible and movable. I am therefore of opinion that the attachment levied in Danville did not reach the claim assigned by Brune to Whitridge, trustee; and that neither the deed of trust nor the special assignment of this claim was such a paper as is required to be recorded by the registry acts.

It follows from these views that there is no error in the decree of the court below abating the attachment, and that the same should be affirmed.

STAPLES, J., said he was not prepared to say that a deed of trust conveying choses in action need not be recorded to make it valid against creditors and purchasers. The question was not free from difficulty, and he was not prepared to express an opinion on the subject. He thought, however, the special assignment in the case for the benefit of creditors sufficient to vest the title in the assignee as against the attaching creditor, and upon that ground he concurred in affirming the decree.

ANDERSON, J., concurred with STAPLES, J.

Decree affirmed.

134 *Slaughters v. Farland's Ex'x.

November Term, 1878, Richmond.

1. **Appeal — Objections — Waiver.** — S brings debt against W, the maker, and H and F, endorsers of a negotiable note. There is an office judgment at rules against all the defendants. At the next rules, office judgment confirmed as to W and H; death of F suggested. At the next term of the

court there is judgment against W and H. Afterwards *scire facias* issued and served on F's executrix to revive the action, and she appears and pleads *nil debet*, and obtains continuance; and this is repeated. There are three trials, and verdict in her favor—**Held:** That F's executrix, not having made any question in the court below as to the revival of the suit against her by *scire facias*, she must be held to have waived the question, and she cannot make it in the appellate court.

2. **Notice of Dishonor—Notary's Certificate.**—The certificate of the notary that he gave notice of protest of note for non-payment sent by mail to the place of residence of endorser whilst there was a mail communication between the place of starting and the residence, though not by the direct route, held to be sufficient evidence of notice.

The case is fully stated by Judge Moncure in his opinion.

J. M. Mathews, for the appellant.

There was no counsel for the appellee.

MONCURE, P., delivered the opinion of the court.

This is a writ of error to a judgment of the circuit court of Essex county, rendered on the 11th day of May, 1872, in an action of 135 debt then pending in said court in *the name of the plaintiffs in error, Fanny Slaughter and Matilda Slaughter, against the defendant in error, Ellen D. Farland, executrix of the last will and testament of Zebulon S., alias Z. S. Farland, deceased, who in his lifetime was sued with George T., alias George T. Wright, and Robert S., alias R. S. Hipkins.

The original action was brought in the said court on the 19th day of August, 1868; the writ was returnable to September rules next thereafter, and was returned duly executed on all the defendants. At the same rules a declaration was filed in the case, which is in the due form of a declaration in an action of debt on a protested negotiable note, payable at the Bank of Commerce, Fredericksburg, against the maker and endorsers thereof. At the same rules a common order was entered against all three of the defendants, the maker and the two endorsers of the note. At the next rules, to-wit: on the 5th day of October, 1868, the common order or conditional judgment entered against two of the defendants, to-wit: the maker, Wright, and first endorser, Hipkins, at the last rules was confirmed, and it was suggested that the other defendant, Zebulon S., alias Z. S. Farland, was dead. At the next succeeding term of the said court, to-wit: on the 18th day of November, 1868, being the last day of the said term, an order was made in the case stating that the plaintiffs on that day came by their attorneys, and the said defendants, Wright and Hipkins, being again solemnly called and failing to appear, and the judgment obtained against them at rules not having been set aside, and the plaintiffs being then entitled

***Notice of Dishonor—Notary's Certificate.**—For rule as to certificate of notary as evidence of notice of dishonor, see generally 4 Am. & Eng. Enc. Law 388.

to a final judgment, it was therefore considered by the court that the plaintiffs recover against the said defendants the sum of \$687.34, with interest thereon at six per centum per annum from the 1st day of April, 1862, till paid, and also \$2.85 cents, the charges of protest of the said note, and also the plaintiffs' costs of suit, \$7.32 cents.

136 *On the 15th day of September, 1869, the plaintiffs sued out of the clerk's office of said court a scire facias to revive the said action against Ellen D. Farland, executrix of the last will and testament of the said Zebulon S., alias Z. S. Farland, deceased.

Afterwards, to-wit: at rules held at the clerk's office of said court on the 4th day of October, 1869, the scire facias aforesaid having been returned executed, it was ordered that the cause stand and be revived against the said Ellen D. Farland as executrix aforesaid, and be in all things in the same plight and condition it was in at the time of the death of said Zebulon S., alias Z. S. Farland, deceased; and on the motion of the plaintiffs it was further ordered that the conditional judgment against the said defendant, Zebulon S., alias Z. S. Farland, be confirmed.

And at a circuit court continued and held for said county, on the 17th day of November, 1869, came the said parties to the said revived action by their attorneys, and on the motion of the defendant the judgment obtained against her in the clerk's office in the cause was set aside, and the said defendant plead "nil debit" and "offsets," to which said pleas the plaintiffs replied generally, and issues were thereupon joined by the parties, and leave was given to the defendant to file special pleas in writing within ninety days, and the cause was continued till the next term.

At the next term, to-wit: on the 28th day of April, 1870, on the motion of the defendant it was ordered that the cause be continued for her and at her costs for that term.

At the next term, to-wit: on the 15th day of November, 1870, on the motion of the defendant she was permitted to file the special pleas in writing which leave was given her to file at November term, 1869, and the plaintiffs filed a general demurrer

137 to said special pleas, in *which demurrer the defendant joined, and which, upon being argued, the court sustained. Whereupon the issues joined in the cause were tried by jury, which found a verdict for the plaintiffs for the sum of \$491.10. On the motion of the plaintiffs the verdict was set aside and a new trial was granted them, and thereupon the cause was continued till the next term.

At the next term, to-wit: on the 13th day of May, 1871, the case was tried by a jury upon the issues joined thereon, but the jury being unable to agree was discharged, and the cause was continued till the next term for a new trial to be had therein.

At the next term, to-wit: on the 14th day of November, 1871, on the motion of the defendant it was ordered that the cause be continued for her and at her costs at that term.

At the next term, to-wit: on the 13th day

of May, 1872, came the parties aforesaid by their attorneys, and neither party, plaintiffs nor defendant, demanding a jury, the whole matter of law and fact was submitted to the court. Whereupon it was considered by the court that the plaintiffs take nothing by their bill, but for their false clamor be in mercy, &c., and that the defendant recover against the plaintiffs her costs by her about her defence in that behalf expended, and that the defendant go thereof without day.

The plaintiffs excepted to the said judgment of the court, and tendered their bill of exceptions, which was made a part of the record, and is in the words and figures following, to-wit:

"Be it remembered that on the calling of this cause the parties, by their attorneys, announced themselves as ready for the trial of the cause, and none of the parties demanding that the cause be tried by a jury, the whole matter of law and fact was heard by the court. The plaintiffs, to prove and maintain the issue on their part, showed as evidence to the court the note in writing on which this suit was instituted, with all the indorsements thereon, in the words and figures following, to-wit:

"Tappahannock, 29th November, 1861.

"Four months after date I promise to pay to the order of Robert S. Hipkins six hundred and eighty-seven dollars and fifty-four cents, value received, payable at Bank of Commerce, Fredericksburg.

687.54; 4,270

687.54 due Nov. 29th.

Geo. T. Wright.

Geo. T. Wright.

R. S. Hipkins.

Z. S. Farland."

And also the protest in writing of the said note in the words and figures following, to-wit:

Then follows a copy of the note, after which is the notarial certificate, in these words: State of Virginia, District of Fredericksburg, to-wit:

Be it known, that on the first day of April, in the year of our Lord one thousand eight hundred and sixty-two, at the request of the cashier of the Bank of Commerce, at Fredericksburg, I, Samuel S. Howison, notary public for the district aforesaid, by lawful authority, duly commissioned and qualified, presented at the Bank of Commerce, where the same was made payable, the original note (whereof the above is a true copy), and demanded payment of the same, which was refused; therefore the said notary has protested, and do by these presents solemnly protest against the drawer or drawers of the said note, and all others to whom it doth or may concern, to avail for the principal sum, together with all interest, exchange, costs and damages suffered and to be suffered for non-payment thereof. Whereupon

139 I gave notice of the said *protest to the parties concerned as follows, viz: notice for drawer and two first endorsers at Tappahannock, Virginia, and to last endorsers in person at Fredericksburg, in-

forming them respectively that they were liable for the payment of said note. In testimony whereof I have hereunto set my hand and affixed the seal of my office on the 1st day of April, 1862.

S. S. Howison, Notary Public.

Fredericksburg, Virginia—Notary Public,
D. S. U.

Tax on seal.....	\$1 50
Cost of protest.....	1 00
Extra notices.....	20
Paid postage.....	15

Protest book AA., 44.	\$2 85
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And the plaintiffs, further to prove and maintain the issue on their part, showed in evidence to the jury, by one witness, R. A. Cauthorn, that he was postmaster at the town of Tappahannock, in the state of Virginia, from sometime early in the year 1861, to sometime in the month of May, 1862; that on the 31st day of March, 1862, he mailed a letter at the postoffice in Tappahannock to Fredericksburg, in said state, and sent it by the Fredericksburg mail; that shortly thereafter (the precise day not recollected), he received a letter from Fredericksburg, dated 5th of April, 1862, in reply to his letter; that he does not know whether the reply letter came by the direct mail from Fredericksburg to Tappahannock, or via Richmond city; that he knows of no irregularity or obstruction of mail communication about the 1st of April, 1862, between Fredericksburg and Tappahannock; that his practice about that time was to send the mail for Fredericksburg via Richmond city; that during the entire month of April, 1862,

140 Tappahannock was the postoffice of *the defendant, Z. S. Farland, and that for the same time and up to the summer of that year, there was regular mail communication between Tappahannock and Richmond, and that mail matter frequently came from Fredericksburg to Tappahannock via Richmond. And the defendants, to prove and maintain the said issue on their part, showed in evidence to the court, by one witness, James H. Muse, that he, the said Muse, was commissary for the Fifty-fifth Virginia regiment; that the mail carrier from Fredericksburg to Tappahannock boarded with him; that he did not come to Tappahannock from the 1st to the 3d of April, 1862, when the witness left with the regiment, and that if the mail had been brought from Fredericksburg to Tappahannock between the 3d and the 6th, over the regular route, he should have known it; that the said regiment was ordered to Fredericksburg, and on the 3d of April, 1862, left Tappahannock and went so far as Lloyd's, in Essex county; on the next day to Loretto, in said county; on the next day (the 5th) to Port Royal, and on the next day (the 6th) to Massaponax swamp, near Fredericksburg; that he accompanied the regiment, and during this time, from the 3d to the 6th of April, 1862, inclusive, he was satisfied that no mail conveyance passed on the direct route (over which the regiment travelled)

between Fredericksburg and Tappahannock; that for several days the regiment was detained at the said swamp, which was so much swollen that it was impossible to cross it; that said Z. S. Farland on the 3d day of April, 1862, went out in the country to place his family with P. A. Sandy, and said Farland went with the said regiment and remained for some time; that at and about this time the cars were running between Fredericksburg and Richmond. And the defendants, further to prove and maintain the issue on their part, showed in evidence to the jury, by one witness, John T. Borghar, that the aforesaid regiment left Tappahannock *for Fredericksburg on the 5th day of April, 1862, and on reaching Port Royal remained there two days and nights, because of high water at the Massaponax swamp, and then proceeded to Fredericksburg.

And the defendants, further to prove and maintain the issue on their part, showed in evidence to the jury the deposition of one witness, S. S. Howison, in the words and figures:

"The deponent being first duly sworn, deposeth and saith:

"First question by defendant's counsel: Were you a notary public of the corporation or district of Fredericksburg, state of Virginia, in the year 1862, and if yes, when and by whom were you appointed?

"Answer: I was commissioned a notary public by Governor John Letcher, in the early part of 1861, as far as my memory serves me; I cannot state positively the date of my commission; under the same commission I protested the note above-mentioned; I never gave any notice to any of the parties of the removal of any of the effects of the Bank of Commerce, nor do I know that any formal notice was given by any of its officers. The specie of the bank was removed, according to my recollection, in April, 1862; the books and all its papers were stowed away in a vault under a store in Fredericksburg for some months. I do not believe the bank did any regular business after 1862; it was engaged simply in closing up the specie of the bank. I think it was moved on the 3d of April; the event being precipitated by the presence of General Augur's United States army brigade on the Stafford side of the Rappahannock river, opposite the town of Fredericksburg. The books and papers of the bank were moved from the banking rooms and stowed away in the vault under the store in Fredericksburg, as before 142 stated, about the same date, viz: on *the night of the 3d of April, or the morning of the 4th of April.

"And further this deponent saith not.
S. S. Howison."

"And this being all the evidence offered in the said cause, the court having considered the same and the arguments of counsel, adjudged that the plaintiffs take nothing by their bill, but for their false clamor be in mercy, &c., and that the defendants recover against the plaintiffs their costs by them

about their defence in this behalf expended. To which said judgment of the court the plaintiffs by their counsel except, and tender this their bill of exceptions, and pray that the same may be signed, sealed and enrolled and made a part of the record in the said cause, which is accordingly done.

J. M. Jeffries, [Seal.]

To the said judgment of the circuit court the plaintiffs applied to a judge of this court for a writ of error; which was accordingly awarded.

There are but two questions arising in this case: one of form, and the other of substance. First, whether the proceeding by scire facias against the personal representative of one of the joint defendants, who died pending the action, was valid and legal; and, second, whether due notice of the dishonor of the note on which the action was brought was given to the endorsers, so as to make them liable.

The former question was not raised by any of the parties, either in the court below or in this court. And if it might have been successfully raised by any party in the court below, it was waived by the acts and proceedings of the parties in the case in that court, and they are concluded from now making it in this court. The action was brought, as we have seen from the

143 preceding statement *of the case, by the holders against the maker and two endorsers of a protested negotiable note payable at a bank. Though the contract of the maker and endorsers was, in its nature, the several contract of the parties, yet the statute authorized a joint action to be brought by the holders against the maker and the endorsers, thus treating it as a joint contract of the parties. The holders had a right of election to bring a joint action against the maker and endorsers or a several action against each. But by bringing a joint action against all, the contract must be considered as a joint one quo ad the action, which is subject to the same rules which govern any other action against several upon a joint contract.

The last endorser in this case, Z. S. Farland, died pending the action, after the common order had been entered against all the defendants at rules, but before it had been confirmed against any of them at the succeeding rules. At the latter rules the death of the said Z. S. Farland was suggested, and the common order was confirmed against the other defendants. At the next succeeding term of the circuit court, no defence having been made by the said other defendants, the office judgment against them became a judgment of the last day of that term. No notice was then taken of the other defendant, Z. S. Farland, nor was any abatement or discontinuance of the case ever entered as to him, nor was any further notice taken of him after the suggestion of his death, on the 5th day of October, 1868, until the 15th day of September, 1869, when a scire facias was sued out by the plaintiff to revive the action against Ellen D. Farland, executrix of the last will and testament of the said

Z. S. Farland. The said scire facias was returned duly executed on her, and she did not move to quash it nor demur to it upon the ground that there could be no proceeding against her except by a new action, nor upon any other ground. What would have

144 been the effect of *such an objection to the scire facias is a question which need not now be decided. It is enough to say, that whatever right she may have had, if any, to make such an objection was waived by not making it, and by her own subsequent conduct in the case. On the 17th day of November, 1869, on the motion of the said defendant, she plead "nil debit" and "offsets," on which issues were joined between the parties. She obtained leave to file special pleas in writing within ninety days, and the cause was continued until the next term. The cause was twice afterwards continued on her motion and at her costs. And there were various other proceedings in the case, which are fully set out in the statement of the case, and need not be here repeated, but which are conclusive against any right on her part, at this time, if any such right ever existed, to object to the proceeding against her by scire facias.

We, therefore, now proceed to consider the only remaining question in the case, and the only question raised and relied on in it by defendant, Ellen D. Farland, executrix of the Z. S. Farland, deceased; that is, whether it appears from the evidence in the record that due notice of the dishonor of the note was given to the said endorser, Z. S. Farland.

The note was payable at the "Bank of Commerce, Fredericksburg," and was due and payable on the 1st day of April, 1862. The evidence of its presentation for payment, its dishonor, the protest for non-payment, and the notices which were given to the maker and endorsers of such dishonor, and that they were looked to for payment, is contained in the notarial certificate which is made a part of the record, and is certified, with the other evidence, in the bill of exceptions taken to the judgment of the court in the case. That the note was duly presented for payment at the Bank of Commerce, Fredericksburg, on the day on which it was

145 payable and *payment was then and there duly demanded, but was not made, and that the note was then and there duly protested for non-payment, are facts which are set out in the notarial certificate of protest, and are not and cannot successfully be denied. Was due notice given to the endorsers to bind them?

What is said in the said certificate on this subject?

The statute declares what contracts shall be deemed negotiable, and may, upon being dishonored for non-acceptance or non-payment, be protested; and that the protest in such cases "shall be prima facie evidence of what is stated therein, or at the foot or on the back thereof, in relation to presentment, dishonor, and notice thereof." Code, p. 987, ch. 141, §§ 7 and 8.

Now, "what is stated therein, or at the foot

thereof, or on the back thereof, in relation to presentment, dishonor, and notice," as aforesaid? As to presentment and dishonor, there can be no difficulty nor any question. But as to notice?

It is stated on the certificate of protest aforesaid, as to notice, as follows: "whereupon"—that is, upon the protest of the note for non-payment—"I gave notice of the said protest to the parties concerned as follows, viz: Notice for drawers and two first endorsers at Tappahannock, Va., and to last endorsers in person at Fredericksburg, informing them, respectively, that they were liable for the payment of said note." And at the foot of the protest is a statement of the items of the costs of protest, amounting together to \$2.85, one of which items is this: "Paid postage, 15" (cents). And this seems, by a memorandum at the foot of said statement, to have been entered in "Protest book AA, page 44."

It thus appears from the said certificate, and what is stated thereon and at the foot of it, that after the said protest was made, **146** and on the same day, notice of *the said protest was given to the two first endorsers (one of whom, the second, was the said Z. S. Farland) informing them, respectively, that they were liable for the payment of said note. Now, here is positive evidence of the fact of notice of the protest, and given by the notary to the endorser Farland on the day of the protest. Such notice might legally have been given to said Farland either in person or by letter sent through the post-office. It appears that such notice was in fact given in the latter way. Tappahannock is about sixty miles from Fredericksburg, and notice could not well have been given by the notary to the endorsers residing there in person without employing, at heavy expense, a special agent for that purpose, and no charge was made by the notary for any such expense. It is stated in the certificate that notice was given to the "last endorsers in person at Fredericksburg," no doubt because they resided there, where the notary resided and the protest was made; which implies that the notice stated in the certificate to have been given to the "drawer and two first endorsers at Tappahannock, Va.," was not given to them in person, but otherwise; that is, through the mail. And in confirmation of this is the charge for postage as aforesaid. What postage could that be but for notices sent by mail to the said parties at Tappahannock?

That Tappahannock was at that time the post-office of the said Z. S. Farland, who then resided there, is certified as a fact proved in the cause; and also that there was, at that time, regular mail communication between Fredericksburg and Tappahannock. Such communication may have been via Richmond. But that fact, if it was a fact, can make no difference. Letters going by mail between the two places no doubt went as expeditiously, or nearly so, via Rich-

147 mond *as by the direct route, though the distance was somewhat increased by the former mode. Probably communication by letter between the two places might be more frequent via Richmond than directly, even supposing that there was no obstruction of

the direct route. But if the direct route was temporarily obstructed, as it may have been by troubles arising out of the war, then the regular mail route during the period of such obstruction was via Richmond; and notice of protest sent in a letter by that route was reasonable and sufficient.

The authorities cited by the learned counsel for the plaintiffs in error clearly show that the notice proved to have been given to the said Z. S. Farland as aforesaid was sufficient. All or most of the cases which have any material bearing upon the subject are referred to and their substance stated in 2 Robinson's Pract., new edition, pp. 191-211; and 1 American Leading Cases, 249-259. The Bank of Columbia v. Lawrence, and the notes to that case. See also 26 Gratt. pp. 806 and 807.

The court is therefore of opinion that the judgment of the circuit court, against the plaintiffs in this case, is erroneous and ought to be reversed and annulled, with costs, and a judgment rendered against the defendant, to be levied de bonis testatoris for the amount of the said negotiable note, with legal interest from the day on which it became payable until payment, and costs of protest and costs of suit in the said circuit court.

The judgment was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the said judgment is erroneous. Therefore **148** it is considered by the court *that the same be reversed and annulled, and that the plaintiffs recover against the defendant their costs by them expended in the prosecution of the writ of error aforesaid here, to be levied of the goods and chattels of the decedent in the hands of the defendant to be administered. And this court proceeding to render such judgment as the said circuit court ought to have rendered, it is further considered by this court that the plaintiffs recover against the defendant the sum of six hundred and eighty-seven dollars and fifty-four cents, the principal of the negotiable note upon which this action was instituted, and also two dollars and eighty-five cents, the charges of protest of the said negotiable note, making together the sum of six hundred and ninety dollars and thirty-nine cents, with interest thereon at six per centum per annum from the 1st day of April, 1862, till paid, and also their costs by them in this behalf in the said circuit court expended, to be levied of the goods and chattels of the decedent in the hands of the defendant to be administered; which is ordered to be certified to the said circuit court of Essex county.

Judgment reversed.

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*Vest v. Michie.

[31 Am. Rep. 722.]

November Term, 1878, Richmond.

1. Unrecorded Deed—Notice—Attesting Witness.*—V, one of the witnesses to an unrecorded deed of trust upon land to secure debts,

*Unrecorded Deeds—Notice.—In McClanahan v. Siter, 2 Gratt. 314, the court said: "The doctrine that whatever puts a party upon enquiry

afterwards became the purchaser of the land from the grantor in the deed of trust, and paid the purchase money. Upon a bill to enforce the deed of trust, charging V with notice of the deed of trust, which he denied—**Held:** The mere fact that he had attested the deed is not sufficient to affect him with notice of the deed of trust.

2. Same—Same—General Rule.—To affect a purchaser for value of land with notice of an unrecorded deed of trust, the evidence must be sufficient to prove him guilty of a fraud.

This was a suit in equity in the circuit court of Louisa county, brought by Charles H. Michie against James M. Vest, George H. Bramham, and the executor of John R. Quarles to enforce the payment of the balance of purchase money of land sold to Bramham by Michie, and afterwards sold by Bramham to Vest. Bramham had given a deed of trust on the land to secure the purchase money, and both the deed by Michie to Bramham and the trust deed were executed at the same time, and both were attested by Vest as one of three subscribing witnesses, but the deed of trust was never recorded. Vest answered, denying all knowledge of the deed of trust when he purchased and paid for the land, and there was no evidence on the subject; and the only question in this court was whether his having attested the deed was sufficient to establish the notice to him.

The cause came on to be heard on the 150 22d of September, *1873, when the court held that Vest had notice of the deed of trust, and that the land was subject to satisfy the balance of the purchase money due from Bramham to Michie. And thereupon Vest applied to this court for an appeal; which was allowed. The facts are stated by Judge Anderson in his opinion.

Guy & Gilliam and F. V. Winston, for the appellant.

John Hunter, for the appellee.

ANDERSON, J., delivered the opinion of the court.

Charles H. Michie, by deed bearing date the 2d of February, 1859, conveyed certain lands to George H. Bramham, in the county of Louisa, for the consideration of \$7,500, the receipt whereof is acknowledged on the face of the deed; and on the same day the said George H. Bramham conveyed the said lands to John R. Quarles in trust to secure the payment of three bonds, each for \$2,500—one payable the 1st of May, 1859, one payable the 1st of May, 1860, and the other payable the 1st of May, 1861; the two last bearing interest from the 1st of May, 1859—

amounts to notice is inapplicable to the provisions of the statute in regard both to registered and unregistered conveyances. * * * The notice in point of fact must be such as to affect the conscience of the subsequent purchaser or incumbrances." See also *Mundy v. Vawter*, 3 Gratt. 518; *Ellison v. Turpin*, 44 W. Va. 455; *Morrison v. Bausemer*, 32 Gratt. 225; and *note*; *Arbuckle v. Gates*, 95 Va. 813; *Johnson v. Exchange Bank*, 33 Gratt. 486, citing principal case; 2 Min. Inst. (4th Ed.) 977; *Hord v. Colbert*, 28 Gratt. 49, and *note*.

which bonds were executed *by the said Bramham to the said Michie for the purchase money of the said lands. Both deeds are witnessed by Charles Quarles, James M. Vest, and William J. Johnston.

On the 1st of October of the same year George H. Bramham and wife conveyed the same lands, by deed of that date, to said James M. Vest for the consideration of \$7,500, the receipt whereof is acknowledged by the deed. The deed from Michie to Bramham, and the deed from Bramham to Vest, are both admitted to record on the same day—

151 January 16, 1860—the former being proved by two of the subscribing *witnesses, William J. Johnston and James M. Vest. The deed of trust has never been recorded. But some time after it was executed, and before Bramham sold to Vest, Michie removed to Missouri and carried it with him, but left the second and third bonds here in the hands of his attorney. The first bond has been wholly paid—and probably before he left—and the second bond, as admitted by the will, up to the 22d of February, 1861, had been paid with the exception of \$135 or \$140, due as of that date. The third and last bond is wholly unpaid. And this bill was brought to enforce the deed of trust and subject the lands to sale to satisfy the balance due. The bill alleges that although the deed of trust was never registered, the subsequent purchaser had notice of its existence when he purchased from Bramham and paid him the purchase money, and that the lands in his hands are chargeable with the debt secured to him by said deed of trust; and he relies upon the fact of his having witnessed the deed, under the circumstances, as evidence that he had notice.

Whilst it is held that the fact of notice may be inferred from circumstances as well as proved by direct evidence, the proof must be such as to affect the conscience of the purchaser, and must be so strong and clear as to fix upon him the imputation of mala fides. 3 Gratt. 494, 545. *Munday v. Vawter & als.*; 2 Gratt. 280, 313. *McClanahan & als. v. Stiter, Price & Co.*, and 2 Johns. C. R., *Day v. Dunham*, 182. Professor Minor, in his admirable work, says the effect of the notice, which will charge a subsequent purchaser for valuable consideration, and exclude him from the protection of the registry law, is to attach to the subsequent purchaser the guilt of fraud. It is, therefore, never to be presumed, but must be proved, and proved

152 clearly. A mere suspicion of notice, even though it be a strong *suspicion, will not suffice. 2 Min. Inst. 887, 2 edi., and cases cited.

The proof, relied on in this case is that the appellant was a subscribing witness to the deed of trust under circumstances which, it is contended, show that he was apprised of the existence and contents of the deed of trust. Sugden says the better opinion is, that being a witness to the execution of a deed will not of itself be notice; for a witness in practice is not witness to the contents of the deed. 2 Sugd. Vend., bottom p. 1060, top 563. In *Welford v. Beezley*, 1 Ves. Sr. R.

7. Lord Chancellor Eldon said: "I do not think the bare attesting a deed as a witness will create such a presumption of his knowledge of the contents as to affect him with any fraud therein; for a witness is only to authenticate it, and not to be presumed privy to the contents." Lord Kenyon held, in *Harding v. Crethorn*, 1 Esp. N. P. C. 56, that the mere subscribing an instrument as a witness should not bind the party unless there was some evidence that he was acquainted with its contents at the time.

The only case I have found which holds a different doctrine is *Mocatta v. Murgatroyd*, reported in 1 P. Wms. 393; and the editor remarks that it has generally been disapproved of, and cites authorities to that effect. In *Backett v. Cordley*, 1 Brown C. C. 353, the Lord Chancellor, referring to it, says: "I do not view this as a case that I would determine in the same manner; for," he remarks, "a witness in practice is not privy to the contents of the deed." If it were proved that all the witnesses were present together when they severally subscribed their names as attesting witnesses; or that the parties talked over the subject-matter of the deeds in the presence of Mr. Vest; or that the deeds were written in his presence, and instructions given to the draughtsman in his presence and hearing; or that

153 *the blanks were filled up by one of the subscribing witnesses in his presence, and he heard instructions given to Mr. Quarles, whose name he should insert as trustee; or was present when the instruction was given; it might be inferred therefrom that he was apprised of the character of the instrument he was called on to witness. But there is no such proof. It does not appear that the witnesses were together when they signed. It does not appear that the deeds were written in the presence of Mr. Vest. The presumption is rather to the contrary: that they were not written at the time they were executed, but had been written before, and blanks left to be filled when the parties met to execute them; nor does it appear that Mr. Vest was present when Mr. Quarles was requested to fill the blanks, and when he filled them up. All we can say is that he may have been present, and that the witnesses may have been together when they signed; but it is only conjecture. It may have been so, and it may not have been. There is no proof as to the place or circumstances under which the deeds were executed and attested: whether it was at a public or private place; whether it was on a private or public occasion; whether the witnesses were convened at the place for the purpose; or whether they accidentally dropped in and were requested to witness the papers; whether Mr. Quarles had filled up the blanks and witnessed both papers before the other two witnesses came in—his name is first subscribed to both papers, whilst Johnston's is subscribed before Vest's to one, and after Vest's to the other, as if both papers had been attested by Quarles, and Vest and Johnston were then called in, and one of them was handed to Vest with a request that he would witness it,

which he did, and then gave place to Johnston, and he subscribed his name, 154 *and before he left his seat the other paper was handed to him to witness, which he did, and then gave place to Vest, who witnessed it also, or vice versa. This all might have been done in two or three minutes of time, without a question being asked. The parties requesting their attestation, acknowledging it to be their act and deed as they handed the papers to them, respectively, for their attestation, and having performed what they were requested to do, the said Vest, or both of them, may have immediately left the room without a word being said as to the character of the instruments they had attested. It is not pretended that there is any proof that it did so occur. But it might have so occurred, and there is no proof that it did not; and it is not incompatible with the office of the witness, which, as Lord Eldon said, is only to authenticate the instrument, and is not presumed to be privy to its contents. And it is not unusual in practice, for as Lord Kenyon said, a witness in practice is not privy to the contents of a deed.

Mr. Vest admits that the sale was talked of in the neighborhood, and he knew that Michie had sold his land to Bramham. But he does not say when he heard it. He knew it before he purchased from Bramham, some eight months after, for he saw the deed from Michie to Bramham, which vested in him an absolute and unencumbered title, and acknowledged the payment of the whole purchase-money. If he had known the character and contents of the papers which he had witnessed on the 2d of February—that one of them was a deed conveying Michie's lands to Bramham, and the other was a deed of trust from Bramham conveying the same lands to secure the payment of the purchase-money to Michie, he would have been likely to have remembered the execution of them. But if he had been just casually called in to witness two papers, without knowing

155 *what they were, whilst his mind was occupied with other matters, he might not have thought of it again. And when the deed was, eight or eleven months afterwards, when it was admitted to record, shown him, and when he recognized his signature as a subscribing witness, it might have recalled to his memory that he had witnessed the execution of the same paper, without recalling to his mind that he had at the same time witnessed another paper; and if it did it would not inform him, or necessarily suggest to his mind, that the other paper witnessed by him was a deed of trust. And the presumption is that it did not, as he seems not to have felt any concern with the dealings between Michie and Bramham. He was probably aware that Bramham was still owing Michie, if not at the time of his purchase, certainly prior to the 8th of January, 1861, the date of Bramham's letter to James Lasley, the agent of Charles Michie. And yet he gives himself no concern about the payments which he had previously made to the said Bramham, or the large payment of \$2,950, which he subsequently made to him

on the 10th of December, 1861, whether the money was paid to Michie or not. He does not seem to regard himself as having anything to do with Michie, who had conveyed the land to Bramham which he had purchased from him, as he avers in his answer, or concerned to see to the application of the money which he paid to Bramham; which he surely would have been vigilant to do if he had known that the said Michie had a deed of trust upon the land for which he was paying Bramham. If he had known that Michie held a subsisting deed of trust upon the land he had purchased for a debt which Bramham was owing him, his first concern would have been to have had that incumbrance removed, and would have claimed the right to have made the payments directly

156 *to Michie, or his agent, or would at least have required that the money should be paid by Bramham to Michie, and the incumbrance on his land removed, neither of which he did.

From this fact a strong presumption arises that he had no notice or knowledge that Michie held a deed of trust upon his land. And he so avers in his answer, and denies that he had any knowledge of the existence of the deed of trust when he purchased the land from Bramham, or before he had paid the whole of the purchase-money, so far as he remembers or believes.

I am of opinion, therefore, that the proof which is necessary to establish the fact of notice to the subsequent purchaser, all the authorities agree, must be so strong and clear as to affect his conscience and to justify the imputation to him of mala fides, this record does not exhibit against the appellant, and that he was a purchaser without a notice of the prior incumbrance; and that the court below erred in decreeing the sale of his land to satisfy the debt due from Bramham to Michie, instead of dismissing the plaintiff's bill as to him. And this conclusion is consonant with the equity of the case. It seems that Michie was informed at least as early as the 8th of January, 1861, through his agent (Lasley) that Vest had purchased the land from Bramham, yet he fails to have his deed of trust recorded, or to notify Vest of its existence, and that there is a balance of the purchase-money due him from Bramham for which he holds the land bound by virtue of his said deed of trust. Nor does he require his agent in this state, who held Bramham's bonds, to notify Vest that he held them and looked to the land for payment; and Vest avers in his answer that he was never notified by said agent and had no knowledge that he held said bonds. The inference would seem to be,

from these facts, that it was understood

157 between *Michie and Bramham that the deed of trust when it was executed should not go to record, and that it was a personal confidence reposed by Michie in his friend and relation, Bramham, and it is most equitable that he should now look to him for payment, and not to the land which Vest has fully paid for without notice or knowledge of his prior incumbrance upon it. I am of opinion, therefore, to reverse the decree of the

circuit court, and to dismiss the bill as to Vest with costs.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the decree of the circuit court is erroneous. It is therefore ordered and decreed that the same be reversed and annulled, and that the appellee, Charles H. Michie, pay to the appellant his costs expended in the prosecution of his appeal here; and this court proceeding to make such decree as ought to have been made by the court below, it is ordered and decreed that the plaintiff's bill, as to the defendant, James M. Vest, be dismissed with costs; and the cause is remanded to the circuit of Louisa county for such further proceedings as to the other defendants as may be right and proper.

Decree reversed.

158 *King's Ex'ors & als. v. Malone & als.

November Term, 1878, Richmond.

M, a few days before his death, made a deed, by which, in consideration, as expressed in the deed, of \$1,000, he conveyed to his children, R and E, four hundred acres of land. M's estate proved to be insolvent, and C and C, two of his creditors, filed a creditor's bill against R and E to set aside the deed as made without consideration deemed valuable in law. R and E answered, insisting the deed was on valuable consideration, R claiming his father was indebted to him for services which he states, in more than \$1,500, and E that he owed her, for money loaned him at different times, more than \$500. Whilst this suit was pending R and E conveyed to their counsel, J & B, one undivided third of the land in consideration of services rendered and to be rendered in said suit, with this condition: "This deed is intended to pass no title whatsoever to said parties of the second part unless they succeed in establishing the title of said parties of the first part to the tract of land hereinbefore mentioned." This case was decided in favor of the defendants.

K, another creditor of M, then filed a bill against R and E and J & B, charging that the deed to R and E was without valuable consideration, and was intended to defraud the creditors of M; and the defendants had notice of the fraud. All of them deny notice of an intention of M to defraud his creditors. R and E rely upon the same grounds stated in the former case; and J & B insist that the condition on which the deed was made to them had been performed, and they were purchasers for value. This court held:

1. **Deeds—Void as to Creditors.**—That upon the evidence in this cause the deed to R and E was made without reference to any indebtedness of M to R and E, if any such existed, but upon a consideration not deemed valuable in law, and was therefore void as to the creditors of M at the date of the deed.

159 *2. **Same—Conditions.**—That the condition annexed to the deed to J & B was

***Parent and Child—Services—Compensation.**—See *Harshberger's adm'r v. Alger et al.*, 31 Gratt. 52 and *note*.

not performed by the decree in favor of R and E in the suit of C and C; but as creditors of M not parties to that suit were not bound by the decree, the condition extended to any other suit brought by such creditor; and as in this case the court held the deed to R and E void as to the creditors of M, J & B had no title to the undivided third of the land under the deed to them.

In the spring of the year 1868, Daniel Malone, of the county of Dinwiddie, died intestate, and in May of that year Alexander Donnan qualified as his administrator. In September, 1868, Roberts' executor instituted a creditor's suit in equity against the administrator and heirs of Malone for a settlement of the account of the administrator, and to subject the real estate to the payment of the debts of the deceased. In this suit the lands were sold, and in May, 1871, a commissioner made a report showing that the debts amounted to \$13,171.48, and the assets to \$5,842.04. This sum was apportioned among the creditors, by the decree of the court of December 8th, 1870. But upon appeal from this decree by John J. Crawford and C. W. Coker, who claimed to be judgment creditors of Daniel Malone, this decree was reversed.

Among the creditors named in said report were John J. Crawford, whose debts were stated at \$3,510.17; C. W. Coker, whose debt was stated at \$692.43, and Wiley King, whose debt was \$721.79. In November, 1871, Crawford and Coker, for themselves and all other creditors of Daniel Malone who would come in and contribute to the expense of the suit, filed their bill in the circuit court of Dinwiddie against R. G. Malone and Ella V. Malone, to set aside a deed for four hundred acres of land, made to them by their father, Daniel Malone, a few days before his death.

They set out their debts, which they stated *were due long before said deed was made. They charge that the deed, though upon the nominal consideration of \$1,000, was a mere gift, and wholly without consideration deemed valuable in law, and is as to plaintiffs' debts wholly void. They call upon the defendants to state when and where and in whose presence the \$1,000 specified in the deed was paid. They pray that all necessary accounts may be taken, that the said deed may be declared void, the land sold and the proceeds applied to the debts of Daniel Malone, contracted before the date thereof.

At the October term, 1872, the defendants answered the bill separately. They each deny that the deed was without consideration deemed valuable in law, or that the conveyance of the land was a mere gift to them. Robert G. Malone says that his father was indebted to him in an amount at least equal to \$1,500, for services rendered during a period of about two years and a half immediately preceding the date of said deed, at the request of the grantor, for which services so rendered said grantor frequently promised the respondent to pay him what they were worth; that these services were rendered in said county of Dinwiddie at the mill and upon the farm of said grantor; and

after charging the defendant all advancements made for board, were worth over and above such charge at least \$1,500; and the said grantor informed the defendant at the time of the execution of the deed that the land thereby conveyed to him and his sister, Ella V. Malone, was deeded to them in consideration of what he owed to the defendant and his said sister.

Ella V. Malone said that at the time of the execution of the deed the grantor was justly indebted to her in a sum exceeding \$500, for sundry sums of money theretofore borrowed by said grantor from her, and which he had promised to pay her.

161 She further avers *that at the time of making the deed the grantor was justly indebted to Robert G. Malone in a sum considerably in excess of \$1,000 for services rendered by him to said grantor, at his request, in his mill and on his farm in the county of Dinwiddie, during a period of two or three years immediately preceding the date of the deed. And she avers that the said grantor, being so indebted to herself and Robert G. Malone, made the deed upon such consideration, and not as charged in the plaintiffs' bill. She says she is unable at this time to speak with greater particularity as to the loans of money before stated to have been made by her to the grantor, than to say that at one time she loaned to him the sum of \$450, and at a subsequent time the sum of \$50, and that said loans were made several years prior to the date of said deed, at the grantor's residence and in the presence of her mother, now the widow of said grantor. She does not recollect the exact amount of or circumstances under which other loans were made by her, except that at no one time did she lend to him as much as \$50, and they were generally made in the presence of her mother at the residence of the grantor in the deed.

At the April term, 1873, an order was made in the cause for the plaintiffs to appear on the first day of the next term of the court to show cause why, at said term of the court, the court should not dispose of the matter of controversy in the case. And at the said next term, the plaintiffs having been served with notice of the order and failing to appear, and having failed to offer any evidence whatever in support of the charges in the bill that the deed aforesaid was without consideration deemed valuable in law, and the court being of opinion that

162 said conveyance was made *upon a legal and valuable consideration, dismissed the bill with costs.

The defendants in the above-named suit having employed R. H. Jones and George S. Bernard as their counsel, by deed bearing date the 27th of September, 1872, Robert G. Malone and wife and Ella V. Malone made a deed to said Jones & Bernard, by which, "in consideration of their professional services rendered and to be rendered to said parties of the first part in defending a certain chancery suit now pending in the circuit court of Dinwiddie county, in which J. J. Crawford and C. W. Coker, who sue for, &c.

are parties plaintiffs and they are defendants," "they grant to said Jones & Bernard one-third interest (undivided) in the tract of land conveyed to them by Daniel Malone," &c. "This deed is made subject to the dower right of the widow of said Daniel Malone in said land, and is intended to pass no title whatsoever to said parties of the second part unless they succeed in establishing the title of said parties of the first part to the tract of land hereinbefore mentioned."

In May, 1874, the executors of Wiley King filed a creditor's bill in the circuit court of Dinwiddie, in which, after referring to the previous suits and the condition of Daniel Malone's estate, they state, upon appeal by Crawford and Coker, the decree in the case of Roberts' adm'r v. Malone's adm'r and heirs was reversed, and it was held that the judgments which had been confessed by Daniel Malone in favor of these parties were valid liens on the real estate, and that after satisfying these judgments there will be little left for a pro rata distribution among the other creditors. They charge that the deed made by Daniel Malone to Robert G. and Ella V. Malone was wholly without consideration deemed valuable in law, and was intended to hinder, delay and defraud the

163 creditors *of Daniel Malone, among whom were complainants, and that said grantees had notice of such fraudulent intent. They set out the deed from Robert G. Malone and wife and Ella V. Malone to Jones & Bernard, and charge that said Jones & Bernard purchased the said interest in said land with full notice of all the facts connected with the conveyance sought hereby to be set aside. They state that said Jones & Bernard have filed their bill against Robert G. and Ella V. Malone for a sale of said land, and that a decree has been made appointing commissioners to sell it. And making Robert G. Malone and wife, Ella V. Malone, Jones & Bernard, and the said commissioners parties defendants, they call upon them to answer fully, and pray that all proper accounts may be taken, that the deed from Daniel Malone to Robert G. and Ella V. Malone may be set aside, and that the land may be subjected to the payment of the claims of the creditors of Daniel Malone, and for general relief.

The defendants Robert G. and Ella V. Malone again answered separately. They deny that the deed to them was without consideration deemed valuable in law, and was intended to delay and defraud Daniel Malone's creditors, and that they had notice of such fraudulent intent on the part of their father. On the contrary, they aver that Daniel Malone, being indebted to each of them, in perfect good faith made the conveyance for the purpose of satisfying and discharging his indebtedness. They refer to the case of Crawford and Coker against them and the decree in that case, and file a copy of the record; and they say that in their answers in that case they fully stated the grounds on which they held their title to said lands under said deed; and they especially refer to and adopt said answers as a part of their answers in this case.

164 *They further say that, believing their title to the land to be valid, they made the contract with Messrs. Jones & Bernard, said compensation to be contingent upon said attorneys defending said suit (which they then believed was the only suit which would or could be brought against them calling in question the validity of said deed) to a successful termination; and accordingly the deed dated September 27th, 1872, was executed. To said Jones & Bernard as their counsel they fully and freely communicated all they knew touching the transaction between themselves and their father, and their said counsel embodied all that was so communicated in their answers filed in that case.

Messrs. Jones & Bernard filed a joint answer. They utterly deny that they were purchasers from Robert G. and Ella V. Malone of an undivided one-third interest in the real estate conveyed by Daniel Malone to said Robert G. and Ella V. Malone with full notice of the alleged fraud rendering void the title of said Robert G. and Ella V. Malone. They say they were counsel of Crawford and Coker in the suit of Malone's creditors against Malone's administrator and others. During the period of their connection with said suit, which was brief, ending with the decree rendered adverse to said Crawford and Coker on the 8th of December, 1870, these defendants saw nothing in said suit which cast a shadow of suspicion upon said deed, nor did they hear anything except a mere opinion expressed that said deed might be successfully attacked as in fraud of the creditors of Daniel Malone. Several months after the suit of Crawford and Coker against Robert G. and Ella V. Malone was brought these defendants were retained as counsel to defend said suit, and in the freedom of a professional interview had with

165 *Ella V., these defendants heard from said Robert G. Malone and his sister, the lips of their said clients their respective statement of the facts of their case, to-wit: the consideration of said deed, in what it consisted, and other matters of defence to the allegations of the bill of said Crawford and Coker, which charged no fraud in the deed aforesaid, but simply that it was upon a consideration not deemed valuable in law. These statements of facts said Robert G. and Ella V. Malone declared their ability to prove by legal evidence, and these defendants as their counsel reduced them to writing and embodied them in their respective answers filed in said suit; the said answers setting forth everything heard from them at that interview, or at any other time, touching said deed, and all that was ever brought to their attention touching the subject, except the expression of opinion aforesaid, if an opinion expressed with no mention of facts as the ground thereof should be considered as calling attention to a matter of the kind in controversy. With the foregoing information touching the matter they made with their clients the contract set forth in the deed of 27th of September, 1872, which they then believed and still believe was in all

respects fair and legal, and in nowise to the prejudice of the rights of Daniel Malone's creditors.

They further say that from September, 1868, to October, 1871, the case of Malone's creditors against Malone's administrator and heirs was pending, which was a general creditor's bill for the administration of the assets of the deceased, and no creditor had sought to impugn the deed of April 9th, 1868. On the 13th of October, 1871, Crawford and Coker commenced their suit aforesaid, but did not allege any fraud in the parties to the deed. At the October term Robert G. and Ella V. Malone filed their answers.

Neither the plaintiffs nor any creditor
 166 disputed one word of *these answers, or produced the slightest proof in support of the bill in said case, although it stood on the docket of the court for a year after these answers were filed, and for two consecutive terms of the court after the deed to these defendants was admitted to record in the county where the deceased resided, and where most of his creditors reside. In view of these facts they insist that whatever be the true state of facts between Daniel Malone and Robert G. and Ella V. Malone—as to which they know nothing except as hereinbefore stated—these defendants are innocent purchasers for value of the undivided one-third interest conveyed to them by the deed of September 27th, 1872; and that the condition upon which they took their title under said deed being fulfilled by the decree in the said suit of Crawford and Coker for, &c., against Malone and al., at the October term, 1873, these defendants now hold an absolute fee simple in the proceeds of sale of said land.

A number of witnesses were examined, and among them John T. Crawford and John P. Tucker, who were present when the deed from Daniel Malone to Robert G. and Ella V. Malone was prepared and executed, and there were others who spoke as to the services of Robert G. Malone for his father. This evidence is referred to by Judge Burks in his opinion.

The cause came on to be heard at the October term, 1874, when the court being of opinion that the deed of April 9th, 1868, from Daniel Malone to Robert G. and Ella V. Malone was upon a legal and valuable consideration, and that the plaintiffs charge of fraud was not sustained, dismissed the bill with costs. And thereupon the plaintiffs applied to a judge of this court for an appeal; which was awarded.

Collier and Budd, for the appellants.

167 *Jones & Bernard, Sam. D. Davies and Gregory, for the appellees.

BURKS, J., delivered the opinion of the court.

The court is of opinion that the deed of conveyance, in the bill and proceedings mentioned, from Daniel Malone to the appellees, Robert G. Malone and Ella V. Malone, if not made with actual intent of the parties to hinder, delay, and defraud creditors, was

at least, not upon consideration deemed valuable in law, and is therefore void as to the appellants and other creditors of the grantor, whose debts had been contracted and were in existence at the time said deed was made.

The conveyance is by an insolvent debtor to his children, made in his last illness and a few days only before his death. The circumstances attending the preparation and execution of the deed are in proof, and indicate very plainly that there was no valuable consideration for the conveyance.

It seems that the grantor had become aware of his insolvency and desired to secure to some of his creditors a preference in the payment of their debts. This he effected by a writing, which he caused to be prepared, empowering his son, Robert G. Malone, as his attorney in fact, to confess judgments in behalf of these creditors.

After this instrument had been executed, acknowledged and certified for recordation, provision was made for the children by the deed of conveyance aforesaid. The consideration expressed is one thousand dollars. The testimony of the witnesses present when the deed was executed shows that this was not the true consideration, and that the grantor,

in the perplexity of the situation, was
 168 influenced rather by *the promptings of paternal affection than by the stern demands of justice and duty. If there had been any consideration of value for the deed, then was the time to disclose it. He did not pretend that there was any; that he had received or was to receive any money or other thing from his children, or that he was indebted to them on any account and desired to pay them in land. On the contrary, after the power of attorney had been executed, and the business, which the witnesses Crawford and Tucker had been summoned to transact, had been concluded, his thoughts, in his distress, turning to his children, he inquired of Crawford if he did not think they should have something, remarking that they had been with him and had been dutiful children. Crawford gave an evasive reply, and proceeded to draw the deed as he was directed. When he reached that part of the deed where the consideration was to be expressed he inquired of the grantor what it should be. The reply was that it did not matter. Crawford suggested that it should be expressed to be for natural love and affection. Tucker remarked that it had better be a money consideration, and suggested \$1,000 as the amount to be inserted, to which the grantor assented, saying that would do. It is quite obvious that but for the interposition of Tucker the consideration expressed would have been love and affection, and it would have been, no doubt, a truthful expression.

But, notwithstanding this proof, the appellees, Robert G. Malone and Ella V. Malone, in their answers to the bill, deny that the deed to them was either voluntary or made with intent to hinder, delay, and defraud their father's creditors, and each claims that there was a valuable consideration for the conveyance.

169 The daughter says that her father at the date of the *deed was indebted to her for money lent by her at different times, the sums aggregating more than \$500; and this was the consideration for the deed as far as she was concerned.

The son claims that the father was largely indebted to him for services rendered in attending to his farm and mills, and that the value of these services was the consideration for the deed as to him.

The averments of the particulars of consideration are not responsible to any allegations of the bill, and therefore not evidence for the respondents. They are of no force unless proved.

No proof was offered by the daughter in support of her answer. The only money her father owed to her was not money lent, but for a legacy left her by Isaiah Goodwyn, of whose will her father was executor, and it was proved that after her father's death she collected this legacy from his administrator.

There was some evidence adduced by the son in support of his claim. It appears that he and his wife and child and sister, all lived with their father, and, it is to be inferred, were supported by him. Their board was certainly furnished by him. The son superintended the farm and mills of his father. His attention was given mostly to the mills, and his services would seem to have been rather in the capacity of manager than laborer. The work at the mills seems to have been done principally by a negro hiring under the direction of the son. These services continued for some two and a half years. Two witnesses, introduced by him, say that they think his services were worth from seventy-five dollars to one hundred dollars per month. On the other hand, two witnesses, examined by the complainants, estimate his services at about

170 twenty-five dollars per month. One *of them says that the saw-mill did not run on an average more than one day in a week, and the estimate they make for the board about equals their estimate for the services. No contract between the father and son is proved, and no admission by the father of any indebtedness on his part to his son. Indeed, one of the witnesses for the defendants says that he did not think Robert G. Malone was employed by his father at all—that he worked as a son for his father—that if there was any bargain between them he knew nothing about it; and so said all the witnesses. There was no proof of any accounts kept or rendered, bonds or notes taken, demands made, settlements sought or had, or receipts or vouchers given or received.

Consider this proof in connection with what took place at the time the deed was made, and we are warranted in the conclusion that there was no contract or understanding between the father and son that the latter was to receive any more for his services than the support of himself and his family. In cases like the present, as stated in the opinion delivered during the present term in *Harshberger's adm'r v. Alger & wife*, where there is absence of direct proof of any

express contract, the question always is, Can it be reasonably inferred that pecuniary compensation was in the view of the parties at the time the services were rendered? and the solution of that question depends on a consideration of all the circumstances of the case, the relation between the parties being one of these circumstances. (See the authorities referred to in the case cited *supra*, p. 52.)

The reasonable inference from all the circumstances in this case would seem to be, that it was never contemplated by the parties that the son should receive any other or further compensation than the board and support of himself and his family; and **171** if the father had *been really indebted to the son, as now claimed, and had intended to discharge that indebtedness, in whole or in part, by the deed which was made, it is almost certain that, in his condition, he would not have left the matter in doubt, but would have plainly declared his purpose, if not on the face of the deed, at least in the presence of the witnesses at the time the deed was made.

The court is further of opinion that under the proofs in this cause the appellees, Robert H. Jones, Jr., and George S. Bernard, acquired no such title under the deed of September 27, 1872, as protects the interest therein mentioned from the claims of the appellants and other creditors of Daniel Malone, deceased, whose debts existed at the date of the deed aforesaid to Robert G. Malone and Ella V. Malone.

Jones & Bernard are intelligent lawyers, and were of counsel for some of the parties in the suit, styled in the proceedings in this cause, *Malone's creditors v. Malone's adm'r & others*, and in that suit, if not by other means, must have learned that the estate of Daniel Malone was insolvent, and that he was insolvent when he made the deed to his children. They were afterwards retained as counsel for these children to defend their interests in the suit instituted by John J. Crawford and C. W. Coker. These last-named parties were creditors of Daniel Malone, and the object of their suit was to set aside the deed from Daniel Malone to his children on the ground that it was voluntary and void as to the grantor's creditors. The answers of the defendants were drawn by these attorneys. The fee they were to receive for their services was contingent upon the success of the defence and was the sole consideration for the deed of September 27, 1872. They, moreover, admit in their answer that before they took the deed they had heard the opinion expressed that

172 the deed from Daniel Malone *to his children might be successfully attacked as in fraud of the creditors of said Daniel Malone.

It is not necessary to decide whether these facts and circumstances were sufficient to affect Jones & Bernard with notice of the true character of the last-mentioned deed; for, if not sufficient, it is still a question how far they can be treated as purchasers at all under the deed from their grantors. Have they

ever acquired any vested interest under said deed? The deed recites the consideration to be "professional services rendered and to be rendered to the parties of the first part (Robert G. Malone and Ella V. Malone) in defending a certain chancery suit now pending in the circuit court of Dinwiddie county, in which J. J. Crawford and C. W. Coker, who sue for, &c., are parties plaintiff," and it is declared on the face of the deed that it "is intended to pass no title whatsoever to said parties of the second part (R. H. Jones, Jr., and George S. Bernard) unless they succeed in establishing the title of said parties of the first part to the tract of land hereinbefore conveyed."

This is a deed with a condition precedent. The title conveyed is not to vest unless and until the condition be performed. The condition is, that Jones & Bernard shall succeed in establishing the title of Robert G. Malone and Ella V. Malone to the tract of land conveyed to them by their father, Daniel Malone. Has the condition been performed? Have Jones & Bernard succeeded in establishing the title referred to? We think they have not.

The condition, it is admitted, must be construed with reference to the suit mentioned in the deed. The record of that suit is made a part of the record of this. Looking to it, we find it was what is familiarly known as a creditor's suit; that is, a suit instituted by the complainants, Crawford and Coker, in their own names and on behalf of themselves and all other creditors of Daniel Malone, deceased, who might come in and contribute to the costs of

173 *the suit. In that suit all the creditors of Daniel Malone might have become parties on the record either by petitions filed for the purpose, or by an order directing an account of the debts of said decedent, and in either case they might have been bound by any decree made in the cause. It was, no doubt, supposed by Jones & Bernard, when they were retained, and also by their clients, that such was the nature of the suit and such would be the result, and hence the condition in the deed, that no title was to pass to them unless they succeeded in establishing the title of their grantors. The undertaking was substantially a defence of the title of Robert G. Malone and Ella V. Malone against the assaults of any and all of the creditors of Daniel Malone, and the vesting of the title in Jones & Bernard was made to depend on the success of such defence. In no other way could the title of the Malones be said to be established as against the claims of the creditors. Crawford and Coker were bound by the decree rendered in the suit instituted by them. No other creditors were affected thereby. It could not be said of the other creditors, not parties to the suit, that the title had been established or pronounced valid as to them. On the contrary, the decision of this court is, that it is not valid as to them; and the title of the Malone's failing, the title of their grantees under the conditional grant fails also.

The court is therefore of opinion that the

decree of the circuit court of Dinwiddie county is erroneous and must be reversed, the deeds aforesaid be set aside, and the cause remanded for further proceedings to be had, in order to a final decree, in conformity with this opinion.

We will add that we are not to be understood as intending, by anything said in this opinion, to impugn the motives of Messrs. Jones & Bernard in taking the deed which they did from their grantors; and **174** there is nothing *in the conclusion we have reached in this case that should affect injuriously the high character of these gentlemen.

ANDERSON, J., dissented.

The decree was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the deed of conveyance, in the bill and proceedings mentioned, from Daniel Malone to the appellees, Robert G. Malone and Ella V. Malone, if not made with actual intent of the parties thereto to hinder, delay, and defraud the creditors of the said Daniel Malone, was, at least, not upon consideration deemed valuable in law, and is therefore void as to the appellants and other creditors of the grantor, whose debts had been contracted and were in existence at the time said deed was executed.

The court is further of opinion that, under the proofs in this cause, the appellees, Robert H. Jones, Jr., and George S. Bernard, acquired no such title under the deed of September 27, 1872, also in the bill and proceedings mentioned, as protects the interests therein mentioned from the claims of the appellants and other creditors of the said Daniel Malone, whose debts existed at the date of the deed first aforesaid to the said Robert G. Malone and Ella V. Malone.

The court is therefore of opinion that the said decree of the circuit court of Dinwiddie county is erroneous. The said circuit court, instead of dismissing the bill of the appellants (complainants in said circuit court),

should have set aside and annulled the

175 deeds aforesaid, and after *ascertaining, by reference to a commissioner for the purpose, the debts of said Daniel Malone, deceased, and the priorities, if any, among them, (not including, however, among said debts the debts claimed by J. J. Crawford and C. W. Coker in the bill filed by them against R. G. Malone and others, set out in the record in this cause), should have proceeded to subject the land conveyed by said deeds to the payment of said debts, observing priorities, if any. It is therefore decreed and ordered that the said decree be reversed and annulled, and that the appellees, Robert G. Malone, Ella V. Malone, Robert H. Jones, Jr., and George S. Bernard, pay to the appellants their costs by them expended in the prosecution of their appeal aforesaid here; and it is further decreed and ordered that

this cause be remanded to the said circuit court of Dinwiddie county, with directions to said circuit court to set aside and annul the two several deeds aforesaid, and further to proceed, in order to final decree, in conformity with the opinion and principles hereinbefore expressed and declared; all of which is ordered to be certified to the said circuit court.

Decree reversed.

173 *Sutherland v. Old Dominion Ins. Co.

November Term, 1878, Richmond.

I. S obtains from the O. D. Ins. Co. a policy of insurance on his storehouse and stock of goods, one condition of which policy is, that there shall be no other insurance on the property without the consent of the company endorsed on its policy. Afterwards S, without the consent of the O. D. Ins. Co., and in fact in ignorance that there was such a condition in its policy, obtains from the C. Ins. Co. another policy of insurance upon the same storehouse and stock of goods, and in this policy there is a condition that there is no previous policy of insurance upon the property. The property having been consumed by fire, in an action by S against the O. D. Ins. Co. upon its policy of insurance—Held:

1. **Insurance—Condition of Policy Construed.**—The condition in the first policy, that if other insurance should be effected without the consent of the company, the policy should be void, related only to other valid insurance; and the fact that S attempted to effect a second insurance with the C. Co., which was invalid, by reason of the condition in its policy, does not avoid the first policy, and the O. D. Ins. Co. is liable on its policy.
2. **Same—Same—Second Policy.**—The second policy must at the time of the loss be inoperative, so that no action can be maintained upon it; but it is not necessary that it shall be absolutely void. It is sufficient if it is voidable.

II. It is a general principle of law, that in order to avoid a policy on account of a subsequent insurance, against an express condition therein, it must appear that such subsequent insurance is valid and can be enforced. If it cannot be enforced it is no breach of the condition of the prior policy.

This was an action on the case, in the circuit court of the city of Petersburg, brought in April, 1877, by B. E. Sutherland against the Old Dominion Insurance Company, *upon a policy of insurance issued by that company on the 13th day of October, 1876, in favor of the plaintiff, upon his storehouse and stock of goods therein, situated in the county of Dinwiddie. The policy contained, among many others, the following condition: "If the assured shall have or shall hereafter make any insurance on the property hereby insured, or any part

thereof, without the consent of this company written hereon, this policy shall be void."

Sutherland afterwards, on the 21st of November, 1876, obtained from the Connecticut Fire Insurance Company, of Hartford, Connecticut, another insurance upon the same storehouse and the stock of goods therein, and in this policy there was a similar condition.

The defendant filed a special plea, in which was set out the condition aforesaid, and the subsequent policy obtained by the plaintiff upon the same storehouse and stock of goods; and it was insisted that this second policy, effected by the plaintiff without the consent of the defendant written on its policy, was a breach of the condition of the defendant's policy, whereby it became null and void. And this was in fact the only question in the case.

On the trial both the policies were introduced in evidence. There was no doubt that the building and stock of goods were destroyed by fire, and all the preliminary proofs had been regularly made by the plaintiff. And this was also done in reference to the second policy. As to the condition in relation to other policies on the property it appeared that when the plaintiff applied to the agent of the defendant for the purpose of effecting an insurance on said property, he (the plaintiff) had never before taken out a policy of insurance, and knew nothing of the manner in which policies of insurance are

issued, nor what requirement he would have to satisfy, nor what *conditions and stipulations he would have to assent to; and being thus ignorant, he requested said agent to tell him all that was necessary for said plaintiff to do; and to ask him all such questions as it was proper and necessary for the plaintiff to answer; and thereupon the agent inquired: 1. If there was other insurance of said property? 2. What was the value of the property to be insured? And 3. How far the dwelling-house was from the storehouse? (This dwelling-house was also covered by both policies, but was not burned.) All of which questions being truly answered by the plaintiff, the policy of insurance was issued to him, and he paid the premium. Plaintiff believing he had received and given all the information necessary to both parties to the contract, he put the said policy away, and never read it, and never knew until after the fire had occurred that it contained the conditions aforesaid.

The plaintiff before the commencement of the trial of this case dismissed an action he had brought against the Connecticut Fire Insurance Company upon the policy of that company, and admitted and insisted that said policy was void and invalid, and offered in open court to cancel it. To which the defendant replied that it would nevertheless insist upon the defence to the policy.

When the evidence was introduced both the plaintiff and the defendant asked the court for instructions. The court gave the instruction of the defendant, which is as follows:

"If the jury believe from evidence that

***Insurance—Effect of Subsequent Invalid Insurance.**—The rule laid down by the principal case in regard to the effect of taking out subsequent invalid insurance is discussed and approved in *Woolpert v. Northern Insurance Co.*, 44 W. Va. 738, and *Woolpert v. Franklin Ins. Co.*, 42 W. Va. 658.

subsequent to the 13th of October, 1876, when the policy on which this action is based was issued by this defendant to the plaintiff, he, the said plaintiff, did, in consideration of the premium of \$7.50, paid by him therefor, apply to and obtain from the Connecticut Fire Insurance Company, of Hartford, Connecticut, the policy of the said last-named

179 company numbered 114, 381, and *dated November 21st, 1876, without the consent of this defendant, written on said policy by it issued to the plaintiff, as aforesaid; and if they further believe from the evidence that said policy issued to the plaintiff by the said Connecticut Fire Insurance Company, of Hartford, Connecticut, covered and embraced, in whole or in part, the property insured by this defendant by the policy of October 13th, 1876, on which this suit is based, then the jury must find for the defendant."

The first instruction of the plaintiff, which the court refused, was as follows:

"Although the jury shall believe from the evidence that, according to the contract between the parties, the plaintiff was inhibited from effecting a subsequent insurance of the property covered by the policy in the declaration mentioned without the consent of the defendant and without notice of prior insurance to the second company; yet, although a second insurance was effected without the consent of the defendant and without notice of prior insurance to the second company, this second policy being invalid and inoperative by reason of the plaintiff's failure to give notice of the prior insurance, does not avoid or impair the first policy."

To the giving of the defendant's instruction, and the refusal to give that of the plaintiff, the plaintiff excepted. There was a verdict and judgment in favor of the defendant, and a motion for a new trial on the ground that the verdict was contrary to the law and the evidence, which the court overruled; and the plaintiff excepted, and applied to a judge of this court for a writ of error and superseas; which was awarded.

Drury A. Hinton, Samuel D. Davies, and R. H. Jones, Jr., for the appellant.

B. H. Nash, for the appellee.

180 *ANDERSON, J. The plaintiff had a policy of fire insurance in two companies on the same property—one in the Old Dominion Insurance Company, and the other in the Connecticut Hartford Insurance Company. In both policies there was a condition against other insurance, prior or subsequent, except with the consent of the company written on the policy. A part of the property was destroyed by fire soon after the second policy was issued; and this suit was brought against the Old Dominion Company, which issued the first policy, to recover the loss.

No objection is made to that policy in its inception. It was valid and operative until it was rendered void, if it were so rendered void, by issuing the second policy. And if it is rendered void thereby, it is because the plaintiff effected insurance by the second

policy on the same property without notice to the defendant company, and without its consent written on the policy. The defendant relies on that as rendering his policy declared on in this suit void. But the instrument of evidence on which it relies shows upon its face that it was void if the insured had a prior insurance upon the same property, because no notice of it, nor assent of the second insurer, is written on the policy, as one of its conditions required. And the very plea of the defendant is an admission that the second insurance is subsequent, and is an insurance on the same property. And that being admitted, the policy shows upon its face, by the terms of the condition on which it was issued, that it is void. Being a void policy, can it annul and render void the prior policy of the defendant? Is the condition of the prior policy against subsequent insurance which was to work a forfeiture, a condition against an abortive attempt to effect a subsequent insurance, or an incomplete and unperfected contract of insurance, which is invalid? Or, is it a condition against a valid subsequent insurance? That

181 *is the subject of inquiry in this case; and upon it there is some contrariety of opinion.

Some hold that it does not mean insurance, but only what the subsequent underwriter regarded and treated at the time as insurance. Others hold that the terms of the condition import that a prior policy shall be void if the assured shall make subsequent insurance, which means indemnity, not what he and the underwriter might suppose was insurance, when it was not. The language of the policy is: "If the assured shall have insurance, or shall hereafter make any other insurance." Any other insurance than what? Than that which he is in the act of receiving from the defendant, which was insurance in fact. It was indemnity against loss, and any other insurance means any other indemnity against loss. I think this is the plain and obvious meaning of the language; and that it imports what was the intention of this company I think further appears from the forty-second article annexed to the policy; which is as follows: "In case of any other insurance upon the property hereby insured, whether made prior or subsequent to the date of this policy, the insured shall be entitled to recover of this company no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon," &c. There is no question that the insured might effect other insurances. The language is not other valid insurances, but simply other insurances; which must have been understood to mean valid, inasmuch as it is provided that there shall be a proportionable abatement from the first policy, if it should be effected. And the insurer must be presumed to have used the term insurance, or other insurance, in the same sense in the former clause in which it uses it in this clause.

The defendant, in stipulating against subsequent insurance upon the pain of forfeiture, cannot be understood as stipulating

against any mere attempt to make
 182 insurance; *or what the assured and the subsequent insurer believed to be insured, though it was not such; or an incomplete and unperfected contract of insurance. To give it that construction would make it a stipulation, not that the assured was to forfeit his policy if he obtained additional insurance, but should be punished for attempting such a thing. It would require a very latitudinous construction to make the language mean that.

Upon what rule of construction can we wrest the language from its natural legal and ordinary import in order to subject the assured to a forfeiture of his indemnity for loss for the benefit of the maker of the policy? All conditions or exceptions are to be construed most strongly against those in whose favor they are made in an established rule of construction. Why should it be departed from in this case? It seems to me that there is a peculiar fitness in its application to policies of insurance. The policy is framed by the insurer in the absence of the assured, who inserts the condition for his own benefit without consulting the assured, who drafts it, with all its multifarious conditions and restrictions, to suit itself; and though it be "an institution necessary for the protection of vast interests embarked in manufacturing and on consignment of goods in warehouses," and therefore should be upheld, I am not aware of any rule, or respectable precedent, that would warrant a court by construction so to alter, or enlarge, or restrict the meaning of its terms in favor of the insurer—to give to the contract the meaning hereinbefore indicated—not even for the attainment of so desirable an object as to secure diligence, and care, and honesty on the part of the assured in the protection of his property against destruction by fire. And in this case it would seem that such a motive could not have operated in the insertion of the condition in question, inasmuch, as by the forty-second clause, before recited, the effecting other insurances
 183 by the assured *could be no inducement to carelessness and negligence in the protection of his property against destruction by fire, or to the destruction of it by his own criminal agency.

I am of opinion, therefore, that the condition made by the defendant in the policy which is the foundation of this suit against further insurance is not applicable to an invalid contract for other and additional insurance, and that the policy of the defendant is not avoided by an abortive attempt to make other assurance, which was never completed or perfected.

And in this position I think I am sustained by the overwhelming weight of authority.

Parsons in his work on Maritime Law says: "Some policies provide that in case of any other insurance on the same property the contract shall be null and void. But the obtaining a policy from another underwriter will not have this effect, if it be void for any cause, although it be on account of the fault

of the insured, as by his misrepresentations." 2 Pars. on Marit. Law, pp. 100-101.

Flanders on Fire Insurance, pp. 49-50, states the doctrine to be well settled, that if the second policy, against which the contract stipulates, is itself a void one, or one that cannot be enforced, it does not avoid the first, notwithstanding the clause of forfeiture.

May in his work on Insurance, p. 439, states the general principle to be, that subsequent insurance, void by its own terms, because it is additional and without notice of prior insurance, is no insurance within the meaning of the usual condition against other insurances.

Wood on Fire Insurance (the most recent work on this subject), p. 586, § 348, states the doctrine thus: "A condition that if other insurance shall be obtained without the consent of the company the policy shall be void, relates to other valid insurance, and the
 184 policy is not *avoided by the procurement of other policies that for any cause are invalid. But the entire invalidity of such other insurance must be established. The other policy or policies must at the time of the loss have been inoperative, so that no action could be maintained to enforce them. It is not necessary that they should have been absolutely void; it is sufficient if they were voidable."

These eminent writers cite numerous authorities in support of the doctrine as they have announced it; and they refer to the decisions which are in real or apparent conflict with their enunciation of the doctrine. I have not met with a single text-writer who controverts their views or who holds that the prior policy is avoided by the procurement of other policies which are invalid.

It would be impossible within the limits of an opinion to review all the cases on this subject. I must be content with a reference to the following judicial decisions as fully sustaining the proposition, as a general principle of law, that in order to avoid a policy on account of a subsequent insurance against an express condition therein it must appear that such subsequent insurance is valid and can be enforced. It it cannot be enforced it is no breach of the prior policy. Hubbard & Spencer v. The Hartford F. Ins. Co., 33 Iowa R. 326, supported by a well-considered and able opinion of Beck, J.; Jackson v. Mass. Mutual Fire Ins. Co., 23 Pick. R. 418; Clark v. New England Fire Ins. Co., 6 Cush. R. 342; Gale v. Belknap Cty. Ins. Co., 41 New H. R. 170; Stacey v. Franklin Fire Ins. Co., 2 Watts. & Serg. (Penn.) R. 506; Philbrook v. New England Mut. Fire Ins. Co., 37 Maine R. 137; Schenck v. Mercer County Mut. Fire Ins. Co., 4 Zab. (N. J.) R. 447; Jackson v. Farmers Mut. Fire Ins. Co., 5 Gray (Mass.) R. 52; Gee v. Cheshire County Mut. F. Ins. Co., 55 New Hamp. R. 65; Rising Sun Ins. Co. v. Slaughter, 20 Ind. R. 520; Thomas & al. v. Builders M. F. Ins. Co., 119 Mass. R. 121; New England Ins. Co. v. *Schettler, 38 Ill. R. 166; Knight v. Eureka F. & M. Ins. Co., 26 Ohio St. 664. In the fore-

going decisions there is a difference of views upon some questions in relation to the general subject; but with perfect unanimity all of them maintain the proposition hereinbefore announced.

It is held in *Philbrook v. New England Mut. Fire Ins. Co.* that the prior policy is valid even though the subsequent policy is not avoided by the underwriter issuing it, but the loss thereon is paid, the policy being legally invalid and such as the plaintiff could not have enforced.

In *Jackson v. Mass. Mutual Fire Ins. Co.* it was held that the subsequent insurance must be a valid and legal policy, and effectual and binding upon the insurers. Assuming it to have been made for the direct benefit of the plaintiffs, it was wholly nugatory and of no effect, and cannot, for this reason, be now set up to defeat the policy made by the defendants.

In *Hardy and al. v. Union Mut. F. Ins. Co.*, 4 Allen 217, it was held: "If such a second policy was void, it did not vitiate the first. It is open to the plaintiffs to take this ground and deny the validity of the second policy." In this case it was claimed that the plaintiffs had received since the loss the amount of their stipulated insurance on the subsequent policy. The court said the point of inquiry is, whether in fact, at the time of the loss, the plaintiffs had a valid claim against the defendants on their policy. They had such a claim if the second policy was then invalid, as the taking of an invalid policy did not constitute a breach between the plaintiffs and the defendants in reference to a subsequent policy. The facts which occurred subsequently to the loss do not constitute a case of estoppel in favor of the defendants.

186 *In *Gale v. Belknap Cty. Ins. Co.* the court said: "We regard the law as settled, that when, in a policy of insurance against fire, it is stipulated that the policy shall be void if any other or subsequent insurance shall be or be made without the consent of the company or its directors, and another is made by other insurers without such consent, which contains a similar provision, the second policy is inoperative and invalid—it does not bind the insurers, and therefore does not avoid the first policy."

In *Gee v. Cheshire County Mut. F. Ins. Co.*, 55 New Hamp. 65, the court said: "Obtaining a nugatory policy in some other company has been held, over and over again, not to constitute any contract at all. It confers no rights on the one hand, and imposes no obligation on the other. It is not a contract; it is a mere nullity."

In a recent case decided by the Supreme Court of Massachusetts, No. 119 Mass. R. supra, the court said: "It is for the defendant to show that such instrument (the subsequent policy) was a valid and legal policy, effectual and binding upon the insurers. If it was invalid so far as the property in question was concerned there would, by legal intentment, be no second insurance upon it, and therefore no avoidance of the first policy. The policy of the Merrimack company, who was to have been the second insurer, was

also upon the condition that without the consent of this company no other insurance shall exist upon the property insured by it; and no such consent was given, and the plaintiffs therefore failed to do what was necessary in order that a contract might be perfected with it; and having effected no valid subsequent insurance, they have not avoided the prior policy with the defendant."

The whole question comes clearly within the decided cases.

187 *In *Clark v. New England Fire Ins. Co.*, 6 Cush. R., supra, the court held that "if the plaintiffs have failed to perfect their contract with the subsequent underwriters by omitting to have the prior assurance allowed of and specified on the policy, as required, it is difficult to imagine in what way the prior insurance can be invalidated or affected. It is a vain, nugatory, void act."

Opposed to all this array of authority we refer to *David v. The Hartford Ins. Co.*, 13 Iowa 69; *Bigler v. The New York Central Ins. Co.*, 20 Barb. R. 635; and same case, 22 New York R. 402; *Lackey v. The Georgia Home Ins. Co.*, 42 Ga. R. 457; and *Carpenter v. Providence Washington Ins. Co.*, 16 Peters R. 495. Other cases have been cited, but need not be specially noticed, as they do not seem to be opposed to the doctrine enunciated. These are the principal cases relied on for the defendant; and upon close inspection I think it will be found that whilst they are in conflict with some points decided in some of the cases I have cited they have decided nothing in conflict with the position which I have announced, and which is sustained by the vast array of authority to which I have referred.

In the Iowa case of *Hubbard & Spencer v. The Hartford F. Ins. Co.* it was held that "a breach of the condition does not absolutely render void and of no effect the policy; it simply renders it voidable, its binding force and effect being subject to be defeated at the option of the company issuing the instruments. If no objection be made by the company on account of the breach of the condition the policy may be enforced as though no forfeiture had ever happened. The act of the company whereby it is shown that the instrument is treated as avoided must be shown in order to defeat recovery thereon. If no such act or objection

188 *on the part of the company be shown, the contract will be considered binding." But that may be shown even at the hearing. The supreme court of New Hampshire holds otherwise. In *Gale v. Belknap Cty. Ins. Co.*, 41 New H. R. 176, the court said: "The policy is neither utterly void nor voidable in the sense that it is a valid and binding contract, and to be so treated, for all practical purposes, until it is avoided. On the contrary, it is an instrument invalid and inoperative, binding upon nobody until and unless it should be ratified and confirmed by some further act on the part of the insurer with knowledge of the fact which caused the invalidity either by an express assent to be

bound or by some implied waiver of the objections. There is an intrinsic absurdity in holding that to be an insurance by which a party is bound to make good another's loss only in case he pleases to do it."

It is not necessary in this case that we should decide between these conflicting opinions. If either be right the plaintiff is entitled to recover; for it appears from the certificate of facts that the plaintiff brought suit against the Connecticut insurance company upon its policy, and that before the trial of this suit, being satisfied that he could not enforce it because of the prior insurance, which rendered it void, he admitted that the said policy was void, and dismissed the suit, and offered in open court to cancel the policy. We may infer from the existence of this suit that the resistance of the plaintiff's demand by the Connecticut insurance company was upon the ground that the policy was avoided by reason of the prior insurance, and from the dismissal of the suit by the plaintiff with the admission that the policy was void and the offer to cancel it, that the policy is invalid and cannot be enforced. Consequently the prior

policy has not been invalidated and rendered void by it. And this *is held to be the law in *Gale v. Belknap* *Cty. Ins. Co.* and all the cases of that class, and is likewise so held in the Iowa case supra. And in that case Judge Beck maintains that his conclusion is not in conflict with *David v. The Hartford Ins. Co.*, 13 Iowa, nor with *Bigler v. The New York Central Ins. Co.*, 20 Barb. R. 635, and same case, 22 New York R. 402. In the latter case the suit was brought to enforce the prior policy, and was defeated upon the ground that it was avoided by a subsequent policy, which was shown to be valid by a judgment in favor of the assured, and that a draft had been given in satisfaction of the judgment.

In *Lackey v. The Georgia Home Ins. Co.*, 42 Ga. R. 457, the court says: "The question here turns not so much on the contract as upon our statute. * * * And this law would make void the first policy though nothing was said in it about a second policy." The case, therefore, the court said, "turned rather on the law than on the contract." The remaining case relied on by the defendant's counsel—of *Carpenter v. Providence Washington Ins. Co.*, 16 Peters R. 495—is not analogous to this case. The suit there was brought against the Washington Insurance Company to enforce the second policy, which had a condition to be void if the property was insured by a prior policy. The defence was that there was a prior policy of the American Insurance Company, of which the defendant had not been notified. The plaintiff replied that the prior policy was invalid and void because it had been obtained by false representations. The point decided by the supreme court was raised by exceptions to the ruling of the lower court rejecting the plaintiff's instruction, and to the instruction given by the court; and is thus stated by Mr. Justice Story. He says the instruction offered by the plaintiff "proceeds on the ground that

although the policy of the American Insurance *Company of 6th December, 1836, was good upon its face, yet if, in point of fact, it was procured by a material misrepresentation by the owners of the cost and value of the premises insured, it was deemed utterly null and void, and therefore, as a null and void policy, notice thereof need not have been given to the Washington Insurance Company at the time of underwriting the policy declared on. The court refused to give the instruction, and, on the contrary, instructed the jury that if the policy of the American Insurance Company was, when that at the Washington Insurance office was made, treated by all the parties thereto as a subsisting and valid policy, and had never in fact been avoided (but was still held by the assured as valid), then that notice thereof ought to have been given to the Washington Insurance Company, and if it was not, the policy declared on was void." The supreme court held that the court below did not err in refusing to give the instruction moved by the plaintiff, and that the instruction given was correct. This was the only point decided in that case which has any relevancy to this; and Mr. Justice Story in stating reasons for the decision assumes that a policy which has been procured by misrepresentation of material facts is not therefore to be treated in the sense of the law as utterly void ab initio, but is merely voidable, and may be avoided by the underwriters upon due proof of the facts; but until so avoided it must be treated for all practical purposes as a subsisting policy. He says the policy to this very day has never been avoided, and the assured, if he pleases, may bring action thereon to-morrow. It will also be remarked that these remarks of Judge Story are made only with regard to a policy procured by false representations. His remarks were not made with reference to such a case as this.

There is no analogy between the two 191 *cases. That was a suit by the assured to enforce a subsequent policy which he had effected with another company, and which was resisted by the defendant upon the ground that by the terms of the policy it was void because at the time he had an insurance of the same property in another company of which he had not notified the defendant; to avoid which defence he alleged that the prior insurance was void because it was procured by those under whom he claimed by misrepresentations of material facts—that is, by fraud. But the supreme court held that inasmuch as it was treated at the time the second policy was issued by all the parties thereto as a subsisting and valid policy, and had never in fact been avoided, but was then held by the assured as valid, it must be regarded as a valid policy until the facts of the fraudulent representation were shown; and Mr. Justice Story remarked that "it may well be doubted whether a party to a policy can be allowed to set up his own misrepresentations to avoid the obligations deducible from his own contract."

We do not think that any decision made in that case applies adversely to this. The cases

are totally unlike. There is no proof or even allegation of fraud or misrepresentation here. The facts certified tend strongly to prove that the plaintiff in effecting the second policy was unconscious of violating any condition in the first policy or of doing anything that he had not a right to do. He seems to have been led into the error by relying on the agent of the company to give him all the information it was necessary for him to have—he having had no experience in such business—who failed, perhaps from inadvertence, to give him this important information. All that has been said against a party taking advantage of his own misrepresentation of material facts, or fraud, has no application

192 cation *to this case. It has not the slightest bearing upon any principle involved in its decision. Nor is there anything decided by the supreme court in *Carpenter v. Providence Washington Ins. Co.*, 16 Peters R. 436, which is opposed to the doctrine as declared in this opinion, and which is sustained by the highest courts of nine or ten of the American states, and, we may add, positively denied by none—sustained by courts presided over by a Gibson, a Bigelow, and a Shaw—names which have shed lustre on the judicial ermine—and a doctrine which has been recognized and approved by all the eminent and learned writers on the law of insurance. Are we to be told that a doctrine so fortified and sanctioned by this overwhelming array of authority, and which, we may add, is supported by reason, is to be overturned, not by the decisions of two or three courts, but by the dicta of a few judges, however eminent?

The decisions of the supreme court of the United States on questions peculiarly and exclusively belonging to that jurisdiction are a final disposition of the subject; but it is not inconsistent with the profound respect which that august tribunal ought to command to say that the decisions of the supreme courts of the states, when the subject is clearly within the limits of their jurisdiction, are entitled to equal respect; and though we would reverently bow to the authority of a court over which the illustrious Taney presided, and of which a Story was an associate justice, within the exalted sphere of its jurisdiction, we could not regard the dicta or reasoning of one of its justices, however eminent, or even its decision, as outweighing the judgments of the supreme courts of the American states on questions within the limits of their respective jurisdictions.

We do not feel called on to notice 193 further the dicta *and reasoning of

Judge Story than merely to suggest that that eminent judge, in his high appreciation of the advantage and importance of these insurance institutions, and in his earnest desire to uphold them, as required by a sound public policy, seems to have been unmindful of the rights of the assured, has been led into the error of giving a construction to the acts and instruments of writing of the insurer which, it seems to us, violates well-established rules of construction, and for which we can find no precedent, and

which would impair the rights of the assured, and if adopted and sanctioned by the courts would thereby do more to discourage insurance and injure those institutions than an adherence to the established rules of construction.

Upon the whole I am of opinion that the judgment of the court below is erroneous, and that it be reversed with costs.

MONCURE, P., and STAPLES, J., concurred in the opinion of ANDERSON, J.

CHRISTIAN, J. This is a case of first impression in this state. It is one of great importance; not only affecting the interests of every insurance company—now becoming a large and useful department of business throughout the country—but the case involves questions of public policy in which every community is interested.

The question discussed and decided, in the opinion of the majority, has been the subject of judicial investigation and decisions in many of the states of the Union and in the supreme court of the United States. A cursory examination of the cases will at

least show one thing, and that is, that 194 there is an irreconcilable *conflict in the authorities on this question. On the one side, the supreme courts of Massachusetts, Pennsylvania, Maine, New Hampshire, and Iowa; on the other side are the supreme courts of New York, Georgia, and the supreme court of the United States. If this case is to be decided on the authority of cases simply, and my judgment is to be determined by the number of cases instead of their weight, then I should find myself on the side of the majority; but no number of cases from other states, however I might respect them as persuasive authority, can bind my judicial action if the cases themselves are not founded upon sound legal principles. I prefer, therefore, to stand on the side of those cases which are fewer in number but which are founded upon sound principles of law and reason, which commend themselves to my judgment; and I am pleased to know that that judgment is sustained by such high authority as the supreme court of the United States and the supreme courts of New York and Georgia.

The cases followed by the majority of the court hold that the second policy does not make void the first unless the second be a valid one—one that can be recovered upon; and if the second company's policy can be shown to be void, even in consequence of the fraudulent representations of the insured, or concealment of the facts, the condition of the first policy is not broken, because there is in fact no second insurance.

The law which permits insurance companies to contract against a second insurance on the same property is founded in a wise public policy. Such stipulations protect not only the insurance companies but the public against the evils of double insurance. As was said by Judge McCay in *Lackey v. The Georgia Home Ins. Co.*, 42 Ga. R. 437:

195 "It is found that to permit double *insurance is to afford a temptation to

self-incendiaries, who are a danger in any community. The man who, to get the benefit of an insurance, sets fire to his own property, endangers the property of his neighbor. Now, it is just as entirely within this public policy to have a second insurance which one thinks is good as to have one which is really good." The temptation to incendiarism is just as great in the one case as the other. Nay, the very fact that one has fraudulently obtained an insurance is *prima facie* a suspicious circumstance; and the man who deliberately perpetrates a fraud in order to get a double insurance has taken one long step towards that other crime, incendiarism, committed by one's self against his own property. The object of the stipulation is to remove the temptation and take away the inducements to fire his own property. This is not done when he thinks he has a good policy or one that is void only in the event his fraud is discovered.

But I insist, with deference, that the cases relied on, and which are now to be followed by this court and settled as the law of this commonwealth, are in violation of fundamental principles which should govern all courts in the adjudication of the rights of parties in that it permits one to set up his own fraud and make that fraud the very basis of his recovery; in that it permits one to call upon a court of justice to aid him to impose an obligation upon another by showing that he, the plaintiff, has been guilty of falsehood and fraud, without the proof of which he could not possibly recover.

To illustrate the doctrine of these numerous cases, so much relief on: A man in the city of Richmond takes out a policy of insurance against fire on his house here in one of the insurance companies in this city. He solemnly stipulates in writing with that
196 *company (and that is one of the conditions on which the policy is issued) that he will not obtain an insurance in any other company without notice to and consent of the company. He then goes to another company, in a distant city of the state, or it may be in another state, and takes out another policy of insurance on the same property. He falsely represents to that company that he is not insured in any other, and the policy is issued upon the express condition that he is not insured, and there is a stipulation in the second policy that any previous insurance voids the policy. Towards the one company he has broken his solemn covenant; towards the other he has practised misrepresentation, falsehood, and fraud. If his property is destroyed by fire he has a double insurance, and the very temptation which the policy of the law would take away exists; and if his fraud remains undiscovered, if his "sins do not find him out," he collects the insurance from both companies. But, according to these cases we are asked to follow, he is safe anyway; for if his fraud is discovered, and his false and fraudulent misrepresentation is made apparent, the second policy is void, and the very fraud which he committed, and that alone, enables him to impose an obligation upon the first company.

I cannot follow cases, however numerous they may be, which declare a principle so variant with all my preconceived ideas of the true administration of justice as to permit a man to recover only when he establishes his own fraud, and to impose an obligation upon another only when he can show he has been guilty of falsehood.

Instead of following these cases I prefer to stand on the side of the supreme court of the United States when Taney and Story adorned the bench of that august tribunal, and who maintained the very opposite
197 site *doctrines from those of the numerous decided cases relied on. I wish I had time now to extract from the opinion of Mr. Justice Story in 18 Peters R. to show how his luminous intellect and just mind dealt with this question. But I must content myself now with a mere reference to the case.

But, after all, in my view of the case, it must turn upon a mere question of the construction of the contract of the parties. What is its fair meaning and intent? When the insured stipulated that he would not effect a policy of insurance in any other company without notice to and consent of the first company, what did he mean then? Can anybody doubt what was his meaning, and what obligation his contract then bound him to observe? Did he sign that contract with the mental reservation that he meant a valid insurance? with a mental reservation that he would go into another company and effect another insurance fraudulently? And if he was found out he could say: Well, I have not violated my contract with the first company because I have not effected a valid insurance. By my own fraud, now discovered and proved, I effected no valid insurance in the second company, and therefore the first stands good to me.

Is this a fair mode of interpreting the contracts of parties in a court of justice? Not according to the meaning of the parties at the time, but upon extrinsic facts based on falsehood and fraud.

So far as the insured is concerned, he did effect a valid insurance. The premiums he agreed to pay on the second policy could be recovered by the company. No one can doubt that. Certainly he could not defeat a recovery by showing he had perpetrated a fraud on the company. As to him, therefore, the insurance has been effected in the meaning of the law and the contract of the parties.

198 *The whole reasoning of the cases relied on to sustain this, to me, strange doctrine, is based on a single idea; and they all argue in a circle. It is said that the contract of the party was that he would effect no insurance; that this means no valid insurance; and inasmuch as, by the party's own falsehood and fraud, he had rendered the second policy void, he has not broken his covenant with the first company. Now, technically it may be true that no second insurance has been effected; but to give such a construction as this to the contract of the parties seems to me to be sticking in the

bark and to invoke a technicality to encourage falsehood and perpetuate fraud.

I have written very hastily, under great pressure, for want of time. The importance of the case and my own strong convictions impelled me to express my dissent from the opinion of the majority at once. I reserve to myself the privilege of writing out more deliberately and at large the views I entertain on this important question.

I am for affirming the judgment of the circuit court.

It is proper to remark that in the present case there is no proof in the record that the plaintiff in error was guilty of wilful misrepresentation and fraud; nor is it intended so to charge him in what I have said. He is permitted, however, in order to assert a claim against the company, to base that claim upon what in law is a fraud upon the other. He is allowed in a court of justice to plead his violated contract with one company to enable him to enforce a claim against another.

In what I have written my purpose was to animadvert upon the principles settled by the cases relied on rather than the conduct of the party in the case before us. It may be true he was guilty of no intentional fraud or misrepresentation, which I am willing to
199 concede; *but that does not change the rights of the parties or their legal obligations.

BURKS, J., concurred with CHRISTIAN, J.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the circuit court erred in giving the instruction asked for by the defendant, and in refusing to give the first instruction asked for by the plaintiff, and in overruling the plaintiff's motion to set aside the verdict and grant him a new trial upon the ground of misdirection to the jury, as hereinbefore indicated. It is therefore considered that the judgment of the circuit court be reversed and annulled, and that the plaintiff in error recover his costs of the defendant in error expended in the prosecution of his writ of error here; and the cause is remanded to the circuit court of the city of Petersburg with instructions to set aside the verdict of the jury and to grant the plaintiff a new trial, to be proceeded with in conformity with the principles herein declared.

Judgment reversed.

200 *Richmond & Danville R. R. Co. v. Morris.

November Term, 1878, Richmond.

M took passage in the caboose of a freight train of the R. & D. railroad from W to B, a way station. It was night when the train arrived at B. M had fallen asleep on the way, and when approaching B the conductor awakened him, telling him they were at B. The train went a short distance beyond the

Approved in Richmond & D. R. Co. v. Picklesimer, 85 Va. 798.

freight-house and reception-room without stopping, and when the engine reached the frog on the west side of the freight-house and reception-room, it stopped, and the conductor seeing M still in the caboose asleep, again aroused him. The train stopped about a minute, and M could then have gotten off whilst the train was not in motion. The conductor then went to the other end of the car, and looking back saw that M did not get up. He returned, shook M and told him to get up, or get off, he was at B. Immediately after the waking of M the last time, the conductor went out at the end of the caboose with his lantern in his hand and stood on the stationary platform about two and a half feet from the platform of the car; the train commenced backing, and M got up and walked out to the end of the car and jumped off, not knowing, as he says, which way the car was going; and the caboose car and several others passed over him, injuring him severely. The point where M jumped off was opposite the platform, which extended thirty-five steps west and a much greater distance east of the pump-house, and was that part of the platform at which passengers going east got off; and it was in good condition. There was no chain across the end of the platform in rear of the caboose, and it was not customary to have them on such cars. It was a dark, drizzly night, and the only lights at the station were two lanterns, one in the hands of the conductor and the other in the hands of a servant of the company at the station. The train reached the station behind time—HELD:

1. **Carriers of Passengers—Contributory Negligence.***—The company was guilty of culpable negligence, and this negligence was the proximate cause of M's injury. The conductor should not have put the train in motion until
201 *M could leave the car; or if put in motion, he should have cautioned him not to attempt to get off until the train was stopped. Instead of this he told him to get off, and the train immediately commenced backing.
2. **Same—Station—Duty to Light.**—The company was also in fault in not having stationary lights at the place, and this made it all the more incumbent on the conductor to exercise more than usual care and caution in letting off passengers.
3. **Same—Negligence and Contributory Negligence.†**—But whilst the injury sustained by M is directly traceable to the culpable negligence of the company, the negligence or absence of ordinary prudence and caution on the part of M contributed to his injury; and he is not entitled to recover of the company damages for the injury he sustained.

***Carriers of Passengers—Station—Duty to Light.**—See Alexandria & F. R. Co. v. Herndon, 87 Va. 204, citing principal case.

†**Negligence and Contributory Negligence.**—Findings stated in third and fourth head-note approved in City of Richmond v. Courtney, 32 Gratt. 792; Richmond & D. R. Co. v. Anderson's adm'r, 31 Gratt. 812; Richmond & D. R. Co. v. Moore's adm'r, 78 Va. 93; B. & O. R. Co. v. McKenzie, 81 Va. 71; Gordon v. Richmond, 83 Va. 440; N. & W. R. Co. v. Harman's adm'r, 83 Va. 553; Reed v. Axtell & Myers, Receivers, 84 Va. 231; R. & D. R. Co. v. Picklesimer, 85 Va. 798; Johnson v. R. Co., 91 Va. 176; Jamison v. R. Co., 92 Va. 330; R. Co. v. Joyner, 92 Va. 362; Overby v. R. Co., 37 W. Va. 525; Beyel v.

4. Same—Same—General Rules.—One who by his negligence has brought an injury upon himself, cannot recover damages for it. Such is the rule of the civil and common law. A plaintiff in such cases is entitled to no relief. But where the defendant has been guilty of negligence also in the same connection, the result depends on the facts. The question in such cases is: 1. Whether damage was occasioned entirely by the negligence or improper conduct of the defendant; or, 2. Whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary care and caution, that but for such negligence or want of ordinary care and caution on his part the misfortune would not have happened. In the former case the plaintiff is entitled to recover. In the latter he is not. See *Railroad Co. v. Jones*, 95 U. S. R. 439.

This was an action on the case in the circuit court of Halifax county, brought in July, 1873, by Moses Morris, against the Richmond & Danville Railroad Company, to recover damages for an injury which he alleged he had sustained by the negligence of the company. There was a verdict and judgment in favor of the plaintiff for \$1,500. The defendant took an exception to a decision of the court overruling their motion for a new trial, and obtained a writ of error
202 *from this court. The facts are fully stated by Judge Burks in his opinion.

F. Smith, H. H. Marshall and Ould & Carrington, for the appellants.

Riley and E. B. Flournoy, for the appellee.

BURKS, J., delivered the opinion of the court.

The plaintiff in the court below (defendant in error here) was run over by a train of cars of the Richmond and Danville Railroad Company. His arm was badly crushed, and was amputated, and he was otherwise injured. He brought his action against the company for damages, alleging that the injury was caused by the company's negligence. On the trial of the issue joined on the plea of not guilty the jury gave the plaintiff a verdict and assessed his damages at \$1,500. The defendant made a motion for a new trial on the ground that the verdict was contrary to the evidence. The motion was overruled, and the defendant excepted. The bill of exceptions taken contains a certificate of the facts proved on the trial. The case is before us on a writ of error awarded the defendant to the judgment rendered on the verdict in behalf of the plaintiff.

R. Co., 34 W. Va. 544; *Eastburn v. R. Co.*, 34 W. Va. 682; *Fowler v. R. Co.*, 18 W. Va. 580.

Same—Proximate Cause.—The leading case was cited in *S. W. Imp. Co. v. Smith's adm'r*, 85 Va. 306, as supporting the rule that where one who is through the negligence of another placed in a situation where he must adopt a perilous alternative, or is placed by such negligence in the terror of an emergency and acts wildly or negligently in consequence thereof and is injured, the negligence of the person causing the danger or emergency is the proximate cause.

Two questions are presented for decision: First, whether the injury complained of was caused by the negligence of the defendant; and, secondly, if so, whether it was caused solely by such negligence, or by the negligence of the plaintiff concurring with that of the defendant; in other words, whether there was contributory negligence on the part of the plaintiff.

203 *The reports are filled with cases expounding and illustrating the doctrine of contributory negligence, and there is more or less conflict in the decisions, under the diversity of circumstances in the cases. Attempt to reconcile them would be labor to no useful purpose. We shall make no such attempt. We think the law on the subject applicable to such a state of facts as we now have to deal with is correctly laid down by the supreme court of the United States in the recent case of *Railroad Co. v. Jones*, 95 U. S. R. (5 Otto) 439.

Mr. Justice Swayne, in the opinion of the court delivered by him, said: "One who by his negligence has brought an injury upon himself cannot recover damages for it. Such is the rule of the civil and common law. A plaintiff in such cases is entitled to no relief. But where the defendant has been guilty of negligence also, in the same connection, the result depends on the facts. The question in such cases is: 1. Whether damage was occasioned entirely by the negligence or improper conduct of the defendant; or, 2. Whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary care and caution that but for such negligence or want of ordinary care and caution on his part the misfortune would not have happened."

In the former case the plaintiff is entitled to recover. In the latter he is not. The authorities cited by the learned justice fully sustain the propositions laid down in the opinion.

One being in default, says Lord Ellenborough, will not dispense with using ordinary care for himself. *Butterfield v. Forrester*, 11 East, 60. If by ordinary care, says Baron Parke, in another case, he (the plaintiff) might have avoided them (the consequences of the defendant's negligence), he is the author of his
204 *own wrong. *Bridge v. Grand Junction Railway Co.*, 3 Mees. & Welsby R. 244.

Authorities to the same effect are numerous. One other only besides our own decisions will be referred to. In *Railroad Co. v. Aspell*, 23 Penn. St. 147, 149, Chief Justice Black delivering the opinion of the court, stated the law thus in its application to railroad companies: "Persons to whom the management of a railroad is intrusted, are bound to exercise the strictest vigilance. They must carry the passengers to their respective places of destination and set them down safely, if human care and foresight can do it. They are responsible for every injury caused by defects in the road, the cars, or the engines, or by any species of negligence, however slight, which they or their agents may be

guilty of. But they are answerable only for the direct and immediate consequences of errors committed by themselves. They are not insurers against the perils to which a passenger may expose himself by his own rashness or folly. One who inflicts a wound upon his own body must abide the suffering and the loss whether he does it in or out of a railroad car. It has been a rule of law from time immemorial, and is not likely to be changed in all time to come, that there can be no recovery for an injury caused by the mutual fault of both parties. When it can be shown that it would not have happened except for the culpable negligence of the party injured concurring with that of the other party, no action can be maintained. A railroad company is not liable for an accident which the passenger might have prevented by ordinary attention to his safety, even though the agents in the train are also remiss in their duty."

The principles of these decisions are applied in two cases—*Baltimore & Ohio Railroad Co. v. Sherman's adm'r*, and same (plaintiff) *v. Whittington's adm'r*, 30
205 Gratt. *pp. 602, 805—decided by this court during the last term at Staunton.

The following are the facts of this case as far as need be stated.

On the 17th day of March, 1873, the plaintiff purchased a ticket from an agent of the defendant at a station on the road called Wolf Trap, in Halifax county, for South Boston, another station in said county, and took passage for his place of destination in a caboose (car), which was attached to a freight train for the purpose of carrying passengers. It does not appear distinctly whether it was in the night time or day when he entered the caboose. It is to be inferred, however, that it was in the night, as it was proved that it was late in the evening when he went to the station, and, as the passenger train had already passed, he had to wait some time for the freight train, which was behind time. This train reached South Boston at 11 o'clock in the night. The distance between the two stations was not proved. Soon after the plaintiff entered the caboose he fell asleep. After the train had left Wolf Trap station the conductor waked the plaintiff and took his ticket. When the train reached the switch nearing South Boston the conductor, finding the plaintiff again asleep, awoke him a second time and told him he was at Boston. The train was then travelling at the rate of four miles per hour. It passed the freight-house and reception-room at the station without stopping, and when the locomotive reached the frog on the west side of the freight-house and reception-room it stopped, and the conductor, seeing the plaintiff still in the caboose asleep, again aroused him. The train stopped about a minute, and the plaintiff could have gotten off while the train was not in motion. The conductor then went

to the other end of the car, and, looking
206 back, saw that the *plaintiff did not get up. He returned, shook him, and told him to get up, he was at Boston. The plaintiff says he told him to get off. Imme-

diately after the waking of the plaintiff the last time the conductor went out at the end of the caboose with his lantern in his hand and took his stand on the stationary platform about two and a half feet from the platform of the car; the train commenced backing, and the plaintiff got up and walked out to the end of the car and jumped off, not knowing, as he says, which way the car was going, and the caboose car and several other cars passed over him, inflicting the injuries before mentioned. The point at which the plaintiff jumped off was opposite the platform, which extended about thirty-five steps west and a much greater distance east of the pump-house, and was that part of the platform at which passengers going east usually get off. The entire platform was in good condition. There was no chain across the end of the platform in rear of the caboose, and it was not customary to have chains across the platforms of such cars. It was a dark, drizzly night. The only lights at the station were two lanterns: one in the hands of the conductor and the other in the hands of a servant of the defendant employed at the station. The train reached the station behind time.

It was proved that when the plaintiff took the train at Wolf Trap he was under the influence of liquor, but it does not appear that this fact was known to the conductor. When discovered, immediately after the train passed over him, he was perfectly sober.

These facts, in our opinion, show the defendant to have been guilty of culpable negligence, and this negligence was a proximate cause of the plaintiff's injury. After the conductor discovered that the plaintiff when

aroused did not get off while the train
207 was standing *for a very short period, but had again fallen asleep, and he found it necessary to wake him again, he should not have put the train in motion until the plaintiff could leave the car, or if put in motion, he should have cautioned him not to attempt to get off until the train was stopped. Instead of pursuing that course, the proof is that he told the plaintiff to get off, and the train immediately commenced backing, at what speed was not shown.

The company was also in fault in not having stationary lights. There were none such, and the only lights used were the two hand-lanterns before mentioned. This defect made it all the more incumbent on the conductor to exercise more than usual care and caution in letting off passengers.

While, however, the injury sustained by the plaintiff is directly traceable to the culpable negligence of the defendant as a cause, the evidence leaves no room for doubt that another cause, concurring with the first, was the negligence or absence of ordinary prudence and caution on the part of the plaintiff. He had time sufficient, according to the proof, to leave the car while the train was standing; and after he was cautioned the last time, if he had at once followed the conductor, who stepped on to the platform with the lantern in his hand, he might have reached the platform with equal convenience

and safety; or if tarrying longer and finding the train in motion, when told to get off, he should either have declined, as he had the right to do, to obey the direction, or if he chose to take the risk of getting off under the circumstances, he should have gotten off on the stationary platform, which, as shown, was alongside of the train. Such would have been the dictates of common prudence. He did not heed them, but according to his

own statement, he got up, walked to
208 *the end of the car and "jumped off," not knowing nor seeking to know in which direction the train was moving. This would seem to be something more than the want of ordinary prudence and caution. It appears to be gross negligence—extreme recklessness.

In what we have said we have treated the certificate of the circuit judge as a certificate of the facts in the case. It is sometimes difficult to determine whether the certificate in a bill of exceptions is one of facts or of evidence. The certificate in this record purports to be the facts, and we think that is its true character. What each witness stated is certified as facts "proved" by that witness, and there seems to be no essential conflict in the statements. The statements of some are fuller than those of others, but they do not appear to be in conflict with each other. This is in effect to certify that the evidence is true, and substantially the facts proved by the evidence. *Gimmi v. Cullen*. 20 Gratt. 439, 455.

If, however, the certificate is of the evidence only, and the rule as laid down in *Read's Case*, 22 Gratt. 924, 925, be applied, rejecting all the parol evidence of the plaintiff in error and giving full faith and credit to that of the defendant in error, this would still be a case for reversal of the judgment. The case, as to the question of negligence, would then rest solely on the statement of the defendant in error himself. That statement need only be read to show that it makes a case against him.

He testified that "on the arrival of the freight train (at Wolf Trap) the agent told him to take his seat in the caboose attached to the freight train for the purpose of conducting passengers; that he did so, and being wearied from his day's work he soon fell asleep; that while at Wolf Trap he purchased a pint of whiskey for one of his hands, but did not buy any whiskey

209 *for himself, or take any unless it was when he bought that for his hand; that he was at Wolf Trap about an hour; that after the train left Wolf Trap he was waked up by the conductor, who called for his ticket; he produced his ticket, and then fell asleep again, and did not remember anything more until he was waked up again at South Boston by the conductor, who told him he was at South Boston and to get off; that he got up and walked out to the end of the car and jumped off; that he did not know which way the car was going, and that the car caught him, ran over him, and after that that the misery was so great he did not know what took place; that he was injured, and

disabled for about three months from the injury; that his right arm had to be amputated, and that he has a wife and three children.

The *Railroad Co. v. Aspell*, supra, was a case in which a passenger, being carried beyond the station where he intended to stop, jumped from the train while it was in motion, and for the injury received thereby sued the railroad company for damages. Chief Justice Black, after using the language already quoted, makes the following observations, with which we conclude this opinion: "From these principles it follows very clearly that if a passenger is negligently carried beyond the station where he intended to stop, and where he had the right to be let off, he can recover compensation for the inconvenience, the loss of time, and the labor of travelling back; because these are the direct consequences of the wrong done to him. But if he is foolhardy enough to jump off without waiting for the train to stop, he does it at his own risk; because this is gross negligence, for which he can blame nobody but himself. If there be any man who does not know

210 that such leaps are dangerous, especially when *taken in the dark, his friends should see that he does not travel on a railroad."

It is to be borne in mind, however, that if a passenger is induced to leap from the carriage, whether by coach or railway, by a well founded apprehension or peril to life or limb induced by occurrences which might have been guarded against by the utmost care of the carriers, he is entitled to recover for any injury he may sustain thereby, although no injury would have occurred if he had remained quiet. *Redfield on Railways*, § 178 et seq. and cases cited in notes; *Sherman & Redfield on Negligence*, § 28. In this case there was no such peril and no apprehension of any.

The court is therefore of opinion that the judgment of the circuit court is erroneous and should be reversed and annulled, the verdict of the jury set aside, and the cause remanded for a new trial.

The judgment was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the said circuit court erred in overruling the motion of the plaintiff in error (defendant in said circuit court) to set aside the verdict of the jury and award a new trial of the issue joined between the parties. It is therefore considered and ordered that for the error aforesaid the said judgment be reversed and annulled, and that the defendant in error pay to the plaintiff in error its costs by it expended in the prosecution of the writ of error aforesaid here; and this court now proceeding to render such judgments as the
said circuit court should have rendered,
211 it is further considered *and ordered that the verdict of the jury be set aside, and a new trial be had of the issue joined in

this cause. And this cause is remanded to the said circuit court for a new trial of the issue in the cause, as herein ordered, and for further proceedings, in order to final judgment; which is ordered to be certified to the said circuit court of Halifax county.

Judgment reversed.

212 *Thornton v. Thornton.

November Term, 1878, Richmond.

1. Injunctions to Actions at Law—Confession of Judgment.*—Upon a bill to enjoin the proceeding in an action at law founded on mutual accounts between the parties, and asking for a settlement of the accounts, if the injunction is granted, *quaere*, if it should not be without requiring the plaintiff in equity to confess a judgment in the action at law.

2. Same—Terms of Confession.—If it was proper to require a confession of judgment, it should expressly provide that the judgment so confessed was thereafter to be dealt with as the chancery court might direct.

3. Same—Setting Aside Judgment.—Although there is no such express provision in the order granting the injunction, the court, if of opinion that the bill should be dismissed for want of jurisdiction, should, in the order of dismissal, direct that the judgment at law be set aside.

4. Accounting—Equity Jurisdiction—Agency.†—In an agency where there is a fiduciary relation between the parties, a court of equity has jurisdiction to settle and adjust the accounts between them.

In June, 1873, Joseph Thornton presented his bill in equity to the judge of the county court of Fairfax, in which he stated that W. H. Thornton had instituted a suit in assumpsit against him in said court to recover a balance of \$2,410.11, as of January 1st, 1866, which he claims to be due upon a settlement of accounts between them; that some time

***Injunctions to Actions at Law—Confession of Judgment.**—The questions discussed in the first two headnotes are also reviewed in *Dudley v. Miner*, 93 Va. 408. The headnote in that case lays down the law as follows: "A defendant in an action at law who has a distinct equitable defence as well as a legal defence * * * should not be required as the price of coming into equity to enjoin the proceedings at law, to confess judgment at law. In such case it is not safe to require him to confess judgment and it is error to require it, and even in proper cases for such confession, it should not be required unconditionally, but the order requiring such confession should provide that the judgment is to be thereafter dealt with as the court of equity may direct." See also *Great Falls Manf. Co. v. Henry*, 25 Gratt. 575; *Warwick v. Norvell*, 1 Rob. 308; *Staples v. Turner*, 29 Gratt. 330; *Robinson v. Braden*, 44 W. Va. 195; *Knott v. Seamonds*, 25 W. Va. 99; *Miller v. Miller*, 23 W. Va. 495.

†Accounting—Equity Jurisdiction—Agency.—On the question of the jurisdiction of courts of equity to settle accounts in cases of agency, see *Simmons v. Simmons*, 33 Gratt. 451, and *note*; *Bank v. Jeffries*, 21 W. Va. 508, citing principal case and *Berkshire v. Evans*, 4 Leigh 223; *Coffman v. Sangston*, 21 Gratt. 263; *Zetelle v. Myers*, 19 Gratt. 62; *Huff v. Thrash*, 75 Va. 546.

in the year 1865 the said W. H. Thornton applied to plaintiff for employment, and plaintiff employed him to take care of his estate in Fairfax county as his agent and steward. He was employed to fell, saw, and get out timber on said estate, plaintiff furnishing him with the means; that in the course of this employment the said W. H.

Thornton had from plaintiff large amounts of money *to disburse, and had authority, in some cases, to make sale of the product of the estate derived from cutting, sawing, and marketing lumber; that he has never rendered a satisfactory account of his stewardship, nor furnished plaintiff with proper vouchers of disbursement of the money placed in his hands to carry on the business aforesaid; that some time in the year 1869 or 1870 he rendered to the plaintiff the meagre and unsatisfactory account herewith filed; but that no vouchers for disbursements accompanied the said statement, nor has he at any time exhibited a satisfactory account of his receipts from sales or otherwise; that he did not keep regular accounts of his transactions as agent, as he was required to do, but, on the contrary, plaintiff was purposely not informed of the condition of the business, and could not tell to what extent he had been involved by the conduct, contracts, and transactions of the said W. H. Thornton.

Plaintiff is informed and believes that said W. H. Thornton, during his employment, which lasted until 1869, clandestinely used and appropriated the property of plaintiff which was under his control, as his agent, for his own purposes and for his own profit, without giving an account of the same.

Plaintiff is willing, if required by the court, to confess a judgment in the action at law, but submits he ought not to be required to do so, as the defendant ought not to have sued plaintiff in a court of law until his accounts had been submitted, examined, and approved, the balance ascertained and admitted to be correct, and this especially as plaintiff denies the justice of the claim in toto, and believes that upon a just settlement of the accounts between them the defendant will be brought largely in debt to him. And making W. H. Thornton a defendant, he prays that he may

be enjoined from proceeding any further in *his action at law until permitted by the court; that the cause may be referred to a commissioner to settle and adjust the accounts between the parties, and for general relief.

An injunction was awarded according to the prayer of the bill upon the plaintiff giving bond and security in the penalty of \$200.

The cause seems to have been sent to the circuit court of Fairfax county; and at the November term, 1873, of that court an order was made that unless the plaintiff confessed a judgment in the action at law at that term of the court the injunction should stand dissolved and the bill dismissed. And this the plaintiff seems to have done.

At the February term of the court the defendant demurred to the bill, and also

answered. It is unnecessary to set out the answer. It is sufficient to say the defendant denies the material allegations of the bill: avers that he kept his accounts in small books, as directed by the plaintiff, which he delivered regularly to the plaintiff with the vouchers, and that the plaintiff from these kept the accounts on his books. There were depositions taken by both parties.

At the June term, 1874, the court entered the following decree: "On motion to dissolve the injunction, and the court hearing argument in opposition thereto, doth order that the injunction granted the complainant on the 16th day of June, 1873, be and the same is hereby dissolved, and bill dismissed with costs." And thereupon Joseph Thornton applied to this court for an appeal; which was allowed.

Wattles, for the appellant.

Smoot and Claughton, for the appellee.

215 *BURKS, J., delivered the opinion of the court.

An injunction was awarded the appellant, as complainant in the bill in the court below, to restrain the defendant (appellee here) from further proceeding in an action at law instituted by the latter against the former to recover an alleged balance on account between the parties. The complainant afterwards confessed judgment unconditionally in the action for the amount claimed, under an order of the judge in this cause requiring him to do so, or else submit to a dissolution of the injunction and a dismissal of his bill.

The defendant then answered the bill, depositions were taken by both parties, and on the 12th day of June, 1874, the case being ripe for hearing, the following brief decree, or order, was entered:

"On motion to dissolve the injunction, and the court hearing argument in opposition thereto, doth order that the injunction granted the complainant on the 16th day of June, 1873, be and the same is hereby dissolved, and bill dismissed with costs."

In making this summary disposition of the cause the learned judge must have proceeded on the idea that the bill presented no case for equitable relief, and that the injunction was improvidently granted. This is to be inferred from the fact that the decree makes no reference to the depositions, and purports to be rendered on a motion simply to dissolve the injunction, after hearing argument in opposition thereto.

If it were conceded that the bill is without equity, still the decree would be plainly erroneous. Notwithstanding it is within the discretion of the chancery court to impose terms as a condition of granting an injunction, yet it was probably an erroneous exercise of that discretion to require the complainant to confess a judgment at law in the pending action, founded,

216 *as it was, on mutual accounts between the parties, as shown by the exhibit filed with the bill. However that may be, if it was proper to require a confession of judg-

ment at all, the order requiring it should have expressly provided that the judgment so confessed was thereafter to be dealt with as the chancery court might direct—Kerr on Injunctions, pp. 18-19; and although there was no such express provision in the order, the court, if of opinion that the bill should be dismissed for want of jurisdiction, should, in the order of dismissal, have directed that the judgment at law be set aside and the case reinstated in the law court as it was when the injunction was granted. *Great Falls Man. Co. v. Henry's adm'r.* 25 Gratt. 575. Otherwise, there would be the grossest injustice. The complainant is admitted into equity on condition that he abandons all defence at law. He complies with the terms imposed. He is then turned out of the equity forum because he is entitled to no relief there, and thus, although he may have a good defence to the claim asserted against him, he is shut out of both forums, and is not allowed to be heard in either.

But we are of opinion that the bill presented a case for equitable relief, and it was error to dismiss it.

The defendant had been the agent of the complainant in the management of his estate in Fairfax county, and the agency extended through a period of four years. The bill shows a case of mutual unsettled accounts, growing out of this agency, which could not be conveniently and safely adjusted and settled in a court of law. The bill of particulars filed in the law suit disclosed mutual demands. Besides, the bill charges a failure on the part of the defendant to keep regular accounts and to render the same with proper vouchers, and further charges that the defendant, during his agency, used and appropriated the

217 property *of the complainant, under his control as agent, for his own purposes and for his own profit, without giving account of the same. This is a proper case for equitable interposition. 1 Story's Eq. §§ 462, 462a.

This is not a case of a single money-demand, which might and should be enforced in a court of law, nor, indeed, of mutual demands merely, of which equity would take cognizance (2 Rob. Prac., old ed., 4, and cases there cited), but it is a case involving a trust.

The bill in *Makepeace v. Rogers*, a case decided in 1865 by Vice-Chancellor Stuart, and on appeal affirmed in the court of appeal in chancery (11 Jurist. N. S. 215, 314), was very similar to the bill in this case. It was filed by a land-owner against the agent and manager of his estates for an account of all moneys received, and for all payments made by such agent, and for a decree for payment of any balance that might be certified to be due. There was a demurrer to the bill, and it was argued that in all cases where an account was required by an agent from his principal, or by a principal from his agent, where there were receipts upon one side and payments upon the other, the remedy was by action at law for money had and received, and that a plaintiff could not come into a

court of equity unless he could make out some special case. The Vice-Chancellor overruled the demurrer, and in his opinion said: "I conceive that wherever the relation between the person who seeks an account and the person against whom he seeks it partakes of a fiduciary character a trust is reposed by the plaintiff in the defendant, and that that trust is not the same as is represented to exist in the ordinary employment of an agent, such as a builder or other tradesman. The fiduciary character of the employment imposes upon the person employed the duty of
218 keeping accounts and of *preserving vouchers; and, according to the old law, which I trust will continue to be the law of this court, a bill for an account in equity may be filed and sustained."

In affirming this judgment of the Vice-Chancellor, Lord Justice Turner said, there was no authority to show that a bill would not lie at any time by a principal against his agent for an account.

We are further of opinion that upon the pleadings and proofs in the cause a case was shown that made it proper to order an account between the parties. No doubt the learned judge of the circuit court would have retained the cause and made such an order if he had been of opinion, with us, that equity had jurisdiction to grant the relief prayed for in the bill.

The decree of the circuit court will therefore be reversed, and the cause remanded for further proceedings; and, in conformity with the precedent in *Staples v. Turner*, adm'r, & als., 29 Gratt. 330-336, the judgment confessed at law will be permitted to stand, subject to the control of the chancery court, as security for any balance which, on accounts to be stated under an order of reference, may be found to be owing by the complainant to the defendant.

Decree reversed.

219 *Ficklin's Ex'or v. Carrington.

November Term, 1878, Richmond.

1. **Implied Contract—Presumption.**—In the absence of C in a foreign country F sent to Mrs. C a check for \$500, which was collected by her. In the absence of all evidence bearing upon the intention of F in sending the check, the presumption is the intention was, not a gift to Mrs. C, but a loan on the credit of her husband, C.

2. **Statute of Limitations—Departure of Debtor from State.***—Where a debtor who resides in the state removes, after contracting the debt, to another state, the removal is itself an obstruction to the prosecution of a suit by the creditor to recover the debt, and the statute of limitations will not run against the debt whilst the debtor resides out of the state.

This was an action of assumpsit in the circuit court of the city of Richmond, brought

*Statute of Limitations—Departure of Debtor from State.—Principal case was distinguished in *Brown v. Butler*, 87 Va. 621. Approved in *Abell v. Insurance Co.*, 18 W. Va. 415.

in June, 1874, by Slaughter F. Ficklin, executor of Benjamin F. Ficklin, against Eugene Carrington, to recover the sum of \$500 in gold, which the plaintiff claimed had been lent to the defendant on the 1st of April, 1865. The defendant residing in Maryland, the process was served by an attachment on property owned by him in Richmond.

Carrington appeared, and filed the plea of non-assumpsit, and also the statute of limitations. The plaintiff took issue on the first plea, and replied specially to the second, that after the loan of the money the defendant removed to the state of Maryland, and had continued to reside out of the state, so that said Benjamin F. Ficklin, in his lifetime, and the plaintiff, since his death, had been obstructed in the prosecution of his suit. And to this replication the defendant rejoined that by his removal he did not obstruct, &c. The replication and rejoinder are set out in the opinion of Judge Christian.

220 *When the cause was called for trial the parties waived a jury and submitted the whole matter of law and fact to the court. And the court, having heard the evidence, rendered a judgment in favor of the defendant. And thereupon the plaintiff applied to this court for a writ of error and supersedeas; which was allowed.

Upon the first issue the only question was, whether a check for \$500 in gold, sent by B. F. Ficklin to Mrs. Eugene Carrington whilst her husband was in a foreign country, was intended to be a gift or a loan. The view of the evidence taken by this court is presented in the opinion.

Kean & Davis, for the appellant.

Ould & Carrington, for the appellee.

CHRISTIAN, J., delivered the opinion of the court.

The court is of opinion that there is no proof in the record to show, either from the relation of the parties or other circumstances, that the check for \$500 in gold delivered by Ficklin to Mrs. Eugene Carrington was a gift to her. In order to declare such transaction a gift to the wife, and not an advancement or loan upon the credit of the husband, there must be proof that it was intended as a gift, and the relations of the parties and the circumstances of the transaction must be of such a character as to show that the money advanced was given to the wife voluntarily and without expectation that the husband would return the same, and that it was not advanced to the wife upon credit given to the husband.

There is a total absence of any such proof in this record. The only facts we have before us (and which were before the court below) are: that on the 1st day of April, 1865, B. F. Ficklin delivered to Mrs.

221 Eugene *Carrington a check drawn by him on Wm. M. Sutton & Co., bankers, in the city of Richmond, for the sum of \$500 in gold, which check was paid on that day by said bankers to Mrs. Carrington; and the further fact, that at that time

Eugene Carrington was in a foreign country. This is all. There is no proof that there was any relationship, or even intimate friendly relations, between Mr. Ficklin and Mrs. Carrington. All these may have existed, but if they did the defendant has failed to prove it. No such proof was even tendered. We have, therefore, the naked fact, that in the absence of her husband in a foreign country Mr. Ficklin delivered to Mrs. Carrington a check for \$500, which was collected by her. From this naked fact it certainly cannot be inferred that Ficklin thereby intended to make Mrs. Carrington a present of this \$500. But, on the other hand, from this fact alone, the inference would be certainly as strong that this amount, paid to the wife in the absence of the husband in another country, was an advancement to her upon the credit of the husband.

There is certainly no evidence tending to rebut the presumption that that advancement, made under the circumstances, was a loan, and not a gift. But there is evidence tending to show, if it does not conclusively show, that Carrington, after his return, recognized this advance by Ficklin to his wife as a debt, which he acknowledged his obligation to pay. A letter of Carrington's is produced, bearing date November 15th, 1866, addressed to Major B. F. Ficklin, Exchange Hotel, Richmond, in which, after alluding to his pecuniary embarrassments and his efforts to relieve himself, he says: "But [I] will continue to make every effort to raise funds by some means, and will settle my account with you with the first money which I succeed in getting hold of."

It was distinctly proved by Smoot, ²²² the only witness *whose deposition appears in the record, that this letter had reference to the money which Ficklin had advanced to Mrs. Carrington. An effort was made, on cross-examination, to show that this letter may have referred to other transactions, in reference to the sale of Confederate bonds in London, in which there was a claim asserted by Ficklin against Carrington. But in answer to the question, Did Mr. Carrington say that Mr. Ficklin had ever demanded this debt of him, and if so what did Mr. Carrington say in regard to it? the witness answers: "I remember Mr. Carrington saying to me that he had received a letter from B. F. Ficklin, to which he had replied, addressing his reply to Exchange Hotel, Richmond, both of which letters had, alone, reference to this five-hundred-dollar gold matter."

Same witness further proved that Carrington stated to him that "after his return to Richmond in the year 1865 his wife advised him that Mr. Sutton, either William M. or P. T., of the firm of Sutton & Co., had called upon her during his absence and left with her \$500, or a check for it, in gold, stating to her that he did so by direction of Major B. F. Ficklin; that he supposed that to be the transaction which constituted the basis of

the claim or demand made by B. F. Ficklin on him through me in full of all demands, as he supposed the difference between gold and greenbacks, with interest up to that time added to the principal, would make about \$1,000." The same witness also proved that Carrington was willing to secure the ultimate payment of this amount by the execution of the necessary papers to bind his reversionary interest in certain property in the city of Richmond.

The court, therefore, is of opinion that there is not only a total absence of proof in the record to show that the payment of \$500 in gold made by Ficklin through Wm. M. Sutton & Co. to the wife of Carrington, in his absence in a foreign country, was ²²³ a gift to Mrs. Carrington, *but there is conclusive proof to show that Carrington himself recognized this advance or loan to his wife, in his absence out of the country, as a debt of the highest obligation, which he was willing and anxious to secure.

The court is, therefore, of opinion that upon the plea of non-assumpsit there ought to have been a judgment for the plaintiff in the court below.

But beside the plea of non-assumpsit there was a plea of the statute of limitations, and upon these two pleas and issues thereon the case was tried by the court, both parties waiving a jury.

To the plea of the statute of limitations there was a replication in those words by the plaintiff:

"The said plaintiff says that he ought not to be barred by reason of anything by the said defendant in his second plea alleged, because he says that on the 1st day of April, 1865, when the said several promises and undertakings in the plaintiff's declaration mentioned were made and entered into, and previous thereto, the defendant was and had been a resident of the state of Virginia, and that afterwards, to-wit: on or before the 15th day of November, 1866, the said defendant departed without the said state, and thereafter resided in the state of Maryland, and thereby the said defendant obstructed the said B. F. Ficklin, deceased, in his lifetime, and the plaintiff since his death, in prosecution of his suit upon the said several promises and undertakings until the 13th day of June, 1874, when this suit was instituted, and this he is ready to verify."

To this special replication there was a special rejoinder by the defendant, which was rejected by the court. It being rejected, it is not necessary to be further noticed here. After being rejected, another rejoinder to the replication of the plaintiff to the plea of the statute of limitations was tendered and received by the court; which rejoinder is as follows:

²²⁴ *The defendant says that the plaintiff ought not, by reason of anything in his replication alleged, to have and maintain his action against him because he says that by his removal from the state of Virginia and his residence in the state of Maryland, as in

said replication is alleged, he did not obstruct the said B. F. Ficklin in his lifetime, or his executor since his death, in the prosecution of suit upon the alleged cause of action in the declaration mentioned; and of this he puts himself on the country. To the filing of which the plaintiff, by his counsel, objected, but the court, overruling said objection, allowed said rejoinder to be filed; to which action of the court in overruling said objection the plaintiff, by his counsel, excepts, and prays that this his first bill of exceptions may be signed, sealed, and made a part of the record; which is accordingly done.

The replication by the plaintiff to the plea of the statute of limitations intended, manifestly, to affirm that the mere removal of the defendant beyond the limits of the state was an obstruction in itself to the prosecution of the plaintiff's suit, and that in such case the statute of limitations would cease to be a bar to the plaintiff's action. The rejoinder to this replication, which was permitted to be filed by the court, affirmed the proposition that the mere removal of the defendant beyond the limits of the state did not of itself obstruct the prosecution of the plaintiff's suit; but it was necessary to show, on the part of the plaintiff, that he was in fact obstructed in consequence of such removal; so that, under these pleadings, the question we have to determine is, whether the removal of a defendant who has been a resident of the state beyond the limits of the state is sufficient of itself, under the statute, to be relied on as an obstruction to the prosecution of the plaintiff's suit, or whether it is necessary for the plaintiff to show that he was in fact obstructed by or in consequence of such removal.

225 *The solution of this question depends upon the true construction to be given to the statute law on this subject. The first act on this subject is found in 1 Rev. Code, 1819, p. 491, § 14. It provides that "if any defendant shall abscond or conceal himself, or by removal out of the country or the county where he resides when the cause of action accrued, or by any other indirect ways or means defeat or obstruct the plaintiff, then the defendants shall not be admitted to plead the statute of limitations."

This statute, based upon the English statute of 4 Anne (see 3 Hen. Stat. at Large, 383-4), which provided that if at the time the cause of action accrued the person liable to it was beyond seas the plaintiff might bring his action within the usual period of limitation after his return.

The next act on the subject was in 1826, and was as follows: "If any defendant in any of the aforesaid actions shall abscond or conceal himself, or remove from this commonwealth, or by any other indirect ways or means defeat or obstruct any person," &c., &c.

Under the revision of 1849 the following section, which changes the phraseology and the structure of the sentences contained in the former acts without changing their meaning, is as follows:

"Where any such right as is mentioned in this chapter shall accrue against a person who had before resided in this state, if such person shall, by departing without the same, or by absconding or concealing himself, or by any other indirect ways or means obstruct the prosecution of such right, the time that such obstruction may have continued shall not be computed as any part of the time within which the said right might or ought to have been prosecuted."

We think it is plain that the change here made, which is simply placing the preposition "by" before the word *removing or "departing" from the state does not alter the meaning of the statute. It means the same thing to declare that "if he remove" from the state, or by other indirect means he obstruct the prosecution of the suit, as to say "if, by removal or departing from the state, or other indirect means, he obstruct" the prosecution of the suit, &c. The use of either phrase means in effect the same thing. Rep. of Rev. 746 and note; Wilkinson & Co., v. Holloway, 7 Leigh. 277; Markle's adm'r v. Burch's adm'r, 11 Gratt. 26. We think it is plain, looking to all the statutes above referred to, and noticing the modification in the structure of the sections without changing its meaning, that it was the purpose of the legislature to declare that where a party having been a resident of this state has gone beyond its limits, that such departing from the state should of itself be considered, during the period of such absence, an obstruction of the plaintiff's right to prosecute his suit, and should not be counted in the period of the statute of limitations.

The court is, therefore, of opinion that upon the plea of the statute of limitations, as well as the plea of non-assumpsit, the judgment ought to have been for the plaintiff.

Upon the whole case we are of opinion that the judgment of the circuit court should be reversed.

The judgment was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the judgment of the said circuit court is erroneous. It is therefore considered by the court that the said judgment be reversed and annulled, and that the plaintiff in error recover against the defendant in error his costs by him expended in the prosecution of his writ of error here; and this court now proceeding to render such judgment as the said **227** circuit *court ought to have rendered, it is considered by the court that the plaintiff in error recover against the defendant in error the sum of five hundred dollars with interest thereon, to be computed after the rate of six per centum per annum, from the 1st day of April, 1865, until paid, together with his costs by him expended in the said circuit court; all of which is ordered to be certified to the said circuit court of the city of Richmond.

Judgment reversed.

228 *Wroten's Ass'nee v. Armat & als.

January Term, 1879, Richmond.

The Exchange Hotel Company of Fredericksburg, in order to complete their building, which they had commenced before the war, in June, 1866, borrowed of the National Bank of Fredericksburg \$10,000, to be secured by a deed of trust on the property, and by direction of the company the president and secretary of the company, by deed dated the 27th of June, 1866, and duly recorded, conveyed the property in trust to secure the money. The company then employed Wroten, a builder, to complete the building, and contracted to give him a deed of trust upon it, subject to the first lien, to secure any balance due him on its completion. The company, out of the money borrowed, paid Wroten \$8,000, and when the work was completed there was due him \$5,791.50. He had recorded the contract to secure the mechanics' lien, and on the 1st of January, 1867, the company conveyed the property, subject to the lien of the first deed, in trust to secure the said balance. In April, 1870, judgment creditors of the hotel company whose debts were due before the first deed was made, filed their bill against the company, the bank, and Wroten, claiming that under the statute the deed to secure the bank enured to the benefit of all the creditors of the company being such at the time of its execution. And so the court held, and the property being sold under the decree, the proceeds were distributed *pro rata* among the plaintiffs and the bank. Afterwards the assignee in bankruptcy of Wroten filed a bill to review the decrees, and insisted that the deed to secure the bank was null and void on the ground that under the act of Congress under which the bank was organized it was forbid to lend money on real estate, and also on the ground that as against Wroten's mechanics' lien the trust in favor of the bank extended only to the property in the condition it was when the deed was executed—**Held:**

1. **Statutes—Construction.**—The act of Congress of the 3d of June, 1864, Revised Statutes of the United States, §§ 5136-5137, under which

229 "this bank was organized, does not imply a negation of the corporate power on the part of the national banks which might be organized under it to make a loan of money on real estate; does not annul any loan made by any such bank; or release or discharge any deed of trust or mortgage on real estate taken by the bank to secure the payment of such loan.

2. **Same—Same—Prohibition Clauses.**—If the act of Congress plainly prohibited a bank organized under it to take a deed of trust or mortgage to secure a loan in any case, or make it penal to do so, such a provision could only have been intended for the benefit of the government, which might or might not, at its pleasure, enforce the forfeiture; and it could not be avoided by the borrower or his creditors.

3. **Same—Contracts in Contravention of—Estoppel.**—Wroten having contracted to

***Statutes—Contracts in Contravention of—Validity.**—The principal case was cited in *Niemeyer v. Wright*, 75 Va. 239, to support the decision that the mere imposition of a penalty by statute for doing or omitting to do an act, does not of itself, in every case, necessarily imply an intention by the legislature, that every such contract in contravention

complete the building with a full knowledge of the means which had been used to raise the money to pay for the work, and having received \$8,000 of said money, is equitably estopped from claiming against the deed of trust executed to secure the return of the money loaned.

4. **Liens—Priority.**—The contract between Wroten and the hotel company having been made and recorded after the deed to secure the loan to the bank, his mechanics' lien was posterior and subordinate to the lien of the bank under the deed to secure it, and was in fact merged in the lien by deed of trust afterwards taken by him to secure the same debt, in which the prior lien of the bank was expressly recognized.

5. **Same—Extent.**—The lien of the bank under its deed of trust extended to the whole property as it was at the time of the sale, and was not confined, as against the mechanics' lien, to the property as it was when the deed was made.

6. **Appeal—Review—Time to Object.**†—An objection that the deed of the 27th of June, 1866, did not have affixed thereto the seal of the hotel company, nor was said hotel company by name a party to it, never made in any of the pleadings or proceedings in the cause, and only in the petition for an appeal, comes too late, and will not be considered.

This is an appeal from a decree of the circuit court of Spottsylvania county, rendered on the 30th of December, *1874, dismissing a bill of review filed by the appellant, A. B. Botts, assignee in bankruptcy of George W. Wroten, to two decrees of said court, rendered in the case of *Armat and others v. The Exchange Hotel Company and others*, which was pending in the said court.

On the 2d day of April, 1870, the said Armat and others filed their bill in the said court against the said Exchange Hotel Company and others, in which bill they stated in substance, among other things, that they were judgment creditors of the said hotel company, a joint stock company with its principal office in the corporation of Fredericksburg, and that the debts for which the said judgments were obtained were contracted by said company prior to the 1st of January, 1863, and were due and owing at that time (copies of which said judgments were filed as a part of the bill); that upon some of said judgments executions had been issued, but no personalty had been found out of which they could be satisfied, so that no recourse was left to secure the payment of the same but a resort to a court of equity to enforce the liens of the said judgments on the real estate of the said hotel

of statute shall be void in the sense that it is not to be enforced in a court of justice. Principal case was also cited approvingly in *Fayette Land Co. v. R. Co.*, 93 Va. 289.

***Mechanics' Lien—Priority.**—See 2 Min. Inst. (4th Ed.) 327.

†**Appeal—Review.**—On a bill of review, the court will not only correct errors of law apparent in the decrees in the cause, but will look into all "the pleadings and proceedings," and correct whatever error of law there may be in the record. *Pracht & Co. v. Lange*, 81 Va. 711, citing principal case. *Daingerfield v. Smith*, 83 Va. 81.

company in the town of Fredericksburg, the said liens having been regularly docketed according to law; said real estate being described in the plat of said town as lot No. 39. That the said hotel company contrived and combined with the National Bank of Fredericksburg to give it a preference over its other creditors, to-wit: the plaintiffs, and in fulfillment of the intent and purpose to give preference to the said National Bank of Fredericksburg, did on the 27th day of June, 1866, execute to Charles Herndon and A. K. Phillips, as trustees, a certain deed of trust (marked E and filed with the bill), whereby the said bank was sought to be preferred and

secured to the extent of \$10,000 to the
231 injury of *the plaintiffs, who charged that the said bank ought not have such preference, nor indeed any preference at all, but that the said deed ought to be so construed in a court of equity as to enure to the benefit ratably of the plaintiffs as creditors of the said company. That the said hotel company again on the 1st of January, 1867, executed another deed of trust to Charles Herndon, trustee, to secure to the said George W. Wroten debts or a debt of that date amounting to \$7,528.95, both of which deeds were duly recorded, and if executed as written, would create a preference as against the debts secured by the judgment liens of the plaintiffs, and so defeat their just rights in the premises, (a copy of the last mentioned deed, marked F is filed with the bill). That the aggregate of the rents and profits of the said real estate will not in five years satisfy the said judgments. And the plaintiffs prayed in substance, among other things, that the said Exchange Hotel Company of Fredericksburg, a corporation organized under the laws of Virginia, and the National Bank of Fredericksburg, a corporation organized under the laws of the United States, and George W. Wroten in his own right, and Charles Herndon and A. K. Phillips as joint trustees, and Charles Herndon as the sole trustee, might be made defendants to the said bill; that certain accounts might be taken by a commissioner of the court; that the deed first herein referred to, in which said Herndon and Phillips were trustees, might be so construed and executed as to give no preference to the said National Bank over the said plaintiffs, who were creditors of the said Exchange Hotel Company existing at the time said lien or incumbrance was created, but that the same should be made to enure to the benefit ratably of the said plaintiffs and any and all creditors of the said company existing at the time such lien

232 or incumbrance was *sought to be created; that the said trustees might be restrained from executing the said trust; that the court would take charge of the trust property and dispose of the same, and that the plaintiffs might have general relief.

Exhibits A, B, C, and D filed with the bill were copies of the plaintiff's judgments, respectively, against the Exchange Hotel Company, obtained in 1866-7-8.

Exhibit E therewith filed is the deed of trust therein mentioned, dated the 27th day

of June, 1866, between William T. Hart, president, and Robert W. Adams, secretary and treasurer of the Exchange Hotel Company of Fredericksburg, of the one part, and Alexander K. Phillips and Charles Herndon of the other part, which deed was executed by the said parties of the first part, acknowledged by and certified as to them and duly recorded in the clerk's office of the corporation court of Fredericksburg on the 28th of June, 1866. It recites "that whereas the stockholders of the said Exchange Hotel Company, in a general meeting held on the 17th of July, 1865, authorized and empowered the president and directors of the company to negotiate a loan for the purpose of completing the building now on their lots in Fredericksburg, and at the same time authorized said president and directors to cause a lien or mortgage to be executed on all their property to secure any such loan; and whereas a loan for \$10,000 has been negotiated at twelve months time, and the president and directors of said company did, on the 26th day of June, 1866, at a meeting held by them direct the president and secretary to execute a negotiable note for the amount of said loan at twelve months, and also to execute a deed of trust on all the property of said company to secure

said note so given for said loan"—The
233 deed, therefore, "witnesseth *that the said William T. Hart, as president, and the said Robert W. Adams, as secretary of said company, do on behalf of said Exchange Hotel Company grant and convey unto the said Phillips and Herndon all the real estate belonging to the said company, situated in the town of Fredericksburg, that is to say," &c., describing the said property—"In trust to secure the payment of a negotiable note executed this day by William T. Hart, president of the Exchange Hotel company, endorsed by Robert W. Adams, secretary of said company, payable and negotiable twelve months after date at the National Bank of Fredericksburg for the sum of \$10,000, or any note which may be hereafter given for the continuance or renewal of the said note of \$10,000, in whole or in part. And should default be made by the said Exchange Hotel Company in the payment of the said note," &c.; provision is then made in the deed for the sale of the trust subject for the satisfaction of the purposes of the trust. Then follows the concluding sentence of the deed, "witness the following signatures and seals," and then said signatures and seals.

"Wm. T. Hart, President, [Seal.]
 R. W. Adams, Secretary, [Seal.]"

Exhibit F, filed with the bill, is the deed of trust therein mentioned, dated the 1st day of January, 1867, between the Exchange Hotel Company of the town of Fredericksburg, of the one part, and Charles Herndon of the other part, which deed was executed by the said parties of the first part, acknowledged by them and duly recorded in the clerk's office of the said corporation court the 23d of January, 1867. It recites "that whereas the stockholders of the said Exchange Hotel Company, in a general

234 meeting held on the 1st *day of August, 1866, authorized and empowered the president and directors of the company to contract with a competent workman for the completion of the buildings of said company, so as to make the same a first-class hotel, and to carry out this object the president and directors were empowered to execute a deed of trust on the property of the company to secure to the said contractor any balance that might be due him after the said company should have paid him the money which said company had in hand upon the completion of said work; and whereas the said president and directors, acting in accordance with the instructions of said stockholders did, on the 4th day of August, 1866, enter into a contract with one George W. Wroten, a master-workman and contractor, to complete the hotel building in a proper manner, which he agreed to do on or before the 1st day of December, 1866, for which the said hotel company were to pay to the said contractor the sum of \$12,279 as agreed on in said contract; and whereas it was afterwards found necessary to make another and further contract with said George W. Wroten for sundry other work on said hotel building, not embraced in said first contract, which other and further work was to cost the said hotel company an additional sum of \$1,512.50; and whereas the said George W. Wroten has fully completed his part of the contract, and the said company are now justly indebted to him in the sum of \$5,791.50, which, according to said contract, is payable in instalments with interest thereon at ten per cent. per annum; all of which will more fully appear by the following statement which has been duly examined by the president and secretary of said company and found to be correct, viz:” Here follows the statement, after which it is further recited in the deed: “And whereas the said hotel company has this day executed

235 *its notes to the said George W. Wroten for the balance due him under said contracts, payable one, two, three, four and five years from this date, and in accordance with said contracts said hotel company is to secure said notes.” Then the deed thus proceeds: “Now this deed witnesseth that the said Exchange Hotel Company, by its president and secretary, for and in consideration of the premises, doth grant with general warranty unto the said Charles Herndon all the real estate belonging to the said company, which said real estate is subject to a lien heretofore executed by said company to A. K. Phillips and Charles Herndon on the 27th day of June, 1866, situated in the town of Fredericksburg, that is to say,” &c., describing the said property, “in trust to secure the payment of five several notes, executed this day by the Exchange Hotel Company, payable respectively at one, two, three, four and five years after date, to George W. Wroten or his order, payable and negotiable at the National Bank of Fredericksburg,” &c., “or any note or notes which may be hereafter given for the continuance or renewal of the said notes in whole

or in part, and should default be made by the said hotel company in the payment of any of said notes six months after the same may be due,” &c. Provision is then made for the sale of the trust subject and the disposition of the proceeds of sale in the manner prescribed by the deed. Then follows the concluding sentence of the deed and the signatures and seals thereto, as follows:

“In witness whereof, William T. Hart, the president of said hotel company, and R. W. Adams, the secretary thereof, have hereunto affixed their signatures and the seal of the company.

“Wm. T. Hart,
President Exchange Hotel Company, [Seal.]

R. W. Adams,
Secretary Exchange Hotel Company,
[Seal.]”

236 *On the 1st day of June, 1870, the defendants, G. W. Wroten, A. K. Phillips, the National Bank of Fredericksburg, and the Exchange Hotel Company filed their answers, by leave of the court before granted them.

In the said Wroten's answer he states in substance, among other things, that the said judgments in favor of the plaintiffs were docketed about the 13th of March, 1868. “But he states that he is a mechanic by trade, and that under an order of said hotel company he was duly employed as such by a contract in writing, duly executed on the 4th day of August, 1866, and 2d October, 1866, to repair and rebuild said hotel, which had not been completed ante bellum; and the said hotel being situated in the town of Fredericksburg said contract, when placed upon record, became entitled to all the protection of the laws of Virginia in regard to the liens of mechanics, (see Code of Virginia, p. 568), and was thus a lien upon all the said hotel and land upon which it was erected, from said date until six months after maturity of the notes executed in payment of said contract, which event has not yet happened. So that your respondent's lien upon said property for said balances, some \$5,791.50, with interest accrued, is clear under his said recorded contract, from the 2d of October, 1866, when it was placed upon record (see Exhibit No. 1) and is prior in time and supreme in equity to any and all the judgments of the said plaintiffs. Your respondent further answering states that in pursuance of said contract, and as one of its provisions, the said hotel company was bound to execute the further security to your respondent of a deed of trust on the said property to secure to him the deferred payments upon his said contract, the object being to save the necessity, in case

237 of their failure to pay said amounts as they became *due, of a resort to a court of equity to enforce his said mechanics' lien against said property, but to provide the easy and speedy method of enforcement by deed of trust for the same, and accordingly the deed of trust of the 1st of January, 1867, was executed for said purpose. You respondent believes that the 8th sec. of ch. 65 of the Code of Virginia, p. 380, does forbid a hotel company to execute a deed to create

preferences among its creditors, and that such deed may have to be construed in favor of all the creditors existing at the time. But if this be so there is a manifest equity enuring to your respondent's claim in this that said lien of the deed of 27th June, 1866, was a lien upon an unfinished, dilapidated and useless building, and should be confined to such security upon the ascertained value of said property on the 27th day of June, 1866, the date of said deed, while the work and labor and materials furnished by your respondent under his said contract for construction and repairs of this property evolved order out of this chaos," &c.

Exhibit No. 1, filed with said answer, is a certificate of the clerk of the corporation court of Fredericksburg "that certain articles of agreement, bearing date on the 14th of August, 1866, between George W. Wroten, contractor of the first part, and the president, directors and company of the Exchange Hotel Company, of Fredericksburg, of the second part, together with certain specifications thereto annexed, were received in the office and admitted to record on the 2d day of October, 1866."

In the said Phillips' answer he declines to accept or execute the trusts confided to him, jointly with Charles Herndon, by the said deed dated the 27th of June, 1866, and says that he has executed a deed releasing all interest under the said deed to the said C. Herndon, who is willing to execute the trust.

238 *In the answer of the National Bank of Fredericksburg, or the paper which was filed as such, it being contended by the counsel for the appellees that said paper was not in fact such answer, it was, among other things, in substance, said "that the Exchange Hotel Company is justly indebted to this respondent in the sum of \$11,297.90 as of the 13th July, 1870. Said hotel company desiring to rebuild and finish its hotel property in Fredericksburg, then in a ruinous and dilapidated condition, borrowed of your respondent the sum of \$10,000 for twelve months at 9 per centum per annum. Your respondent being advised by counsel that under the statute law of Virginia it was legal and right for your respondent to lend to said company and for said company to borrow at that rate, it was made a condition of said loan that a deed of trust should be given on the hotel property to secure said amount, and that the amount so lent should be expended on the property in work and material. Neither this respondent nor any of its officers had knowledge that the Exchange Hotel Company owed one cent at the date of said loan, to-wit: on the 27th June, 1866. Even if the complainant's debts were all due before the 27th June, 1866, it is submitted that the law in reference to a deed from a joint stock company only prevented a preference among creditors existing, and did not prevent the contracting of a new debt for the purpose of adding to the value of the property." The manifest intention of the legislature was to prevent joint stock companies in failing circumstances from preferring one

creditor or class of creditors to another. The subscription to the said answer is: "National Bank of Fredericksburg, by A. K. Phillips, President"; and it was sworn to by him. No seal was attached to the said answer.

In the answer of the Exchange Hotel Company they *say "that they had partially built in Fredericksburg, before the late war broke out, a large and commodious building as a hotel; that owing to the war they were obliged to abandon said property in a half finished state; that the building, so partially completed, was occupied alternately by the Confederate and Federal forces, and was used for some time by the Freedman's Bureau as a receptacle for the colored people who flocked to town. After the termination of the war the property, thus in a ruinous condition, was scarcely of any value; it would not, in its then condition, bring enough yearly to pay insurance and taxes, and the character of the property was such that it was of no use as it stood to any one, and it required so large an outlay of money to put any value on it that no person was willing to have anything to do with it. In this dilemma the board of directors, after much inquiry, did the only thing that was feasible, to-wit: they endeavored to negotiate a loan in order to rebuild and repair the property, for no builder or contractor would agree to undertake the work unless a good part of the contract price was paid in money. Under these circumstances, and for the sole purpose of giving value to the property, the said company effected the loan of \$10,000, to secure which the deed of trust of the 27th June, 1866, was executed. This loan was contracted by the authority of the stockholders of said company in general meeting; and after the loan was effected and the deed of trust given a general meeting of the stockholders of said company was called," and ratified what had been done. "The parties lending the money refused to do so unless they were secured by first lien on the property; and respondent could get the necessary money from no one who did not demand and require such first lien. This money, so borrowed, was expended almost entirely on the property, thus enuring

240 *to the benefit of all concerned. Most of said money was paid to contractor G. W. Wroten, but the cost of rebuilding and refitting said property, so as to make it what it was designed to be—a first-class hotel—was very large, and respondent had to give, and did give, the said deed in pursuance of their agreement to secure to said contractor the residue of his contract price. For a year or so after the completion of the building on said property respondent rented it out for a price that justified them in believing that they would be able to pay off all their indebtedness in a few years. They paid all taxes and insurance and the interest on the said \$10,000, and they paid off entirely to the said G. W. Wroten the first of his debt secured in the said deed of trust, some \$1,400, and they have also paid some \$500 on the second debt

of said G. W. Wroten, so secured as aforesaid, which said second debt is held by Messrs. Thomas & Son, of Baltimore, to whom it had been assigned by said G. W. Wroten." The said answer was signed, but not sealed, by "W. R. Mason, Pres't Exchange Hotel Co.," and "R. W. Adams, Sect'y & Tres. Exchange Hotel Co.," and sworn to by said Adams.

On the 9th day of May, 1870, shortly after the institution of the above-mentioned suit, another suit was instituted in the same court, between the same parties, involving nearly the same subject of controversy, the style of which was "Armat v. Phillips & Herndon, trustees," which was afterwards, to-wit on the 23d of July, 1870, ordered to be heard together with the before mentioned cause of "Armat v. Exchange Hotel Co.," &c. It is unnecessary to state all the proceedings had in the said case of "Armat v. Phillips & Herndon, trustees," before it was heard with the other case, though it may be proper to state some of them; at least the purport of some

241 of the *evidence of Robert W. Adams, whose deposition was taken in the case. He was secretary and treasurer of the said Exchange Hotel Company when his deposition was taken, on the 15th of July, 1870, and had been for about four years previously, and was in the said office when the said hotel company negotiated a loan with the National Bank of Virginia for \$10,000. The note was at twelve months, and the rate of interest was nine per cent. He was in office when the contract was made with Wroten for repairing the hotel. The deferred payments to him were to bear ten per cent. interest, which was included in the notes. When the repairs of the property were first completed it rented for \$2,000 for the first year and \$2,500 per annum for the next four years; but before the lease expired the tenant failed, and the property was afterwards rented for a much smaller sum. The contract with the said national bank for the said loan of \$10,000 was ratified by a meeting of the stockholders of the said hotel company as of 1st August, 1866. Of the said loan the sum of \$8,000 was paid to Wroten, the contractor, as the work progressed. The balance went towards paying taxes, insurance, and other incidental expenses of the company.

On the 23d of July, 1870, the matters in controversy in the said two causes being the same, it was ordered that they be heard together. Whereupon they accordingly came on to be heard together, when the court, without then deciding anything but what followed, decreed, among other things, that one of the commissioners of the court should ascertain and report what amount was originally borrowed from the National Bank of Fredericksburg by the Exchange Hotel Company, and how that amount was expended, and the amount then due, of principal and interest, on said debt.

specifying in the account the rate of 242 interest received *by said bank; also, the time of the creation of the debts due the complainants, and a full statement of the amounts then due on all the debts of the Exchange Hotel Company, &c. And the court, among other things, further decreed

that Charles Herndon should sell the property of the Exchange Hotel Company in the proceedings mentioned in the manner and on the terms mentioned in said decree, and report his proceedings to the court.

On the 11th day of October, 1870, Commissioner A. W. Wallace made his report, in pursuance of the last-mentioned decree, showing, among other things, that the amount originally borrowed from the National Bank of Fredericksburg by the Exchange Hotel Company was \$10,000, and that the said amount was to bear interest at the rate of nine per cent. per annum; that the first year's interest was deducted by the bank at the time of the loan, so that the company received only \$9,100. The commissioner returned with his report a statement, marked B, furnished by the secretary of the Exchange Hotel Company, showing how the amount borrowed from the bank was expended. Also, the deposition of G. W. Wroten, to the effect that \$8,000 was all that was spent in repairing the hotel property.

On the 30th day of November, 1870, Charles Herndon, who had been decreed to sell the said property, as trustee, reported that he had offered it for sale at public auction, when it was cried out to George W. Wroten at \$12,000 upon the terms mentioned in said decree, but that said Wroten had failed to comply with the terms of the sale, and the trustee did not, therefore, recommend a confirmation of the said sale.

The said Wroten also presented a petition to the court, insisting, for the reasons therein stated, that the said sale should be confirmed, and that he might be permitted to comply with the terms thereof upon its confirmation.

243 *On the 17th day of December, 1870, the said causes came on to be further heard on the papers formerly read, &c. On consideration whereof the court, being of opinion that the lien created by the deed of trust of the 27th June, 1866, upon the real property of the Exchange Hotel Company in the bill and proceedings mentioned, enured ratably to the benefit of all the creditors of said company existing at said date, and, therefore, that the complainants were entitled to participate ratably with the National Bank of Fredericksburg in the proceeds of the sale of the said real property; and the court being of opinion that the debt due by said company to G. W. Wroten must be postponed until the debts before mentioned are satisfied out of said trust subject; and the court being of opinion that the said decree of the 23d July, 1870, so far as it undertook then to order a sale to be made of said real estate, was inadvertently entered, declined to confirm the sale thereunder reported by the trustee, Charles Herndon; the court accordingly decreed that the said Herndon, who was thereby appointed a commissioner for that purpose, should sell the said real property at public auction in the manner and on the terms prescribed by the said decree.

On the 27th day of April, 1871, Commissioner Herndon reported a sale made by him, in pursuance of the last-mentioned decree, to Jacob Lorne, as agent and trustee for the

preferred creditors, he being the highest bidder at public auction, at the price of \$10,000, and recommended a confirmation of the said sale.

On the 19th day of May, 1871, the court decreed a confirmation of the said sale and the application of the proceeds of sale according to the rights of the parties under the previous adjudications of the court in the said causes.

On the 11th day of November, 1871, the causes came on to be heard upon the **244** papers formerly read and the *final report of Commissioner Herndon; and it appearing from said report that a final distribution of the funds in the said causes had been made in accordance with the decrees theretofore rendered therein, the said causes were ordered to be discontinued.

On the 9th day of June, 1873, on the motion of A. B. Botts, assignee in bankruptcy of George W. Wroten, leave was granted him to file a bill of review in said causes; whereupon he filed the same.

In the said bill of review the complainant, after setting out the proceedings in the said causes, or such of them as he deemed material to be set out, insisted that the said decrees of December 17, 1870, and May 19, 1871, are erroneous and ought to be reviewed and reversed for errors of law and fact apparent on the face of said decrees, in this, that the said loan of \$10,000 was made by the said bank to the said hotel company in consideration of the security given by the said company contemporaneously with the said loan by the deed of trust of June 27th, 1866, on the real property of the said company, whereas the act of congress of the United States commonly called the National Bank Act, approved June 3, 1864, under which act and the acts amendatory thereof the said National Bank of Fredericksburg was transacting its business and received all its powers, prohibited said bank from lending money on the security of real estate, so that the said deed of June 27th, 1866, was illegal and void, and notwithstanding the complainant was entitled to satisfaction of the balance due by said hotel company to said Wroten out of the real property of said company by virtue of the mechanics' lien of said Wroten and the deed of trust executed for his benefit, in the proceedings mentioned. And the complainant prayed that the National Bank of Fredericksburg, the Exchange Hotel Company of Fredericksburg, and others might be made defendants to the said bill of review;

245 *that the said decrees of December 17, 1870, and May 19, 1871, might be reviewed and reversed, and that he might have such other relief, special or general, as to the said court might seem proper.

Process having been issued, executed and returned on said bill of review, the National Bank of Fredericksburg filed a demurrer, plea and answer thereto. The substance of the plea and answer was that the said defendant never filed, nor authorized any one to file, any answer in said cause; and it denied that the answer filed in said cause, purporting to be its answer, and sworn to by A. K.

Phillips, was its answer; that respondent had no notice of said answer and had never ratified the same; that he repudiated it as an unauthorized act; and that respondent's seal was never attached thereto, which was necessary to make it respondent's answer. And said respondent denied "that said deed of trust of the 27th June, 1866, was an illegal act, but the same was executed in good faith and in strict accordance with law to secure a note executed by said Exchange Hotel Company; and that the conduct of this respondent touching said loan was in no way in violation of its charter or ultra vires, as is claimed by complainant; but said loan was made on personal security, and said deed of trust was the independent act of the grantor."

On the 30th day of December, 1874, the cause came on to be heard upon the said bill of review and the said answer of the National Bank of Fredericksburg thereto, and was argued by counsel. Upon consideration whereof the court being of opinion that there was no error in the decrees sought to be reviewed, and that the said bill of review ought to be dismissed, decreed its dismissal accordingly, and that the complainant pay the costs out of any assets of George W. Wroten in his hands.

From the said decree dismissing the **246** said bill of review *the complainant therein applied to a judge of this court for an appeal; which was accordingly allowed.

Goodrich, Little and Wallace, for the appellant.

Marve and Fitzhugh, for the appellees.

MONCURE, P., delivered the opinion of the court. After stating the case he proceeded:

Three questions are presented to us for our decision in this case, either one of which seems to be conclusive of it. They are: first, that upon general principles the National Bank of Fredericksburg is entitled to priority of payment of the debt due to it by the Exchange Hotel Company of Fredericksburg over the debt due by the said company to the appellant, A. B. Botts, as assignee in bankruptcy of George W. Wroten, which said debts are in the proceedings mentioned and described; secondly, that upon the principle of equitable estoppel, such right of priority certainly exists; and, thirdly, that the appellant was certainly entitled to no relief by bill of review. We will consider these questions in the order in which they are above stated, and.

First. That upon general principles the National Bank of Fredericksburg is entitled to priority of payment of the debt due to it by the Exchange Hotel Company of Fredericksburg over the debt due by the said company to the appellant, A. B. Botts, as assignee in bankruptcy of George W. Wroten.

The deed of trust under which the said bank claims, bearing date on the 27th day of June, 1866, having been duly recorded on the 28th of June, 1866, while the deed of trust under which the said assignee of Wroten claims bears date on the 1st day of January,

1867, and was recorded on the 23d of January, 1867, the maxim of *law, prior in tempore potior in jure, would plainly show the right of priority of the said bank, unless there be some provision of the charter of the bank which disables it from claiming under the deed of trust executed for its security by the hotel company as aforesaid.

Accordingly it is contended by the learned counsel for the appellant that there is some such provision of the said charter. Let us now enquire and determine whether there is or not.

There can be no question but that a corporation is the creature of its charter, from which it derives not only all its powers, but its very existence. It certainly has no power which its charter denies to it. But in the absence of such denial it has certain implied powers which are as complete as if they were expressly given or affirmed in the charter. One of these powers is the power to acquire estate, real or personal. Another is the power to acquire a credit by bond, bill of exchange or other chose in action, and to obtain security for the payment of such credit by mortgage, deed of trust, or other security. That a bank, the main object of whose creation is to loan out money, may acquire such a credit and obtain such security, would be a plainly implied power in the absence of a plainly expressed negation of such a power on the face of the charter of the bank. And if the charter could be fairly construed so as to make it consistent with the existence of such a power, it would accordingly be so construed.

Now let us examine the charter in this case and see if there be anything, and if anything what, which negatives the power of the bank to acquire such a credit or obtain such a security.

The National Bank of Fredericksburg was organized very soon after the war between the Confederate States and United States, under the act of the 3d of June, 1864, (see Revised Statutes of the United States, title 62, p. 998, *§ 5136,) which declares that "upon duly making and filing articles of association and an organization certificate, the association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power," &c. The seventh enumeration of express powers is in these words:

"Seventh. To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, or bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this title.

Section 5137 declares that "a national banking association may purchase, hold, and con-

vey real estate for the following purposes, and for no others:

"First. Such as shall be necessary for its immediate accommodation in the transaction of its business.

"Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

"Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

"Fourth. Such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts due to it.

"But no such association shall hold the possession of any real estate under mortgage, or the title or possession of any real estate purchased to secure any debts due to it, for a longer period than five years."

These are the only provisions of the said act of congress which can have any effect to imply a negation of *corporate power on the part of the national banks which might be organized under it to make a loan of money on real security. Can they have any such effect? Can their effect be to annul any loan made by any such bank? to release and discharge any deed of trust or mortgage on real estate taken by the bank to secure the payment of any such loan?

We are of opinion that they cannot have any such effect.

It will be observed that none of these provisions prohibit the banks organized under the said act of congress to loan money on real estate, nor impose any penalty on the act of any such bank in so doing. The most they do is to declare that such banks shall have power to loan money "on personal security." Does this exclude, by necessary implication, the common-law power of such a corporation to loan money on real security, or any other security which would be satisfactory to the bank or might be desired by any persons bound as endorsers for said loan, for their indemnity? And that in the enumeration of the purposes for which, and no others, such an association may purchase, hold, and convey real estate are embraced the following, viz: "Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted." See, also, the third and fourth specifications. How long previously contracted? A year, a month, a week, a day? There is no specification of time which must elapse between the loan and mortgage or deed of trust to make the latter valid. Was it not the object of the specification to indicate that the banks organized under the said act were not to engage in the business of speculating in lands, but in the business of making loans on bills of exchange and other negotiable securities, as incidental, however, to which latter business they were to have the power

to take mortgages and deeds of trust on real estate for the better *security of said loans, and any persons bound as endorsers for said loans were to have the power to take such mortgages and deeds of

trust for their indemnity. Indeed, the third and fourth specifications expressly legalize conveyances of real estate made to any such bank in satisfaction of debts previously contracted in the course of its dealings, or such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts due to it.

But suppose the act of congress plainly prohibited a bank organized under it to take a deed of trust or mortgage to secure a loan in any case, or made it penal to do so. Would it follow that the deed or mortgage in such case would be void, and that the borrower would be entitled to have the money loaned and at the same time to hold on to the property which he stipulated to give or to pledge for its security? For whose benefit could any such prohibition have been made, or such penalty imposed? Certainly not for the benefit of the borrower or his sureties, contrary to his or their express contract, the benefit of which he or they had received. But such a provision could only have been intended for the benefit of the government, which might or might not, at its pleasure, enforce the forfeiture.

Let us now examine some of the authorities referred to on the subject, and see how far they tend to sustain these views.

In a case decided by this court, *The Banks v. Poitiaux*, 3 Rand. 136, it was held that under an act of assembly authorizing a bank to hold so much real property as may be requisite for its immediate accommodation, in relation to the convenient transaction of its business, and no more; the bank may purchase more ground than is necessary for the erection of a banking-house, build fire-proof houses on the vacant land, for the greater security of the banking-house, and sell them out to third persons. And

251 that, *even if the bank violated its charter in so doing, the only proceeding against it would be by quo warranto; and the purchasers of the houses cannot resist a specific performance of their contracts by alleging that the bank had exceeded its powers in erecting and selling the houses.

In another case decided by this court, *Rivanna Nav. Co. v. Dawsons*, 3 Gratt. 19, only three judges were present—Baldwin, Stanard, and Brooke. Baldwin, J., delivered an opinion, and the only one that was delivered in the case, in which he said: "But a general prohibition (to purchase real estate) would not be inferred from a mere partial enactment of the incidental common law power; as, for example, from a clause authorizing a bank, or insurance or manufacturing company, to purchase land for its necessary buildings. Such a clause, whether with or without limitation as to quantity or value, would not exclude the incidental power to take mortgages or other securities on real or personal estate for debts due the corporation, or assignments or conveyances of chattels or lands in commutation therefor." "To avoid altogether the contract of a corporation made in reference to the objects of its institution

is a measure of extreme rigor, and may be productive of great injustice to the corporation on the one hand, or to the other contracting party on the other. An incapacity to take will not even be inferred from an inhibition to hold, though the policy of the latter be to prevent the accumulation by the corporation of a specified description of property, if the purpose of the conveyance be a sale of the property by the corporation and the application of its proceeds to the objects contemplated by the charter. This proposition, reasonable in itself, may be fairly deduced from the cases of *The Banks v. Poitiaux*, 3 Rand. 136; *Leazure v. Hillegas*, 7 Serg. & Raw. 313; and *Baird v. The Bank of Washington*, 11 Id. 411." "At most, the

act is only voidable on the ground of 252 misuser or abuse of *the franchise, and cannot be drawn in question collaterally, especially by those having no longer any interest in the subject. *The Banks v. Poitiaux*, supra; *Silver Lake Bank v. North*, 4 John Ch. R. 370." Standard, J., concurred in the results of Baldwin's opinion. Brooke, J., dissented.

The cases of *Silver Lake Bank v. North*, 4 John Ch. R. 370; *Leazure v. Hillegas*, 7 Serg. & Raw. 313; and *Baird v. The Bank of Washington*, 11 Id. 411, above referred to, were cited and much relied upon by the learned counsel for the appellees in this case, and have an important bearing upon it.

In *The Silver Lake Bank v. North*, which was decided by that great judge Chancellor Kent, he said: "Another objection is, that the plaintiff had no right to take a mortgage concurrently with the loan, in order to secure it; and that their charter only authorized them to take mortgages for debts previously contracted. If this objection was strictly true in point of fact, I should not readily be disposed to listen to it. Perhaps it would be sufficient for this case that the plaintiffs are a duly incorporated body, with authority to contract and take mortgages and judgments; and if they should pass the exact line of their power, it would rather belong to the government of Pennsylvania to exact a forfeiture of their charter than for this court, in this collateral way, to decide a question of misuser by setting aside a just and bona fide contract. But if we were driven to that necessity we might, on colorable grounds, consider this to be a mortgage to secure a debt previously contracted, for it is in proof that previous to the date and execution of the mortgage the plaintiff had agreed to loan the money; and it was loaned and paid when the mortgage was delivered. The debt may be said to have been contracted for at the time of the agreement, and the mortgage taken for its security. But I do not rest

253 on any verbal criticism *of the kind.

If the loan and the mortgage were concurrent acts, and intended so to be, it was not a case within the reason and spirit of the restraining clause of the statute, which only meant to prohibit the banking company from vesting their capital in real property and engaging in land speculations. A mortgage taken to secure a loan, advanced bona fide as

a loan, in the course and according to the usage of banking operations, was not, surely, within the prohibition."

In *Leazure v. Hillegas*, supra, the act of 17th March, 1787, enabled the Bank of North America to have, hold, purchase, &c., lands, &c., and also to sell, &c., the same lands, &c., provided that such lands, &c., which the said corporation was thereby enabled to purchase and hold, should only extend to such lots of ground and convenient buildings, &c., as they might find necessary for carrying on the business of said bank, &c., and should actually occupy; and to such lands and tenements as were or might be bona fide mortgaged to them as securities for their debts. It was held that the bank might purchase absolutely lands in a distant county which they did not occupy, though their title, like that of an alien, is defeasible by the commonwealth; and if they convey to a third person without claim by the commonwealth, such third person holds the same estate defeasible in like manner. The unanimous opinion of the court in the case was delivered by Tilghman, C. J.

In *Baird v. The Bank of Washington*, supra, it was held, that where, by the act of incorporation, a bank is empowered to hold "such lands as are bona fide mortgaged or conveyed to it in satisfaction of debts previously contracted in the course of its dealing," it has a general power to commute debts really due for real estate; and this power does not depend upon whether, in the opinion of the jury, the debt was in danger and prudence required that the real estate should
254 be taken in satisfaction *of it. But it seems that even if the bank could not hold such real estate the acquittance of the debt would not be void and the parties remitted to their original rights; for the bank may take for the benefit of the state, which alone can take advantage of the defect of the title. It seems, too, that if the conveyance was not directly to the bank, but to trustees with a view not to permanent ownership, but to raise money by a sale of the property, it would be forbidden neither by the spirit nor the letter of the act of incorporation.

Several cases have very recently been decided by the supreme court of the United States, construing the National Bank Act in question, which are entitled to great weight in the decision of the question now under consideration, as well because of the recency of their decision as because of their being adjudication of the highest, or, at least, one of the highest, tribunals in the land, construing an act of congress (the very act we have under consideration) which bears the same relation to that tribunal which an act of a state legislature bears to the highest appellate court of that state.

One of these is the case of *Gold Mining Co. v. National Bank*, decided in October, 1877, and reported in 6 Otto, p. 640, in which it was, among other things, held, that a defendant, sued by a national bank for moneys it loaned him, cannot set up as a bar that they exceeded in amount one-tenth

part of its capital stock actually paid in. The court in its opinion said: "The first objection to the recovery arises from the amount of the debt. The plaintiff is a national bank organized under the act of congress of June 3, 1864, with a capital stock of \$50,000. By the twenty-ninth section of that act it is provided as follows: The total liabilities to any association of any person or of any company, &c., for money borrowed, &c., shall at no time exceed one-tenth
255 part of the amount of *the capital stock of such association actually paid in. Rev. St. § 5200.

"After obtaining and holding to its own use the money, can the mining company be allowed to interpose the plea that the bank had no right to loan the money? In *Harris v. Runnels*, 12 How. U. S. R. 79, where the defendant sued upon a note, set up the illegality of its consideration, it was held that the whole statute then in question must be examined to discover whether it is intended to prevent courts of justice from enforcing contracts in relation to the act prohibited; and that when a statute prohibits an act, or annexes a penalty for its commission, it does not follow that the unlawfulness of the act was meant to avoid a contract made in contravention of it. A statute provided that slaves should not be brought into the state without a previous certificate signed by two freeholders. Slaves were brought in without such certificate and sold, and the purchaser was held liable for the purchase money. Mr. Justice Swayne said that the rule was allowed, not for the benefit of either party to the illegal contract, but altogether upon grounds of public policy.

"In *O'Hare v. The Second National Bank of Titusville*, 77 Pa. St. 96, the question was made on the statute we are considering, and it was objected that the bank could not recover the amount of the loans in excess of the proportion specified. The court held that the section of the statute referred to was intended as a rule for the government of the bank, and that the loan was not void. See also *Pangborn v. Westlake & al.*, 36 Iowa R. 546; *Vining & al. v. Bricker*, 14 Ohio State R. 331.

"We do not think that public policy requires, or that congress intended, that an excess of loans beyond the proportion specified should enable the borrower to avoid the payment of the money actually received by him. This would be to injure the in-
256 terests of creditors, stockholders, *and all who have an interest in the safety and prosperity of the bank."

The opinion of the court was delivered by Mr. Justice Hunt, and the judgment of the court below was unanimously affirmed.

In a still more recent case, decided by the same court during the present year (1878), and reported in the February number of *The Reporter*, vol. 5, p. 225, *Union Gold Hill Mining Co. v. Rocky Mountain National Bank*, the construction of the same provision of the same act of congress was involved, and the same decision was made, the same Justice delivering the opinion of the court,

affirming the judgment of the court below.

See also *Hayward v. National Bank*, 6 Otto, 611.

Several cases apparently to the contrary of the foregoing were cited in the argument of the learned counsel for the appellant, and especially the case of *Fowler v. Scully*, 72 Penn. St. (22 P. F. Smith) 456; also reported in 13 American Reports, 699. In that case the judgment of the court below was reversed by a divided court, Agnew, J., delivering the opinion of the majority, and two of the judges, Sharswood and Williams, dissenting.

Without further commenting, however, upon this and some other like cases referred to on the same side, it is sufficient to say that, in our opinion, if they be in conflict with this case, they are outweighed by the cases referred to on the other side, which we have already commented upon.

In the case under consideration the Exchange Hotel Company was incorporated just before the late war between the Confederate States and the United States to erect a first-class hotel in the city of Fredericksburg, which was deemed to be very important to the convenience and prosperity of that city. When the war came on, the hotel, about the

erection of which a great deal of money
257 had been expended, was *still unfinished, and was of little or no value in that unfinished state for any purpose. It was occupied during the war by Confederate and Federal forces alternately and during and after the war by colored, people who flocked to the said city. When the war was over and efforts were being used to improve the city, which had sustained great and almost irreparable damage, it was considered all-important to its prosperity that the Exchange hotel should be completed if possible, and as soon as possible. But it would require at least ten thousand dollars to complete it. And where to obtain that large amount in those trying times was a question very hard to be solved. It could not be obtained of an individual, and could only be obtained of the National Bank of Fredericksburg, whose stockholders, directors and officers were deeply interested in the prosperity of the city, and deeply anxious concerning it. It was their duty, of course, to do all they legally could to promote the prosperity of the city, and with that view, to aid in the completion of the Exchange hotel. They, therefore, agreed to loan \$10,000 to the company for twelve months, upon being well secured. But the difficulty was in procuring satisfactory security for so large a sum during the period and under the circumstances which then existed. To depend alone on personal security for so large a loan and so long a period of credit, would have been extremely hazardous, however good the apparent credit of the parties may then have been. It seemed to be absolutely necessary to the success of the object in view that security should be obtained by a lien on real estate, either directly by the bank itself, or indirectly by the maker and endorser of the note. Had such security been obtained by the

maker and endorser of the note by a deed of trust executed on the Exchange
258 *hotel for their indemnity, no question would have been raised as to the validity of the deed or of the note, to secure the payment of which it would have been executed. What difference can it make that the deed of trust was executed to secure the payment of the note without expressly and literally providing for the indemnity of the maker and endorser? Is not the effect precisely the same.

Then again, the money was not invested in the purchase of real estate. Nor was it borrowed upon the security of real estate for the purpose of being expended otherwise than upon that estate. On the contrary, it was borrowed to be expended upon that estate, in making it, from being an expensive and unproductive building, a first-class hotel, so necessary to the prosperity of the city, in which all its citizens were deeply interested, as was also the state at large. At that time no expenditure was considered more important for the city, or more prudent and proper, looking to the interest of the owners of the hotel. Property in and about Fredericksburg soon after the war took a rise, and it was hoped and believed would continue to rise, so that the completion of the hotel would be beneficial alike to its owners and the public. For several years after the hotel was completed it was leased out for a large sum, as much as \$2,500 per annum, which, if it had continued for a few years, would have enabled the company to have paid off all its debts. Had that reasonable and expected result followed, all would have commended the propriety and prudence of what was done in regard to the completion of the work. But instead of such a result there was a sudden and unexpected change in the times, and in the value of real estate in and about Fredericksburg. The tenants of the Exchange hotel became bankrupt, the property became of little value, and
259 could not be *rented out for little if any more than enough to pay the amount of taxes and insurance annually due thereon, and the sale of the property became necessary to pay the amount which had been borrowed to complete the hotel.

Is it reasonable or right that such an improbable and unexpected result should produce a radical and complete change in the rights of the parties?

We think not, and we are therefore of opinion that, upon general principles, the National Bank of Fredericksburg is entitled to priority of payment of the debt due to it by the Exchange Hotel Company of Fredericksburg over the debts due by the said company to the appellant, A. B. Botts, as assignee in bankruptcy of G. W. Wroten.

But even if we can be wrong in that conclusion, we think, secondly, that upon the principle of equitable estoppel such right of priority certainly exists.

The money was borrowed by the said company for the special and only purpose of completing the hotel, and was secured by a deed of trust upon the hotel. These facts were

known to George W. Wroten, the mechanic employed by the company to complete the hotel, who was to receive payment out of the money so borrowed, to the extent to which it could be spared for that purpose, and the balance which might remain due and unpaid to him, after receiving such payment, was to be secured to him by a lien on the hotel, subject expressly to a prior lien to the holder of the note for the money borrowed as aforesaid. Of that money the sum of eight thousand dollars was paid at once to George W. Wroten, and the balance was paid for insurance, taxes and other necessary expenses of the property. And more than six months after the date and recordation of the deed of trust executed to secure the return

of the money borrowed as aforesaid, 260 *the said Wroten received a deed of trust executed by the hotel company on their said property to secure the payment of the balance due to him, but expressly subject to the prior lien for the balance due of the money borrowed as aforesaid. Now is it not plain and clear that George W. Wroten, having contracted to complete the Exchange hotel with a full knowledge of the means which had been used to raise the money to pay for the work, and having received eight thousand dollars of the said money, is equitably estopped from claiming against the deed of trust executed to secure the return of the money loaned as aforesaid, the priority of which deed over that under which he claims is expressly admitted on the face of the latter? We certainly think so, and we consider it unnecessary to cite any cases on the subject. See *Insurance Co. v. Wilkinson*, 13 Wall. U. S. R. 222.

But even if we can be wrong in that conclusion also, we think, thirdly and lastly, that the appellant was certainly entitled to no relief by bill of review.

A bill of review can only be brought upon two grounds: First, error in law apparent upon the face of the decree; second, the discovery of new matter which could not have been used at the time of making the decree. Story's Eq. § 403, et seq.; 2 Rob. Pr. 414, old ed. The bill in this case was brought upon the former ground only—error in law apparent upon the face of the decree. Error in fact in a final decree can be corrected only on appeal to an appellate court, and not on a bill of review in the same court. What may be said to be "the face of the decree," within the meaning of the rule, is different in England and in this country. In England the decree embodies the substance of the bill, pleadings and answers. In the courts of the United States the decree usually contains a

mere reference to the antecedent proceedings 261 *without embodying them.

But for the purpose of examining all errors of law, the bill, answers and other proceedings are, in our practice, as much a part of the record before the court as the decree itself; for it is only by a comparison with the former that the correctness of the latter can be ascertained. Story's Eq. Pl. § 407; *Putnam v. Day*, 22 Wall. U. S. R. 60.

In this case we have endeavored to show

that there is no error in the decree complained of, and if we be right in that respect there can of course be no good ground for a bill of review. The only ground for relief relied on in the bill of review which we have not already disposed of is the claim to a mechanics' lien under the statute, by virtue of which priority seems to be claimed for Wroten, not only over Armat and the other judgment creditors of the hotel company, but also over the national bank. The articles of agreement between Wroten and the hotel company bore date on the 14th of August, 1866, and was recorded in the corporation court of Fredericksburg on the 2d day of October, 1866, from which latter date he was, no doubt, entitled to a mechanics' lien on the said property under the statute. But that lien was posterior and subordinate to the lien of the said bank under the said deed of trust in their favor, recorded on the 27th of June, 1866, and was in fact merged in the lien by deed of trust afterwards taken by Wroten as aforesaid to secure the same debt, in which deed it was expressly declared that the property conveyed was subject to the prior lien in favor of the bank as aforesaid. There is in the record no copy of the said articles of agreement; no doubt because the lien acquired by having them recorded was considered by Wroten as merged in the lien of the deed of trust as aforesaid. The effect of the said deed of trust of the 27th of June, 1866, was to enure to the benefit of all

262 *the then existing creditors of the hotel company pro rata, which effect was not denied by Wroten, though he was not one of the existing creditors, but was a subsequent creditor of the hotel company, and was thus postponed to all of the said existing creditors. But he contended that this right of the said existing creditors ought to be confined to the property in the condition in which it was on the 27th day of June, 1866, when the said deed of trust for the benefit of the bank was recorded. In this, however, he was clearly wrong, and the court below accordingly decided that the said existing creditors had priority over Wroten in regard to the property in the condition it was in at the time of the sale thereof under the decree. The property was first cried out to Wroten as the highest bidder therefor, and he claimed to be entitled to the property as such highest bidder, though he did not comply with the terms of sale. The court, however, held that the said sale was not valid, declined to confirm it, and decreed a resale, which was accordingly made. Thus the only apparent grounds of complaint which Wroten had to the final decree when rendered were the two before referred to, viz: that the prior lien of the existing creditors should be confined to the property in the condition it was in when that decree was rendered; and, secondly, that he ought to have been confirmed as purchaser. But he took no appeal and apparently acquiesced in the final decree until more than two years thereafter, when he had become a bankrupt, and when his assignee in bankruptcy filed the said bill of review. But did not therein rely on either of the said two grounds.

We think the court below did not err in dismissing the said bill.

It may be proper, before concluding our opinion in this case, to notice an objection taken, for the first *time, in the petition for an appeal in this case, that the deed of trust of the 27th day of June, 1866, before referred to, "did not have affixed thereto the seal of the said hotel company, nor was the said hotel company by name a party to the same." To the said objection a short but all-sufficient answer is, that it comes "too late." It was not made in the appellant's answer to the original bill, nor in the progress of the original suit, nor in the bill of review, nor in the proceedings on that bill. But, on the contrary, the validity of that deed, as a deed duly executed by the said corporation, was admitted by the appellant, either expressly or by plain implication, throughout the proceedings in the cause in the court below. Had such an objection been made in the court below while the cause was pending therein, all foundation for it, if any such in fact existed, might have been completely removed by the most conclusive proof exhibited by the National Bank of Fredericksburg. Instead of making the objection, if there was any foundation for it, at the proper time, the validity of the deed was, tacitly at least, admitted. There was a decree for a sale in pursuance of it, all the creditors of the hotel company, except the appellant, united in becoming purchasers of the property at said sale in proportion to their claims, credit was given by them on their said claims for their ratable proportions of the purchase money, the property was conveyed to them, a final decree was entered in the cause, and not until after a decree was made dismissing the bill of review filed by the appellant several years after the final decree was rendered in the original suit, was the objection aforesaid made. It would doubtless not be a difficult matter, even now, to show that the objection is unfounded; but as it is wholly unnecessary to do so, this opinion will, therefore, here be ended.

264 *We are of opinion that there is no error in the decree appealed from, and that the same ought to be affirmed; which is decreed accordingly.

Decree affirmed.

265 *Redd v. Ramey & als.

January Term, 1879, Richmond.

R obtains a decree against his guardian and his sureties for a certain sum of money; and sues out an execution, which is levied, and a forthcoming bond taken, and forfeited. The court on its chancery side, on notice to the obligors in the forthcoming bond, renders a judgment in favor of R against them; and this judgment is docketed—**Held:**

1. Judgment—Validity.—The judgment is a valid judgment, and having been docketed, it is

notice which will affect all subsequent purchasers of land from any of the defendants in the judgment.

This was a suit in equity in the county court of Henry county, afterwards removed to the circuit court of said county, instituted by Edmund B. Redd to enforce the satisfaction of a judgment recovered by him, against John H. Redd, Peter R. Ramey, Overton R. Dillard, and John H. Jamerson, upon a forfeited forthcoming bond. The object of the suit was to subject the lands held by said Ramey at the date of the judgment; a part of which land had been sold by Ramey to John R. Robertson, and of which John R. Robertson had sold a part to Henry C. Robertson. These and a number of others, including several brothers and sisters of the plaintiff, who held similar judgments against the same parties, were made defendants, and the prayer of the bill was that the land still in the possession of Ramey and that sold to John R. Robertson might be sold to satisfy the judgments recovered by the plaintiff and his brothers and sisters.

266 *John R. Robertson answered, averring he was a purchaser for valuable consideration fully paid up, and without notice, either actual or constructive, of the judgments of the plaintiff, or of any other person. He insisted that the judgments were rendered on forthcoming bonds taken on executions sued out on decrees in a chancery suit, and the judgments on the bonds having been rendered on the chancery side of the court, were of no force or validity, and when docketed did not amount to any notice whatever; and that neither the decrees nor the forthcoming bonds had been docketed.

The cause came on to be heard on the 8th of May, 1873, when the court held that the lien asserted by the plaintiff on the land of John R. Robertson had no legal validity, and dismissed the bill as to said John R. and Henry C. Robertson. And thereupon Edmund B. Redd applied to this court for an appeal; which was allowed. The only question in the cause in this court was as to the lien of the judgment; and on this question the facts are stated by Judge Christian in his opinion.

Kean & Davis, for the appellant.

James Alfred Jones, for the appellees.

CHRISTIAN, J., delivered the opinion of the court.

The court is of opinion that the decree of the circuit court of Henry county declaring that the lien asserted by the appellant has no validity, and dismissing his bill against the appellees, John R. and Henry C. Robertson, is plainly erroneous.

The orders of the circuit court of Henry entered on the chancery side thereof **267** on the 5th day of September, *1859, were in form and legal effect judgments, and cannot be held to be mere awards of executions.

The appellant, Edmund Redd, together with his brothers and sisters, had, in a chan-

cery suit instituted in the circuit court of Henry, recovered against their guardian and his sureties a decree for various amounts due to each of them—the amount decreed in favor of the appellant being \$583.23 with interest thereon from the 12th July, 1858, till paid. Upon this decree executions were sued out and levied, and forthcoming bonds taken. These forthcoming bonds were forfeited, and judgments entered in the following form in favor of the appellant, and in the same form as to the other wards:

This day came the plaintiff by his attorney, and it appearing to the satisfaction of the court that the defendants have had legal notice of this motion, they were solemnly called, but came not. And thereupon, on motion of the plaintiff, it is considered by the court that he recover against the defendants the sum of twelve hundred and eighty-nine dollars and fifty-two cents, the penalty of the said bond, and his costs by him about his motion in this behalf expended; and the said defendants in mercy, &c. But this judgment is to be discharged by the payment of six hundred and forty-four dollars and seventy-six cents with interest thereon, at the rate of six per centum per annum, from the 27th day of June, 1859, till paid, and the costs.

This judgment was regularly docketed on the lien docket in the clerk's office of the county court of Henry. From the date of such docketing it was a lien upon all the real estate of the defendants, and was notice to all purchasers of the same.

Before the act of 1842 (Sess. Acts, 1842, ch. 71, § 2) a forthcoming bond forfeited had the force of a judgment, and the clerk, on motion, awarded execution *thereon.

But by said act the bond forfeited and returned had no longer the force of a judgment; but the court was directed, after notice, to grant judgment and award execution.

It is now provided by statute "that the obligor in such forfeited bond shall be liable for the money therein mentioned, with interest thereon from the date of bond till paid, and the costs; the obligee or his personal representative shall be entitled to recover the same by action or motion." Code 1860, ch. 189, § 3. Although a forfeited forthcoming bond when returned to the clerk's office has the force of a judgment, yet there may be a judgment rendered by the court, by motion or action, thereon. See Code 1849, ch. 189, § 2.

It is plain, under these statutes, that the order referred to above is in terms and legal effect a judgment, and, being recorded, is a lien on all the lands of the defendants and those in the hands of purchasers conveyed after the docketing of said judgment.

The court is therefore of opinion that the decree dismissing the plaintiff's bill as to the purchasers, John R. and Henry C. Robertson, is erroneous. And for this cause the said decree must be reversed and the cause remanded.

The court is further of opinion that the said circuit court ought to have referred to

one of its commissioners, to ascertain and report, the lands in the hands of John H. Redd, Peter R. Ramey, Overton H. Dillard, and John H. Jamerson, and that said lien shall first be enforced against the lands of the principal debtor, John H. Redd; and if not sufficient to satisfy said lien, then to be apportioned among the sureties in accordance with the principles laid down by this court in *Horton & als. v. Bond*, 28

269 Gratt. 815; and for that *purpose all proper parties interested in such apportionment shall be brought before said circuit court.

The decree was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the decree aforesaid, and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the decree of the said circuit court of Henry county, declaring that the lien asserted by the appellant has no validity and dismissing his bill against the appellees, John R. and Henry C. Robertson, is erroneous. It is, therefore, decreed and ordered that the said decree be reversed and annulled, and that the appellant recover against appellees his costs by him expended in the prosecution of his appeal and writ of supersedeas here. And this court now proceeding to enter such decree as the said circuit court ought to have rendered, it is therefore adjudged, ordered and decreed that the order of the circuit court of Henry county, entered on the chancery side thereof on the 5th day of September, 1859, was in form and legal effect a judgment, and having been regularly docketed on the lien docket in the clerk's office of the county court of Henry, was a lien upon the lands of the said Peter R. Ramey sold and conveyed to the said John R. and Henry C. Robertson after the recordation of said judgment, and that said lands in their hands are liable to said judgment lien, and that the same be enforced against them. It is, therefore, decreed and ordered that this cause be remanded to said circuit court, with instructions to said court to direct an enquiry by one of its commissioners to ascertain and report before proceeding to enforce the lien of said judgment against the lands in the hands

270 *of the said John R. and Henry C. Robertson, whether the principal debtor, John H. Redd, was possessed of any real estate on which said judgment was a lien, and also what real estate was in the possession of Peter R. Ramey, Overton R. Dillard, and John H. Jamerson; and upon the report of the commissioner the said circuit court shall proceed to enforce said judgment lien according to the rights of the parties to this suit; and it is further decreed and ordered that John H. Jamerson and the heirs of Overton R. Dillard be made parties to this suit; all of which is ordered to be certified to the said circuit court of Henry county.

Decree reversed.

271 *Noble & Wife v. The City of Richmond.

[31 Am. Rep. 726.]

January Term, 1879, Richmond.

1. Municipal Corporations — Defective Streets — Liability.*—A municipal corporation, which, by its charter, has the power to lay out, improve, light, and keep its streets in order, is liable in damages at the suit of an individual who sustains injuries by reason of the neglect of said corporation to keep its streets in a proper and safe condition.

2. Quasi Municipal Corporation.—This rule applies to *Municipal Corporations* proper; but *quaere* if it applies to *quasi* corporations, such as counties, townships, and New England towns, unless they are so declared to be liable by some statute.

3. Municipal Corporations — Delegating Grants of Power.—The grant of power, in the charter of a city, to the council, to lay out, improve, light, &c., its streets, is a grant to the corporation, and is of such a character as to prevent its exercise by any other person or body

4. Same—Pleading.—The action cannot be maintained solely on the defect or want of repairs in the street or sidewalk, but the plaintiff must allege and prove that the corporation had notice of such defects (which notice may be implied), and that he was injured either in person or property in consequence of such defects in such street or sidewalk.

This was an action of trespass on the case, brought in the circuit court of the city of Richmond, by William M. Noble and Olivia E., his wife, against the City of Richmond for alleged injuries sustained by said Olivia E. by falling in a hole in the sidewalk of one of the streets of the city. The declaration was as follows:

In the circuit court of the city of Richmond—Hon. Beverly R. Wellford, judge—April rules, 1874:

William M. Noble and Olivia E. Noble, his wife, plaintiffs, complain of the City of Richmond, Virginia, *defendant, who has been duly summoned, &c., of a plea of trespass on the case, for that whereas the defendant before and on the 12th day of December, 1873, was a municipal corporation, chartered by the legislature of Virginia, clothed with the powers incident to its charter as a city, and subject to all the duties and liabilities incident to such charter, and thereby it became and was, among other duties of said defendant, the duty of the defendant to keep in good repair and fit for the use of the public generally, and the plaintiff in particular, all of its public streets and sidewalks which it allowed to remain open to the use of the public, and to keep sound, safe and serv-

iceable for public use and travel all its pavements, foot-ways and sidewalks, and particularly the sidewalk or pavement on the westernmost side of Second (2d) street, between Franklin and Main streets, opposite the house of one Marian Anderson, in the city of Richmond, Virginia, aforesaid, in which said highway there now is, and for a long time before, and on the day and year aforesaid there was a certain hole opening into a cellar or vault belonging to said Marian Anderson, to-wit: at Richmond, Virginia, of all which the said defendant, long before the day and year aforesaid, had notice. Yet the said defendant, well knowing the premises, although bound as aforesaid to keep said highway in safe condition and repair for the use of the public and the plaintiff, on the day and year aforesaid, disregarding its duty in the premises, did not so keep the same in good repair, but on the contrary wilfully, negligently, wrongfully and unjustly permitted said hole to be and continue, and the same was then and there so badly, insufficiently and defectively covered or protected that by means of the premises, and for want of proper covering or railing to said hole or area, the plaintiff,

Olivia E. Noble, who was then and there necessarily and unavoidably slipped and fell into said hole, and thereby the right shoulder and the left shoulder of the plaintiff, Olivia, were badly dislocated, and she, the plaintiff, became and was sick, sore, lame, diseased and disordered, and so remained from thence hitherto, during all which time she thereby suffered and underwent great pain, and was prevented from attending to and transacting her necessary and lawful business, and was also, by means of the premises, forced and obliged to pay, lay out and expend, and did pay, lay out and expend a large sum, to-wit: \$100, in and about the endeavoring to get healed and cured of said wounds, sickness and disorder, to-wit: at Richmond, Virginia; and the said plaintiffs aver that said hole or area had been so open upon said highway unprotected, and unfenced, and uncovered for many years prior to the day and year aforesaid, and that the defendant had notice of the same, and that it was a dangerous hole, but the defendant, although well informed thereof, and having had notice thereof for a long time, wilfully and negligently permitted the same to remain unprotected, uncovered and unfenced until the occurrence of the accident aforesaid on the day aforesaid, to-wit: at Richmond, Virginia. Wherefore the plaintiffs say that they are injured and have sustained damage to the amount of \$5,000, and therefore they sue.

Chas. A. Rose,

H. A. & J. S. Wise, p. q.

The City of Richmond demurred to the declaration, and also pleaded not guilty. And on the hearing of the cause the court sustained the demurrer, and rendered a judgment for the defendant. And thereupon

274 *the plaintiffs applied to this court for a writ of error; which was awarded.

***Municipal Corporations — Defective Streets—Liability.**—The principal case was cited with approval in *Clark v. City of Richmond*, 83 Va. 355; *Gordon v. City of Richmond*, 83 Va. 436; *Moore v. City of Richmond*, 85 Va. 538; *McCoull v. City of Manchester*, 85 Va. 579; 1 Min. Inst. (4th Ed.) 629, 630; *Smith v. City of Alexandria*, 33 Gratt. 208, and *note*; *Biggs v. Huntington*, 32 W. Va. 61; *Chapman v. Town of Milton*, 31 W. Va. 384. The principal case is distinguished in *Terry v. City of Richmond*, 94 Va. 537.

John S. Wise and James Lyons, Jr., for the appellants.

Keiley, for the appellee.

ANDERSON, J., delivered the opinion of the court.

This case is brought up upon a demurrer to plaintiffs' declaration, and raises the question as to the civil liability of municipal corporations for injuries to private persons caused by defective and unsafe streets and sidewalks.

The City of Richmond—the defendant—is a municipal corporation, chartered by an act of the legislature of Virginia. Among the many important powers vested by the charter in the council is the power over the streets and public alleys of the city—to close or extend, widen or narrow, lay out and graduate, pave and otherwise improve them; to have them properly lighted and kept in good order. They may build bridges in and culverts under the streets, and may prevent or remove any structure, obstruction, or encroachment over or under or in a street or alley or any sidewalk thereof. And they are invested with power to prevent the cumbering of streets, avenues, walks, public squares, lanes, or bridges in any manner whatever.

The grant of these powers to the city council is a grant to the corporation; (16 New York R., p. 161, opinion of Selden, J., in *West v. The Trustees of the Village of Brockport*, in note;) and the grant to the corporation is of a character to exclude its exercise by any other. The city corporation, by its charter, has the exclusive power to keep the

streets and sidewalks in repair and
275 *safe condition; and if they neglect to do it there is no other who has the power to do it, and so it will not be done at all. The terms of the grant, therefore, imply a duty on the part of the defendant to keep the streets and sidewalks of the city in good order and safe condition. And so, "where the duty to repair is not especially enjoined, and an action for damages, caused by defective streets, is not expressly given, (it is said, 2 Dillon on Municipal Corporations, § 789, p. 917, ch. 23,) still both the duty and the liability, if there be nothing in the charter or legislation of the state to negative the inference, has often, and in our judgment properly, been deducted from special powers conferred upon the corporation to open, grade, improve, and conclusively control public streets within their limits, and from the means which, by taxation and local assessments, or both, the law places at its disposal to enable it to discharge this duty."

The means to perform the duty of maintaining the streets in a safe condition by authority to levy taxes, or impose local assessments, is conferred upon the defendant by its charter. If this view is correct it is undoubtedly a duty devolving upon the corporation of Richmond City—the defendant—to keep its streets and sidewalks in repair and in safe condition. If it neglects to keep any of them in repair and in safe condition, by reason whereof private persons without fault

on their part have sustained injuries, is the city liable in a civil action for damages?

The books distinguish between municipal corporations proper and quasi corporations, such as counties and townships, and New England towns. It is almost universally considered that the latter are not liable to civil action for damages occasioned by defective roads and bridges under their control, unless so declared by statute. There is no

common-law obligation upon them,
276 *it is held, to repair highways or bridges within their limits, and they are only

obliged to do so by force of the statute. Even when the legislature enjoins on them the duty to make and repair roads, &c., and grants the power to levy taxes therefor, it has generally been regarded as a public and not a corporate duty, and these political subdivisions of the state on whom the duty is imposed, as state agencies, are not liable to a civil action for damages caused by the neglect to perform the duty, unless the action is expressly given by statute. But in a recent case (*Bigelow v. Inh. of Randolph*, 14 Gray, Mass. 541), Mr. Justice Metcalf says: "This rule of law, however, is of limited application. It is applied, in the case of towns, only to the neglect or omission of a town to perform those duties which are imposed on all towns, without their corporate assent, and exclusively for public purposes; and not to the neglect of those obligations which a town incurs when a special duty is imposed on it, with its consent, express or implied, or a special authority is conferred on it at its request. In the latter cases a town is subject to the same liabilities for the neglect of those special duties to which private corporations would be if the same duties were imposed, or the same authority conferred on them, including their liability for the wrongful neglect as well as the wrongful acts of their officers and agents." And this comports with the reason which has been assigned for the distinction between these quasi corporations and corporations proper—that is, municipal corporations—why the former are exempt, whilst the latter are not, from liability to damages in civil actions for injuries to private persons caused by defects in the public highways, streets or sidewalks within their respective limits, to-wit: that the duties are imposed on the former by the mandate of the

law, without their assent, and the au-
277 thority *conferred on them as agents of the public without special advantage to them, not by their request; whilst upon the latter the power is conferred by their requests, which may be wielded for their advantage, and the duties are voluntarily assumed by them in consideration of special and valuable benefits, which as corporations they derive therefrom, and other privileges and franchises conferred by their charter. As was said in *Meares v. Commiss. of Wilmington*, 9 Ired. R. 80, "when the sovereign grants power to a private corporation to construct a railroad, the grant is made for the public benefit, and is accepted because of the benefit which the corporation expects to derive by making money. So

when the sovereign grants power to a municipal corporation to grade the streets and keep them in repair, the grant is made for the public benefit, and is accepted by the corporation for the benefit which it expects to derive, by making it more convenient for the citizens—the members of the corporation—to pass and repass in the transaction of business, and by the greater inducements it holds out to others to frequent the town and thereby add to its business. The stockholders in the one case and the citizens in the other, derive special benefits which are not shared by the citizens of the state generally."

It is a general principle of law, and it is founded in reason, that when one suffers an injury by the neglect of another to perform a duty, in the performance of which he is interested, he has against him a right of action. This doctrine applies not only to individuals, but to private corporations aggregate, and it obliges such corporations to respond in a private action, though the action be not given by statute, for the damages which another has sustained by reason of its neglect or default to perform any corporate duty. *Riddle v. Proprietors of*

Locks and Canals, &c., 7 Mass. R. 169; **Weld v. Proprietors, &c.*, 6 Greenl. R. 93; *Ward v. New York, &c., Turnpike Co., Spencer (N. J.)*, 323, 325; *Parnaby v. Canal Co.*, 11 Ad. & El. 223, 39 Eng. C. L. R. 54.

The principle which lies at the basis of the decision in *Henley v. Mayor, &c., of Lyme Regis*, 5 Bing. 91, 3 Barn. & Adolph 77, as stated by Mr. Justice Selden in *West v. The Trustees of the Village of Brockport* (16 New York R. 163, in note), and of the series of English cases upon the authority of which that case was decided, is, "That whenever an individual, or a corporation for a consideration received from the sovereign power, has become bound by covenant or agreement, either express or implied, to do certain things, such corporation or individual is liable, in case of neglect to perform such covenant, not only to a prosecution by indictment, but to a private action at the suit of any person injured by such neglect. In all such cases the contract made with the sovereign power is deemed to enure to the benefit of every individual interested in its performance." In *Sawyer v. Corse*, 17 Gratt. 230, Joynes, J., speaking for the whole court, announces the same principle; i. e., "that where the authority, though for the accomplishment of objects of a public nature, and for the benefit of the public, is one from the exercise of which the corporation derives a profit; or where the duty, though of a public nature and for the public benefit, may fairly be presumed to have been enjoined upon the corporation in consideration of privileges granted to and accepted by it, the exemption does not apply"; and the reason he assigns why the corporation is not exempt from liability in a civil action, though differently expressed, is substantially the same—that "the corporation is not acting merely as an agent of the public, and with a view solely to the public benefit, but

279 that in the former *(where it derives a profit) it is pursuing its own interest and profit, and in the latter is executing a contract, for which it has received a consideration. This court also, in *City of Richmond v. Long's administrators*, recognized the doctrine that where a municipal corporation acts in the exercise of powers or the discharge of duties in nowise discretionary or governmental, but purely ministerial in their character, it incurs, like a private person, the common-law liability for the acts of its servants; and it does not matter, as was once intimated, if there be the absence of special rewards or advantages, it being considered and allowed that such gratuitous function is to be regarded as a burthen accepted under the charter in consideration of its privileges."

The case of *Henley v. The Mayor and Burgesses of Lyme Regis*, supra, went from the Common Pleas, through the King's Bench, to the House of Lords. And the counsel for the plaintiff in the House of Lords contended that every breach of a public duty, or neglect of what the party is bound to perform, working wrong or loss to another, is injurious and actionable, a principle hereinbefore alluded to, and cited *Sutton v. Johnstone*, 1 T. R. 784, and *Russell v. The Men of Devon*, 2 T. R. 667. But it appears that the decision was not upon that ground, from the opinion of Park, J., the only opinion given in the House of Lords, who, after quoting the charter, said: "Now, these words are undoubtedly an expression of the King's will, that the corporation shall repair, but they are not the less a consideration on that account; on the contrary, they show the consideration for the grant, the motives inducing the King to make the grant, and consequently the terms and conditions on which the grant was to be accepted."

Mr. Justice Selden, in *West v. Brockport*, supra, very truly remarks 280 "that such charters are never imposed upon municipal bodies except at their urgent request. While they may be governmental measures in theory, they are in fact regarded as privileges of great value, and the franchises they confer are usually sought for with much earnestness before granted. The surrender by the government to the municipality of a portion of its sovereign power, if accepted by the latter, may with propriety be considered as affording ample consideration for an implied undertaking on part of the corporation to perform with fidelity the duties which the charter imposes."

Mr. Justice Cooley in a dissenting opinion in *Detroit v. Blackely*, says: "The New York courts have invariably held that when the people of the municipality accepted the charter which they thus solicited a contract was implied on their part to perform the corporate duties. They have always denied that in this respect there was any difference between a municipal corporation and a private corporation or private individual who had received from the sovereignty a valuable grant charged with conditions"; and he cites numerous decisions of New York

courts, which fully sustain the assertion. He cites, also, the decisions of other states—of North Carolina, Pennsylvania, Indiana, Alabama, Connecticut, Illinois, Maryland, and Wisconsin, and the two decisions of this court before referred to. He also refers to decisions of the supreme court of the United States. These cases and others which might be cited, though all of them may not go to the full extent of his proposition, I think fully maintain the doctrine that municipal corporations are liable in civil action for neglect of duties, in cases like the present, to a private citizen who has been injured by such neglect. The doctrine

of *Henley v. Mayor, &c.*, of Lyme
281 *Regis*, as applied in *West v. *Brockport*, Mr. Justice Cooley says, is denied in no state except in New Jersey, and in that state the authorities to which he referred seem to have been passed over in silence, and perhaps were not observed.

In the recent case of *Barnes v. District of Columbia*, 1 Otto U. S. R. 540, the supreme court of the United States maintained the liability of municipal corporations to a civil action for injuries to a private individual caused by their neglect to keep the streets or sidewalks in repair. Mr. Justice Hunt, in delivering the opinion, in which the majority of the court concurred, says that the decisions holding the doctrine "that a city is responsible for its mere negligence are so numerous and so well considered that the law must be deemed to be settled in accordance with them, and cites many of them, including the two Virginia cases cited *supra*. *Detroit v. Blackely*, 21 Mich. R. 84, is referred to and disapproved of, whilst the conclusions of Mr. Justice Cooley, in his dissenting opinion are maintained.

But no one can maintain an action against the city grounded solely on the defect or want of repair of the street or sidewalk, but he must allege and prove that the corporation had notice of the defect or want of repair—which notice may be implied—and that he was injured, either in person or property, in consequence of the unsafe and inconvenient state of the street or sidewalk. *Weightman v. The Corporation of Washington*, 1 Black's R. 39. In this case the defect in the sidewalk, and the injury caused thereby to the plaintiff, and that the corporation had notice of it, are all averred in the declaration, and must be taken to be true on the demurrer.

For the reasons stated, and upon the authorities cited, we are of opinion that
282 the plaintiffs, upon the *case made by their declaration, were entitled to their action against the defendant for damages, and that the court erred in giving judgment for the defendant. We are therefore of opinion to reverse the judgment with costs, and to remand the cause to be proceeded with in conformity with the principles herein declared.

MONCURE. P., dissented.

The judgment was as follows:

The court is of opinion, for reasons stated in writing, that municipal corporations are

liable to civil action at the suit of the party injured, because of a default in keeping the streets and sidewalks in repair and safe condition; and that the matters, substantially set out in the plaintiffs' declaration, are sufficient in law to entitle them to their action against the defendant for damages, and that it was error in the court below to sustain the defendant's demurrer to the plaintiffs' declaration, and to give judgment thereon for the defendant. It is therefore considered that the judgment of the circuit court of Richmond be reversed and annulled, and that the plaintiffs in error recover their costs expended in the prosecution of their writ of error here. And the court proceeding to render such judgment as ought to have been rendered by said circuit court, it is considered that the demurrer to the plaintiffs' declaration be overruled; and the cause is remanded to the circuit court of Richmond for further proceedings therein in conformity with this order.

Judgment reversed.

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**Francis v. Francis.*

January Term, 1879, Richmond.

1. **Statutes—Legalizing Colored Marriages.**—The act of February 27th, 1866, to legalize the marriage of colored persons living together as husband and wife at the time the act was passed, includes and applies to colored persons so living together though they were born free.
2. **Same—What Evidence of Marriage Necessary.**—It is not necessary that there shall be evidence of an actual agreement to take each other as husband and wife, but the relation may be established by proof—by the acts, conduct and conversation of the parties.
3. **Alimony—Death of Husband.**—A certain sum monthly having been allowed as alimony to the wife, the husband appeals from the decree, and pending the appeal dies. The appellate court affirming the decree, the wife is entitled to the allowance up to the time of his death.

This was a suit in equity in the corporation court of the city of Norfolk, brought in July, 1872, by Emma Jane Francis against Robert Francis. The parties were colored persons, born free. The plaintiff in her bill alleged that in 1852 the defendant persuaded her to live with him as his wife; that she agreed to do so and moved into his house and put herself under his protection; that with his consent and by his instruction she adopted the name he bore, and by that name he recognized and introduced her to his friends as his wife. She lived with him constantly from 1852 until the 25th of November, 1868, during which time she bore him ten children, eight of whom are dead, leaving two, a boy of eleven years old, and a girl eight years of age, now living with and supported by plaintiff.

She further says that at the time when she

See *Harris v. Harris*, 31 Gratt. 13 and note; 1 Min. Inst. (4th Ed.) 308, 309; 1 Min. Inst. (4th Ed.) 268; *Smith v. Perry*, 80 Va. 563.

went to live with the defendant, and during the whole time she *did live with him, up to the 25th of November, 1868, when the defendant left her, they had agreed and undertaken to occupy the relation of husband and wife, and were cohabiting together as such at the time of the passage of an act entitled an act to amend and reenact the 14th section of chapter 108 of the Code of Virginia for 1860, in regard to the register of marriages, and to legalize marriages of colored persons now cohabiting as man and wife, passed February, 1866.

She further states that on the 25th of November, 1868, the defendant, without any cause known to her, deserted and left her without means of support; and she is entirely dependent upon her own labor for her support and that of the children of herself and the defendant; that said defendant owns a considerable real estate, and is doing a business in the city from which he derives a large income; and she prays that the said Robert Francis may be required to make suitable provision for the support of herself and the said children during the pendency of this suit, and that the court may decree her a separate maintenance for herself and the children, and for general relief.

The defendant, Francis, demurred to the bill for want of equity, but the court overruled the demurrer. He then answered, denying all the allegations of the bill as to their ever agreeing to live together as man and wife, and denied that he had ever consented to said relation between them.

A number of depositions were taken in the cause, which are sufficiently referred to in the opinion of Judge Staples. The evidence established to the satisfaction of the court below, and this court, the allegations of the bill, that the parties had lived together as husband and wife, and that this relation had been recognized by the defendant up to the year 1868.

The cause came on to be heard on the 11th of November, *1874, when the court being of opinion that the plaintiff, Emma Jane Francis, and the defendant, Robert Francis, had undertaken and agreed to occupy the relation to each other of husband and wife, and were cohabiting together as such at the time of the passage of the act to legalize the marriage of colored persons cohabiting together as husband and wife, passed February, 1866, and are man and wife, decreed that a commissioner should ascertain and report the estate, both real and personal, and the fee simple and annual value thereof, owned and possessed by the said Robert Francis, including the income arising from his business, and also what would be a reasonable allowance per month as alimony for the said Emma Jane Francis.

The commissioner returned his report stating the real estate of the defendant, and the income from his business, and recommended twenty-five dollars a month as a proper allowance to the plaintiff to be paid by the defendant.

The cause came on to be further heard on the 14th of January, 1875, and there being no

exception to the report of the commissioner it was confirmed, and the court decreed that the defendant should pay annually to the plaintiff \$300, in monthly instalments of \$25 each on the first day of each month. And thereupon Robert Francis obtained an appeal to this court. After the appeal the appellant died.

Baker and Walke, for the appellant.

Baker and Borland, for the appellee.

STAPLES, J. This case brings before this court for the first time the question of the proper construction of an act passed February 27th 1866, "to legalize the marriage of colored persons." It is therein provided that *"where colored persons before the passage of this act shall have undertaken and agreed to occupy the relation to each other of husband and wife, and shall be cohabiting together as such at the time of its passage, whether the rites of marriage shall have been solemnized between them or not, they shall be deemed husband and wife, and be entitled to the rights and privileges, and subject to the duties and obligations of that relation in like manner as if they had been duly married by law, and all the children shall be deemed legitimate whether born before or after the passage of this act." Code of 1873, ch. 103, § 4, p. 941.

It is insisted that the parties to this suit, although they were colored persons, and living together as man and wife at the time of the passage of the act, are not within the influence of its provisions, inasmuch as they were free before the war, and might have been lawfully married under the laws then in force; that the sole object of this legislation was to provide a remedy for persons emancipated by the war, who, being slaves, could not legally contract the marriage relation, and who, from want of proper information, even after freedom acquired, might not understand the necessity and propriety of so doing.

It must be admitted there is great force in this reasoning. There is no doubt that the legislature, in adopting this provision, had reference mainly to slaves emancipated by the war. But it is impossible to say that this was the sole purpose of the act. The words include all "colored persons," no matter how or when their freedom was acquired. When the legislature has used words of a plain and positive import the courts cannot put upon them a construction which amounts to holding the legislature does not mean what it has actually expressed. Dwarris on Statutes, 181-4, 209, 204, 5 and 8; Floyd, trustee, v. Harding, 28 Gratt. 401.

*This very case, as will be hereafter seen, vindicates the wisdom and propriety of extending this provision to all classes of colored persons.

The next question is as to the character of proof requisite to show that the parties are within the statute. It has been very properly said it was not the intention of the legislature to force upon persons the relation of husband and wife against the consent of either. It

must appear they have agreed to occupy that relation. The fact that they have so agreed is, however, not always susceptible of direct proof. The courts must, in many cases, infer it from the circumstances. It is not necessary that the parties shall have expressly agreed to live together as husband and wife. The agreement or understanding may be implied, as in other cases, from their conduct and declarations. In the present case there is no positive proof of an express agreement of the appellant and the appellee to occupy the relation to each other of husband and wife. But the circumstances tending to show an implied understanding of that sort are almost as satisfactory as the direct testimony of unimpeached witnesses to the fact. It appears that they lived together in the house of the appellant as early as the year 1852, and so continued down to November, 1868, when the appellant abandoned the appellee and intermarried with another woman. During that time the appellee gave birth to ten children—all of them by the appellant; never denied by him or questioned by any other person, so far as the record discloses, until, in 1868, the appellant, as a pretext, no doubt, for his contemplated abandonment, raised a question as to the paternity of a son then eleven years of age. It further appears that the appellant for many years prior to 1866 recognized the appellee as his wife, spoke of her as such to persons with whom he had dealings or with whom he was acquainted; the children were treated by

288 him as his own; and in every respect he conducted himself as if he had been the husband by the rites of matrimony duly solemnized. The mother and the sisters of the appellant visited the house and recognized them as husband and wife. One circumstance worthy of observation is that the appellee had been excluded from the Baptist church for some time previous to February, 1866, in consequence of her connection with the appellant. When the act already adverted to was passed by the legislature legalizing that connection, as was supposed, the appellee was restored to the church, and thereafter recognized as a regular member in good standing. The appellant, when informed of this matter, merely said he was not yet married; but he continued to live with the appellee as his wife, so called her and uniformly recognized her throughout the years 1866-67 to November, 1868. These facts are proved by eight or nine witnesses, and in a manner carrying entire conviction of the truth of the testimony.

The appellant, on the other hand, has introduced two witnesses—neither his mother nor sisters, as might have been expected, nor even his neighbors and friends by whom he was surrounded. One of them is a white man, living at the time in the country, but who did business as a butcher in the same market with the appellant. All his information is derived from what the appellant told him at the market, and it is very apparent that much of the conversation occurred after the appellant had determined to abandon the appellee for the woman he wished to marry.

The difficulty with regard to both witnesses introduced by the appellant is that they prove too much, and most of their statements are in direct conflict with the well-established facts of the case. The appellant was examined as a witness in his own behalf. Without undertaking now to determine whether he is a competent witness, I think it is sufficient to say that no weight can be

289 *attached to his testimony. He does not hesitate to make the most reckless assertions or denials, utterly inconsistent with his previous conduct for fifteen years and the whole tenor of the evidence. His deposition shows that he is either ignorant or regardless of the obligations of an oath. My opinion, therefore, is, that the circuit court did not err in holding that the appellee was, under the act of February, 1866, the lawful wife of the appellant at and after the passage of that act, and the appellant could no more release himself of the duties and obligations of that position by any act of his than he could if he had been legally united to the appellee by the rites of matrimony.

It seems, however, that since this appeal was taken the appellant has died, leaving a will, by which he devised his estate to his mother and an infant son, in whose names the appeal has been revived. The corporation court, by the decree of the 14th January, 1875, directed the appellant to pay annually to the appellee the sum of \$300, in monthly instalments of \$25, on the 1st day of each month, that sum being, in the opinion of the court, a sufficient maintenance and support for the appellee. The question is as to the effect of the death of the appellant upon this branch of this decree. Alimony is a proportion of the husband's estate allowed to the wife for her maintenance and support during the period of their separation, and only continues with their joint lives. It ceases with the death of either of the parties. 2 Bishop on Marriage and Divorce, § 350. The death of the appellant, therefore, puts an end to the provision in favor of the appellee. It could not, however, affect her right to those instalments which, under the decree of the court, accrued before the death occurred. So far as these instalments are concerned, the affirmation by this court of the decree leaves

290 the appellee in the same condition *as if no appeal had been taken. The record does not show the date of the appellant's death. The case must, therefore, be remanded to the corporation court of Norfolk with instructions to that court to ascertain the amount which had accrued at the death of the appellant, and so to modify its own decree as to require the payment of the same to the appellee out of the estate of the appellant.

The other judges concurred in the opinion of STAPLES, J.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, there is no error in the decree of the corporation court, &c. But it appearing that the appellant had died since this appeal was al-

affirming the judgment of the court below.

See also *Hayward v. National Bank*, 6 Otto, 611.

Several cases apparently to the contrary of the foregoing were cited in the argument of the learned counsel for the appellant, and especially the case of *Fowler v. Scully*, 72 Penn. St. (22 P. F. Smith) 456; also reported in 13 American Reports, 699. In that case the judgment of the court below was reversed by a divided court, Agnew, J., delivering the opinion of the majority, and two of the judges, Sharswood and Williams, dissenting.

Without further commenting, however, upon this and some other like cases referred to on the same side, it is sufficient to say that, in our opinion, if they be in conflict with this case, they are outweighed by the cases referred to on the other side, which we have already commented upon.

In the case under consideration the Exchange Hotel Company was incorporated just before the late war between the Confederate States and the United States to erect a first-class hotel in the city of Fredericksburg, which was deemed to be very important to the convenience and prosperity of that city. When the war came on, the hotel, about the

erection of which a great deal of money
257 had been expended, was *still unfinished, and was of little or no value in that unfinished state for any purpose. It was occupied during the war by Confederate and Federal forces alternately and during and after the war by colored, people who flocked to the said city. When the war was over and efforts were being used to improve the city, which had sustained great and almost irreparable damage, it was considered all-important to its prosperity that the Exchange hotel should be completed if possible, and as soon as possible. But it would require at least ten thousand dollars to complete it. And where to obtain that large amount in those trying times was a question very hard to be solved. It could not be obtained of an individual, and could only be obtained of the National Bank of Fredericksburg, whose stockholders, directors and officers were deeply interested in the prosperity of the city, and deeply anxious concerning it. It was their duty, of course, to do all they legally could to promote the prosperity of the city, and with that view, to aid in the completion of the Exchange hotel. They, therefore, agreed to loan \$10,000 to the company for twelve months, upon being well secured. But the difficulty was in procuring satisfactory security for so large a sum during the period and under the circumstances which then existed. To depend alone on personal security for so large a loan and so long a period of credit, would have been extremely hazardous, however good the apparent credit of the parties may then have been. It seemed to be absolutely necessary to the success of the object in view that security should be obtained by a lien on real estate, either directly by the bank itself, or indirectly by the maker and endorser of the note. Had such security been obtained by the

maker and endorser of the note by a deed of trust executed on the Exchange
258 *hotel for their indemnity, no question would have been raised as to the validity of the deed or of the note, to secure the payment of which it would have been executed. What difference can it make that the deed of trust was executed to secure the payment of the note without expressly and literally providing for the indemnity of the maker and endorser? Is not the effect precisely the same.

Then again, the money was not invested in the purchase of real estate. Nor was it borrowed upon the security of real estate for the purpose of being expended otherwise than upon that estate. On the contrary, it was borrowed to be expended upon that estate, in making it, from being an expensive and unproductive building, a first-class hotel, so necessary to the prosperity of the city, in which all its citizens were deeply interested, as was also the state at large. At that time no expenditure was considered more important for the city, or more prudent and proper, looking to the interest of the owners of the hotel. Property in and about Fredericksburg soon after the war took a rise, and it was hoped and believed would continue to rise, so that the completion of the hotel would be beneficial alike to its owners and the public. For several years after the hotel was completed it was leased out for a large sum, as much as \$2,500 per annum, which, if it had continued for a few years, would have enabled the company to have paid off all its debts. Had that reasonable and expected result followed, all would have commended the propriety and prudence of what was done in regard to the completion of the work. But instead of such a result there was a sudden and unexpected change in the times, and in the value of real estate in and about Fredericksburg. The tenants of the Exchange hotel became bankrupt, the property became of little value, and

259 could not be *rented out for little if any more than enough to pay the amount of taxes and insurance annually due thereon, and the sale of the property became necessary to pay the amount which had been borrowed to complete the hotel.

Is it reasonable or right that such an improbable and unexpected result should produce a radical and complete change in the rights of the parties?

We think not, and we are therefore of opinion that, upon general principles, the National Bank of Fredericksburg is entitled to priority of payment of the debt due to it by the Exchange Hotel Company of Fredericksburg over the debts due by the said company to the appellant, A. B. Botts, as assignee in bankruptcy of G. W. Wroten.

But even if we can be wrong in that conclusion, we think, secondly, that upon the principle of equitable estoppel such right of priority certainly exists.

The money was borrowed by the said company for the special and only purpose of completing the hotel, and was secured by a deed of trust upon the hotel. These facts were

known to George W. Wroten, the mechanic employed by the company to complete the hotel, who was to receive payment out of the money so borrowed, to the extent to which it could be spared for that purpose, and the balance which might remain due and unpaid to him, after receiving such payment, was to be secured to him by a lien on the hotel, subject expressly to a prior lien to the holder of the note for the money borrowed as aforesaid. Of that money the sum of eight thousand dollars was paid at once to George W. Wroten, and the balance was paid for insurance, taxes and other necessary expenses of the property. And more than six months after the date and recordation of the deed of trust executed to secure the return of the money borrowed as aforesaid,

260 *the said Wroten received a deed of trust executed by the hotel company on their said property to secure the payment of the balance due to him, but expressly subject to the prior lien for the balance due of the money borrowed as aforesaid. Now is it not plain and clear that George W. Wroten, having contracted to complete the Exchange hotel with a full knowledge of the means which had been used to raise the money to pay for the work, and having received eight thousand dollars of the said money, is equitably estopped from claiming against the deed of trust executed to secure the return of the money loaned as aforesaid, the priority of which deed over that under which he claims is expressly admitted on the face of the latter? We certainly think so, and we consider it unnecessary to cite any cases on the subject. See *Insurance Co. v. Wilkinson*, 13 Wall. U. S. R. 222.

But even if we can be wrong in that conclusion also, we think, thirdly and lastly, that the appellant was certainly entitled to no relief by bill of review.

A bill of review can only be brought upon two grounds: First, error in law apparent upon the face of the decree; second, the discovery of new matter which could not have been used at the time of making the decree. *Story's Eq. § 403, et seq.; 2 Rob. Pr. 414, old ed.* The bill in this case was brought upon the former ground only—error in law apparent upon the face of the decree. Error in fact in a final decree can be corrected only on appeal to an appellate court, and not on a bill of review in the same court. What may be said to be “the face of the decree,” within the meaning of the rule, is different in England and in this country. In England the decree embodies the substance of the bill, pleadings and answers. In the courts of the United States the decree usually contains a mere reference to the antecedent proceedings *without embodying them.

261 But for the purpose of examining all errors of law, the bill, answers and other proceedings are, in our practice, as much a part of the record before the court as the decree itself; for it is only by a comparison with the former that the correctness of the latter can be ascertained. *Story's Eq. Pl. § 407; Putnam v. Day*, 22 Wall. U. S. R. 60.

In this case we have endeavored to show

that there is no error in the decree complained of, and if we be right in that respect there can of course be no good ground for a bill of review. The only ground for relief relied on in the bill of review which we have not already disposed of is the claim to a mechanics' lien under the statute, by virtue of which priority seems to be claimed for Wroten, not only over Armat and the other judgment creditors of the hotel company, but also over the national bank. The articles of agreement between Wroten and the hotel company bore date on the 14th of August, 1866, and was recorded in the corporation court of Fredericksburg on the 2d day of October, 1866, from which latter date he was, no doubt, entitled to a mechanics' lien on the said property under the statute. But that lien was posterior and subordinate to the lien of the said bank under the said deed of trust in their favor, recorded on the 27th of June, 1866, and was in fact merged in the lien by deed of trust afterwards taken by Wroten as aforesaid to secure the same debt, in which deed it was expressly declared that the property conveyed was subject to the prior lien in favor of the bank as aforesaid. There is in the record no copy of the said articles of agreement; no doubt because the lien acquired by having them recorded was considered by Wroten as merged in the lien of the deed of trust as aforesaid. The effect of the said deed of trust of the 27th of June, 1866,

262 *the then existing creditors of the hotel company pro rata, which effect was not denied by Wroten, though he was not one of the existing creditors, but was a subsequent creditor of the hotel company, and was thus postponed to all of the said existing creditors. But he contended that this right of the said existing creditors ought to be confined to the property in the condition in which it was on the 27th day of June, 1866, when the said deed of trust for the benefit of the bank was recorded. In this, however, he was clearly wrong, and the court below accordingly decided that the said existing creditors had priority over Wroten in regard to the property in the condition it was in at the time of the sale thereof under the decree. The property was first cried out to Wroten as the highest bidder therefor, and he claimed to be entitled to the property as such highest bidder, though he did not comply with the terms of sale. The court, however, held that the said sale was not valid, declined to confirm it, and decreed a resale, which was accordingly made. Thus the only apparent grounds of complaint which Wroten had to the final decree when rendered were the two before referred to, viz: that the prior lien of the existing creditors should be confined to the property in the condition it was in when that decree was rendered; and, secondly, that he ought to have been confirmed as purchaser. But he took no appeal and apparently acquiesced in the final decree until more than two years thereafter, when he had become a bankrupt, and when his assignee in bankruptcy filed the said bill of review. But did not therein rely on either of the said two grounds.

We think the court below did not err in dismissing the said bill.

It may be proper, before concluding our opinion in this case, to notice an objection taken, for the first *time, in the petition for an appeal in this case, that the deed of trust of the 27th day of June, 1866, before referred to, "did not have affixed thereto the seal of the said hotel company, nor was the said hotel company by name a party to the same." To the said objection a short but all-sufficient answer is, that it comes "too late." It was not made in the appellant's answer to the original bill, nor in the progress of the original suit, nor in the bill of review, nor in the proceedings on that bill. But, on the contrary, the validity of that deed, as a deed duly executed by the said corporation, was admitted by the appellant, either expressly or by plain implication, throughout the proceedings in the cause in the court below. Had such an objection been made in the court below while the cause was pending therein, all foundation for it, if any such in fact existed, might have been completely removed by the most conclusive proof exhibited by the National Bank of Fredericksburg. Instead of making the objection, if there was any foundation for it, at the proper time, the validity of the deed was, tacitly at least, admitted. There was a decree for a sale in pursuance of it, all the creditors of the hotel company, except the appellant, united in becoming purchasers of the property at said sale in proportion to their claims, credit was given by them on their said claims for their ratable proportions of the purchase money, the property was conveyed to them, a final decree was entered in the cause, and not until after a decree was made dismissing the bill of review filed by the appellant several years after the final decree was rendered in the original suit, was the objection aforesaid made. It would doubtless not be a difficult matter, even now, to show that the objection is unfounded; but as it is wholly unnecessary to do so, this opinion will, therefore, here be ended.

264 *We are of opinion that there is no error in the decree appealed from, and that the same ought to be affirmed; which is decreed accordingly.

Decree affirmed.

265 *Redd v. Ramey & als.

January Term, 1879, Richmond.

R obtains a decree against his guardian and his sureties for a certain sum of money; and sues out an execution, which is levied, and a forthcoming bond taken, and forfeited. The court on its chancery side, on notice to the obligors in the forthcoming bond, renders a judgment in favor of R against them; and this judgment is docketed—**Held:**

1. Judgment—Validity.—The judgment is a valid judgment, and having been docketed, it is

notice which will affect all subsequent purchasers of land from any of the defendants in the judgment.

This was a suit in equity in the county court of Henry county, afterwards removed to the circuit court of said county, instituted by Edmund B. Redd to enforce the satisfaction of a judgment recovered by him, against John H. Redd, Peter R. Ramey, Overton R. Dillard, and John H. Jamerson, upon a forfeited forthcoming bond. The object of the suit was to subject the lands held by said Ramey at the date of the judgment; a part of which land had been sold by Ramey to John R. Robertson, and of which John R. Robertson had sold a part to Henry C. Robertson. These and a number of others, including several brothers and sisters of the plaintiff, who held similar judgments against the same parties, were made defendants, and the prayer of the bill was that the land still in the possession of Ramey and that sold to John R. Robertson might be sold to satisfy the judgments recovered by the plaintiff and his brothers and sisters.

266 *John R. Robertson answered, averring he was a purchaser for valuable consideration fully paid up, and without notice, either actual or constructive, of the judgments of the plaintiff, or of any other person. He insisted that the judgments were rendered on forthcoming bonds taken on executions sued out on decrees in a chancery suit, and the judgments on the bonds having been rendered on the chancery side of the court, were of no force or validity, and when docketed did not amount to any notice whatever; and that neither the decrees nor the forthcoming bonds had been docketed.

The cause came on to be heard on the 8th of May, 1873, when the court held that the lien asserted by the plaintiff on the land of John R. Robertson had no legal validity, and dismissed the bill as to said John R. and Henry C. Robertson. And thereupon Edmund B. Redd applied to this court for an appeal; which was allowed. The only question in the cause in this court was as to the lien of the judgment; and on this question the facts are stated by Judge Christian in his opinion.

Kean & Davis, for the appellant.

James Alfred Jones, for the appellees.

CHRISTIAN, J., delivered the opinion of the court.

The court is of opinion that the decree of the circuit court of Henry county declaring that the lien asserted by the appellant has no validity, and dismissing his bill against the appellees, John R. and Henry C. Robertson, is plainly erroneous.

The orders of the circuit court of Henry entered on the chancery side thereof **267** on the 5th day of September, *1859, were in form and legal effect judgments, and cannot be held to be mere awards of executions.

The appellant, Edmund Redd, together with his brothers and sisters, had, in a chan-

cery suit instituted in the circuit court of Henry, recovered against their guardian and his sureties a decree for various amounts due to each of them—the amount decreed in favor of the appellant being \$583.23 with interest thereon from the 12th July, 1858, till paid. Upon this decree executions were sued out and levied, and forthcoming bonds taken. These forthcoming bonds were forfeited, and judgments entered in the following form in favor of the appellant, and in the same form as to the other wards:

This day came the plaintiff by his attorney, and it appearing to the satisfaction of the court that the defendants have had legal notice of this motion, they were solemnly called, but came not. And thereupon, on motion of the plaintiff, it is considered by the court that he recover against the defendants the sum of twelve hundred and eighty-nine dollars and fifty-two cents, the penalty of the said bond, and his costs by him about his motion in this behalf expended; and the said defendants in mercy, &c. But this judgment is to be discharged by the payment of six hundred and forty-four dollars and seventy-six cents with interest thereon, at the rate of six per centum per annum, from the 27th day of June, 1859, till paid, and the costs.

This judgment was regularly docketed on the lien docket in the clerk's office of the county court of Henry. From the date of such docketing it was a lien upon all the real estate of the defendants, and was notice to all purchasers of the same.

Before the act of 1842 (Sess. Acts, 1842, ch. 71, § 2) a forthcoming bond forfeited had the force of a judgment, and the clerk, on motion, awarded execution *thereon.

But by said act the bond forfeited and returned had no longer the force of a judgment; but the court was directed, after notice, to grant judgment and award execution.

It is now provided by statute "that the obligor in such forfeited bond shall be liable for the money therein mentioned, with interest thereon from the date of bond till paid, and the costs; the obligee or his personal representative shall be entitled to recover the same by action or motion." Code 1860, ch. 189, § 3. Although a forfeited forthcoming bond when returned to the clerk's office has the force of a judgment, yet there may be a judgment rendered by the court, by motion or action, thereon. See Code 1849, ch. 189, § 2.

It is plain, under these statutes, that the order referred to above is in terms and legal effect a judgment, and, being recorded, is a lien on all the lands of the defendants and those in the hands of purchasers conveyed after the docketing of said judgment.

The court is therefore of opinion that the decree dismissing the plaintiff's bill as to the purchasers, John R. and Henry C. Robertson, is erroneous. And for this cause the said decree must be reversed and the cause remanded.

The court is further of opinion that the said circuit court ought to have referred to

one of its commissioners, to ascertain and report, the lands in the hands of John H. Redd, Peter R. Ramey, Overton H. Dillard, and John H. Jamerson, and that said lien shall first be enforced against the lands of the principal debtor, John H. Redd; and if not sufficient to satisfy said lien, then to be apportioned among the sureties in accordance with the principles laid down by this court in *Horton & als. v. Bond*, 28 Gratt. 815; and for that *purpose all proper parties interested in such apportionment shall be brought before said circuit court.

The decree was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the decree aforesaid, and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the decree of the said circuit court of Henry county, declaring that the lien asserted by the appellant has no validity and dismissing his bill against the appellees, John R. and Henry C. Robertson, is erroneous. It is, therefore, decreed and ordered that the said decree be reversed and annulled, and that the appellant recover against appellees his costs by him expended in the prosecution of his appeal and writ of supersedeas here. And this court now proceeding to enter such decree as the said circuit court ought to have rendered, it is therefore adjudged, ordered and decreed that the order of the circuit court of Henry county, entered on the chancery side thereof on the 5th day of September, 1859, was in form and legal effect a judgment, and having been regularly docketed on the lien docket in the clerk's office of the county court of Henry, was a lien upon the lands of the said Peter R. Ramey sold and conveyed to the said John R. and Henry C. Robertson after the recordation of said judgment, and that said lands in their hands are liable to said judgment lien, and that the same be enforced against them. It is, therefore, decreed and ordered that this cause be remanded to said circuit court, with instructions to said court to direct an enquiry by one of its commissioners to ascertain and report before proceeding to enforce the lien of said judgment against the lands in the hands

*of the said John R. and Henry C. Robertson, whether the principal debtor, John H. Redd, was possessed of any real estate on which said judgment was a lien, and also what real estate was in the possession of Peter R. Ramey, Overton R. Dillard, and John H. Jamerson; and upon the report of the commissioner the said circuit court shall proceed to enforce said judgment lien according to the rights of the parties to this suit; and it is further decreed and ordered that John H. Jamerson and the heirs of Overton R. Dillard be made parties to this suit; all of which is ordered to be certified to the said circuit court of Henry county.

Decree reversed.

changed in its fiduciary character; and the rights of other creditors were not prejudiced by the delay in reforming and correcting the report of the master in this respect, inasmuch as they would have been no better off if his debt had been classed with the fiduciary debts from the beginning.

The court is of opinion, therefore, that there is no error in the decree of the circuit court, and that the same be affirmed.

Decree affirmed.

304 *Young & als. v. Devries & als.

January Term, 1879, Richmond.

1. Transfer of Land under Unrecorded Agreement.*—Land sold and purchased under a written contract which has not been recorded, though the purchasers have paid all the purchase-money and have been for years in possession under their contract before a judgment has been recovered against their vendor, is liable to satisfy the judgment.

2. Transfer of Land under Parol Agreement.†—Land sold and purchased under a parol contract, the purchasers having paid the purchase-money, and having been put in possession, and holding the possession under the contract before a judgment has been recovered against their vendor, is not liable to satisfy the judgment.

This was a suit in equity in the circuit court of Loudoun county brought by Devries, Stephens & Co. to subject certain parcels of land which had been sold by Tazewell Lovett to satisfy a judgment they had recovered against said Lovett in August, 1866. The suit was a creditor's bill in behalf of all the lien creditors of Lovett. The bill sets out five parcels of land which had been sold to different persons, all the deeds for which had been admitted to record since the plaintiff's judgment was docketed. But it appeared that these purchasers had been in possession of their land some of them as early as 1854, and none later than 1862, and that they had paid all the purchase-money. Three of them had entered under written contracts, which had not been recorded; the others seem to have entered under parol contracts.

The court below held that all the land was subject to the lien of the plaintiffs' judgment, and a report *having been made by a commissioner showing the different judgments against Lovett, which were liens upon the land, and their amount and priorities, at the April term, 1873, the court made a decree that these purchasers

should pay these debts, or commissioners named should proceed to sell the lands. And thereupon Young and the other purchasers of the lands obtained an appeal.

Heaton, for the appellants.

There was no counsel for the appellees.

CHRISTIAN, J. This case is before us on appeal from a decree of the circuit court of Loudoun county.

The bill was filed by the appellees, Devries, Stephens & Co., for the purpose of enforcing their judgment lien against certain lands in the hands of the vendees of their judgment debtor, Tazewell Lovett.

At the August term, 1866, of the county court of Loudoun, the appellees recovered a judgment against Lovett for the sum of \$1,305.44 with interest from April 10th, 1866, and \$6.33 costs.

This judgment was docketed on the 15th day of November, 1866. An execution proving unavailing, this suit was instituted to enforce the lien of said judgment against the real estate of said Lovett. Under the proceedings in this suit certain real estate of Lovett's was sold and the proceeds distributed among his creditors according to the priority of these liens. But after the distribution of the fund realized by this sale there still remained an unpaid balance due to the appellees, Devries, Stephens & Co., amounting to the sum of \$821.63 on the 1st November, 1871. Thereupon they filed an amended bill

in the same cause, in which they *charge that in addition to the lands already sold to satisfy liens against Lovett they have a lien, by reason of their said judgment, against certain tracts of land which formerly constituted a part of the real estate of Lovett, and which had been sold by him; and they seek by their amended bill to subject these lands in the hands of Lovett's vendees to the satisfaction of the unpaid balance of their judgment.

The bill alleges that Tazewell Lovett, the judgment debtor, was the owner of five several tracts of land, which he had conveyed to the several parties therein named, and against which they insist that they have the right to enforce their judgment lien in the hands of the alienees of Lovett.

Lot No. 1 is described as a parcel of land in the county of Loudoun, containing five acres, three roods and eight poles, which was conveyed by Lovett and wife to one Frederick Miller by deed acknowledged on the 9th of January, 1868, and put on record on the 10th January, 1868.

Lot No. 2 is described as a tract of land lying in said county, containing ten acres, and conveyed by Lovett and wife to Ellen Kelly, Mary Kelly and Michael Kelly by deed acknowledged on the 25th January, 1867, and recorded on the 8th March, 1867.

Lot No. 3 is described as a parcel of land lying in said county, containing five acres, and conveyed by Lovett and wife to Mary Kelly, Margaret Kelly, John Kelly and Catharine Kelly by deed dated November

***Transfer of Land under Unrecorded Agreement—Right of Judgment Creditors.**

—See *Dobyn's adm'r v. Waring*, 82 Va. 159; *March, Price & Co. v. Chambers*, 30 Gratt. 299 and *note*.

†Transfer of Land under Parol Agreement—Right of Judgment Creditors.—See

Burkholder v. Ludlam, 30 Gratt. 255 and *note*; *Floyd, Tr., v. Harding*, 28 Gratt. 401; *Long v. Hagerstown Agr. Imp. Mfg. Co.*, 30 Gratt. 665; *Trout's adm'r, v. Warwick, Tr.*, 77 Va. 731; *Hurt's adm'r v. Prillaman*, 79 Va. 257; *Powell v. Bell's adm'r*, 81 Va. 222.

27th, 1866, acknowledged 12th January, 1867, and recorded on the 23d January, 1867.

Lot No. 4 is described as a tract of land lying in said county, containing two hundred and sixteen acres, two roods and seventeen perches of land, which was conveyed by

Lovett and wife to Abram Young
307 *by deed dated 2d February, 1863, but not recorded until 17th December, 1866.

Lot No. 5 is described as a tract of land lying in said county of Loudoun, containing twenty-nine and a half acres, conveyed by Lovett and wife to William Brislau and Michael Brislau by deed bearing date 13th December, 1866, and was put upon record on the 14th December, 1866.

Against all these five tracts of land the appellees (plaintiffs in the court below) are seeking to enforce their judgment liens; and the vendees of each tract are made parties defendant.

The case was heard upon the bills, original and amended, and answers to the same, and the depositions of witnesses, and the circuit court held by the decree appealed from that all these lands are liable to the lien of the appellees' judgment docketed on the 15th November, 1866, and decreed a sale of said lands in default of payment of the amounts ascertained by said decree to be due. From this decree an appeal was allowed by this court.

I am of opinion that this decree is in part erroneous. By the answers of the defendants and the evidence filed with the record, it is plain that according to the repeated decisions of this court a part of these tracts of land above mentioned were not liable to the enforcement of the appellees' lien as against them in the hands of Lovett's vendees.

The three first-named lots or tracts of land—to-wit: that sold to Frederick Miller, that sold to Ellen Kelly and others, and that sold to Mary Kelly and others—were sold to the parties respectively under a written contract, and it is shown by the pleadings and the proofs in the cause that these parties took possession of the same under these written contracts. None of these contracts were
ever recorded. As to these, the

308 *lien of the judgment was properly enforced. They come within the very terms of the statute, which declares that "every such contract, every deed conveying such estate or term, and every deed of gift or deed of trust or mortgage conveying real estate or goods and chattels shall be void as to creditors and subsequent purchasers for valuable consideration without notice, until and except from the time it is duly admitted to record in the county or corporation wherein the property embraced in such contract or deed may be."

This statute has been construed by this court in two very recent cases. See *Eidson v. Huff*, 29 Gratt. 338, and *March, Price & Co. v. Chambers*, 30 Gratt. 29.

Under these decisions, the alienees of Lovett going into possession under a written contract, which they had failed to have recorded, and there being no evidence of a

pre-existing parol agreement, cannot assert their title against the lien of the judgment creditor of their vendor. If any injustice is done to them in subjecting the lands in their hands to the judgments rendered against their vendor, it is due to their negligence. The law pointed out to them a plain duty: that of putting on record the evidence of their title. Having failed to do so, the loss must fall upon them. As was well said by Judge Staples in *Eidson v. Huff*, supra, p. 344: "This court cannot construe away a plain statute to avoid cases of individual hardship. The legislature has thought proper to place all written contracts for the sale of land upon the same footing as deeds of conveyance, so far as they come within the influence of the registration acts; and we have no alternative but to enforce the law as it is written."

I think, therefore, it is clear that the decree of the circuit court enforcing the judgment lien against lands in the hands of those alienees of Lovett who went

309 *into possession of the same under a written contract, unrecorded, must to this extent be affirmed.

But I am further of opinion that so much of said decree as subjects the lands in the possession of Abram Young and William and Michael Brislau is erroneous. These last-named purchasers (together with Osborne, who purchased a small portion of the tract sold to Young,) were let into possession under a parol agreement, and having paid the purchase-money, and being in a condition to call upon the vendor for specific execution before the judgment was rendered, upon the principles settled by this court in *Floyd, trustee, v. Harding*, and cases there cited, the judgment cannot be enforced against these lands. They were not held under titles which come within the influence of the registration acts, but under equitable titles which could not be affected by the provisions of those acts.

It is useless to repeat here a discussion of the principles which governed the court in protecting the vendees in possession under such a title against a judgment rendered against the vendor. It is sufficient to refer to the case of *Floyd, trustee, v. Harding*, supra, where the whole subject is elaborately discussed by Judge Staples, and to adopt his views in that case as applicable to this. See also *Withers v. Carter*, 4 Gratt. 407; *Briscoe v. Ashby & als.*, 24 Gratt. 454; *Borst v. Nalle*, 28 Gratt. 423; *Shipe, Cloud & Co. v. Repass*, 28 Gratt. 716.

I am therefore of opinion that so much of the decree of the circuit court of Loudoun as enforces the execution of the judgment lien against the lands in the hands of the appellees, Young, William Brislau, Michael Brislau and Osborne, is erroneous, and that it be reversed, and that the same in all other respects be affirmed.

310 *STAPLES and BURKS, J's, concurred in the opinion of CHRISTIAN, J.

MONCURE, P., concurred in the decree, but with great reluctance.

ANDERSON, J., dissented.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that there is no error in the said decree of the circuit court so far as and to the extent that the said decree enforces the judgment lien of the appellees against the lands conveyed by Tazewell Lovett to the purchasers, Frederick Miller, Ellen Kelly, Mary Kelly, Michael Kelly, Margaret Kelly, John Kelly, Catharine Kelly, and Thomas Kelly, all of the aforesaid named parties having purchased said lands and taken possession of the same under written contracts with said Tazewell Lovett; which contracts have never been recorded, and, not being recorded, are under the statute void as to creditors. But the court is further of opinion that the said decree of the circuit court, so far as and to the extent that it enforces the judgment lien of the appellees against the lands sold to Abram Young, William Brislau, Michael Brislau and Samuel Osborne, is erroneous, the court being of opinion that these lands having been purchased under a parol agreement, and the purchase-money, or a large part thereof, having been paid and the parties having been let into possession of the same under said parol agreement, which was not susceptible of being recorded, and therefore not coming within the provisions of the registration acts, and were not liable to the lien of the judgment

311 *against the vendor Lovett, it is therefore decreed and ordered that for this error the said decree of the said circuit court be reversed and annulled, and that the appellants, Abram Young, William Brislau, and Michael Brislau, recover against the appellees their costs by them expended in the prosecution of their appeal and supersedeas here; and this cause is remanded to said circuit court to be further proceeded in, in accordance with this decree and with the principles declared in the opinion of the court filed in this cause; all of which is ordered to be certified to the said circuit court of Loudoun county.

Decree affirmed in part, and reversed in part.

312 *Colley's Adm'r v. Sheppard's Adm'r.

January Term, 1879, Richmond.

In an action of debt upon a bond by C's administrator against S's administrator, profert of the bond is excused on the ground that it was lost by accident. S's administrator pleads payment, and special pleas in which he avers that the bond was not lost or destroyed by accident, but was destroyed by the obligee in her lifetime, with the intention and for the purpose of releasing S from the payment of the debt, and this he is ready to verify; and issues were made up on the pleas. On the trial of the cause the defendant insists the plaintiff should first prove to the satisfaction of the court the original existence of the bond and its loss, and it was agreed that all the evidence in the cause shall be heard, and the defendant may move to exclude it; and on his motion all the evidence was excluded—HELD:

1. **Pleading—Confession.**—Every pleading is taken to confess such traversable matter on the other side as it does not deny. The pleas, therefore, confess the original existence of the bond as described in the declaration and its destruction. There was, therefore, no necessity on the plaintiff to prove to the satisfaction of the court the original existence and loss of the bond before receiving testimony as to its contents.

2. **Same—Question for Jury.**—If the pleas put in issue the loss of the bond, then that issue must be tried by the jury; and if there was evidence introduced before the jury bearing on the question of the loss of the bond, it was for the jury to decide upon the sufficiency of the evidence to establish the loss; and it was error in the court to exclude it.

3. **Same—Decision in This Case.**—If it was incumbent on the plaintiff to prove the original existence and the loss of the bond, before proving its contents, the evidence was sufficient in this case.

This was an action of debt upon a bond brought in March, 1860, in the circuit 313 court of the city of Richmond *by William L. White, Jr., as administrator of Nancy Colley, deceased, against Joseph M. Sheppard. The declaration set out a bond for \$723, bearing date the 8th of January, 1856, payable on demand, executed by Sheppard to Nancy Colley in her lifetime, which having been lost by accident the plaintiff could not make profert thereof.

In May, 1860, Sheppard demurred to the declaration, and the plaintiff joined in the demurrer. And no further proceedings seems to have been taken in the case until December, 1865, when a scire facias was issued to revive the suit against Thomas Pollard, personal representative of Sheppard. And the case was continued from time to time until June, 1873. At the June term, 1873, the court overruled the demurrer, and the defendant pleaded payment, and tendered three special pleas, to which the plaintiff objected. The court sustained the objection to the first special plea, but overruled it as to the second and third. The plaintiff replied generally to the two special pleas, and the plea of payment; and issues were made up upon these pleas.

The defendant did not except to the opinion of the court respecting the first special plea; but the plaintiff excepted to the admission of the second and third of these pleas. The pleas are as follows:

First plea. And the said defendant, by James Lyons, his attorney, comes and defends the wrong, &c., and says that the plaintiff ought not to have or maintain his action against him, because he says that the said bond in the declaration mentioned has not been lost or destroyed by accident, as the plaintiff has in his declaration stated, and of this he puts himself upon the country, &c.

Second plea. And for a further plea in this behalf, this defendant says that the

***Pleading Payment—Confession and Avoidance.**—The principal case was cited in Norvell's adm'r v. Little, 79 Va. 141, to support the proposition that the plea of payment is a confession and avoidance, and concludes the party from denying the execution of the deed as set forth in the pleadings.

plaintiff ought not to have or maintain his action against him, because he says
 314 that the *writing obligatory mentioned in the declaration was not lost or destroyed by accident, but was destroyed by the obligee in the said writing obligatory, with the intention and for the purpose of releasing the said Joseph M. Sheppard from the payment of the debt mentioned therein, and this the said defendant is ready to verify; wherefore he prays judgment, &c.

Third plea. And for a further plea in this behalf, the said defendant says that the said plaintiff ought not to have or maintain his action against him, because he says that the writing obligatory mentioned in the declaration was not lost or destroyed by accident, but was destroyed by the obligee in the said writing obligatory, with the intention and for the purpose of releasing the said J. M. Sheppard from the payment of the debt mentioned therein, and therefore the defendant says that the said Nancy Colley released and discharged him from the said obligation and from the payment of the said sum of money in the writing obligatory mentioned, and this he is ready to verify; wherefore he prays judgment, &c.

The cause came on to be tried at the same term of the court. After the jury was sworn, and the plaintiff introduced his first witness, the counsel for defendant stated that they should insist that the plaintiff should first prove the original existence of the bond referred to in the declaration, and thereafter its loss; and that upon this question the evidence should be addressed to the court, and the fact of the existence and loss of the bond established to the satisfaction of the court before any secondary evidence of its contents could be presented to the jury; after which the examination of witnesses was permitted to proceed before the court and the jury, with a reservation to the defendant of the right to move to exclude the evidence from the consideration of the jury,

upon the ground of its insufficiency to
 315 establish the facts *necessary to entitle the plaintiff to introduce secondary evidence of the contents of the said bond.

The trial then proceeded. The plaintiff and a number of witnesses were examined on his behalf, and also one for the defendant; and when all the evidence had been submitted to the jury, the defendant moved the court to exclude all the evidence which had been offered from the consideration of the jury, upon the ground that the evidence was not sufficient to establish the loss of the bond, so as to enable the plaintiff to introduce secondary evidence of its contents. This motion the court sustained, and excluded the evidence. And the plaintiff excepted, setting out the evidence in his bill of exceptions.

There was a verdict and judgment for the defendant, and thereupon the plaintiff applied to a judge of this court for a writ of error and supersedeas; which was awarded. The view taken of the evidence by this court is presented in the opinion of STAPLES, J.

Jno. B. Young and C. White, for the appellant.

Wm. W. Crump and Bev. T. Crump, for the appellee.

STAPLES, J., delivered the opinion of the court.

This is an action of debt brought in the circuit court of Richmond city on a bond executed by Joseph M. Sheppard on the 8th January, 1856, to Nancy Colley, the plaintiff, intestate. The declaration avers that the bond having been lost by accident the plaintiff cannot produce the same in court. The defendant pleaded payment, and he also tendered three special pleas in writing, to the filing of which the plaintiff objected. The court sustained the objection to the first plea, and overruled it as to the second and third pleas. And thereupon the plaintiff re-

316 plied generally *to the special pleas and to the plea of payment. The special pleas allege in substance that the bond was not lost or destroyed by accident, but was destroyed by the obligee in her lifetime with the intention and for the purpose of releasing the defendant from the payment of the debt; and the defendant was thereby released and discharged from the obligation and from the payment of the debt therein mentioned. After the jury was sworn, and the plaintiff had introduced his first witness, the counsel for the defendant stated they would insist that the original existence of the bond and its loss should be established to the satisfaction of the court before secondary evidence of its contents could be offered to the jury. This being understood, the examination of the witnesses was proceeded with, subject to the right of the defendant to move to exclude the evidence from the jury.

After the testimony was concluded on both sides the defendant submitted his motion to exclude the evidence, upon the ground that it was not sufficient to establish the loss of the bond, so as to enable the plaintiff to introduce secondary evidence of its contents. This motion was sustained by the court, and the evidence excluded; to which the plaintiff excepted. And thereupon the jury rendered a verdict for the defendant.

The only question we have to consider is whether the court erred in this ruling. It may be well to premise that at common law, when an action is brought upon a bond or other writing obligatory, the plaintiff is required to make profert of the instrument; that is, to bring it into court. The object of the profert is to enable the court to inspect the writing and to see that it is a good deed, and to put it in the power of the defendant to examine it, and that he may see if it be

really his deed, and plead non est
 317 factum if it is not. *If, however, the bond has been lost or destroyed by accident, or by the defendant himself, or be in his possession, and the fact be set forth in the declaration, it will be a good excuse for not making profert. When the plaintiff alleges the loss of the instrument, he is required to give some evidence that the paper once existed, and that a bona fide and diligent search has been unsuccessfully made for it in the place where it was most likely to be

found, if the nature of the case admits of such proof. The object of the proof is merely to establish a reasonable presumption of the loss of the instrument; and this is a preliminary enquiry addressed to the discretion of the court, and not to the jury. This rule is founded on the idea that the writing itself is the best evidence of the agreement of the parties; and if one of them be permitted to hold back the original when he could produce it, and substitute for it secondary evidence, the door would be opened not merely to mistakes, but to the grossest frauds. Greenl. on Evidence, § 558. It is, however, obvious that the parties may, by their form of pleading, not only dispense with all proof of the existence and contents of the instrument, but they may supersede the necessity of adducing the preliminary proof of its loss, usually required in such cases. Every pleading is taken to confess such traversable matter on the other side as it does not deny. The plea of release, or payments, admits the execution of the deed, as set forth in the declaration, and concludes the party from denying and the jury from finding against the fact. Stephen on Plead. 90, 207; 2 Tucker Com. 212. The plea of release, or payment, is therefore a plea in confession and avoidance. It confesses the original cause of action, as charged in the declaration, and relies upon affirmative matter in avoidance.

In the case before us, the special
318 pleas *already mentioned admit the bond as described in the declarations, and they set up a release of the debt by a destruction of the instrument by the obligee. Both pleas conclude with a verification and a prayer of judgment. The plaintiff replies generally, putting himself on the country, and the defendant adds the similiter. Pleas of this sort are necessarily in confession and avoidance. They put the onus probandi upon the defendant, and they give him the right to open and conclude. *Young v. Highland*, 9 Gratt. 16. The same thing is true with reference to the plea of payment.

It is very true that the special pleas also contain a denial of the loss of the bond, but we do not understand the defendant thereby intends to insist that the bond was in existence when the suit was brought, or the plea pleaded, and to raise a distinct issue upon that point. What he means is to affirm the destruction of the instrument by the act of the obligee, as distinguished from its loss or destruction by accident. If this is not a correct construction of the pleas—if they are to be construed as denying the loss of the bond, and thereby, in effect, affirming it is in existence—they are inconsistent with themselves, for the gravamen of the defence is the destruction of the bond. We have here then a case in which both parties are agreed as to the contents of the bond; both admit it no longer in existence, and the utter impossibility of producing it; and yet the court excludes all the evidence relating to the bond, because the proof of loss is not sufficient to let in evidence of its contents. Secondary evidence is rejected in this class of cases upon the idea that the writing is in the possession

of the party claiming under it, or within his control, and may be purposely withheld. But surely no such presumption can arise when both parties assume that the paper is no longer in existence. Ordinarily
319 the *plaintiff must show that he has made bona fide and diligent search for the instrument. But it is difficult to see of what advantage the most diligent search can be when the defendant himself admits the destruction of the bond and bases his claim to a discharge upon that very ground.

It will be understood, of course, that what has been already said has reference to the issues joined, and to the case as it was presented to the circuit court when the motion was made to exclude the evidence. No evidence had been offered upon the plea of payment. There was no pretence of any payment, and it is apparent that plea had been filed merely as a matter of form. The real and only matter of controversy was whether the obligor had been released from the payment of the debt in the manner claimed in the two special pleas, and this the defendant averred he was ready to verify.

But if we are mistaken altogether in the view presented, if the pleas are to be construed as negating the loss of the bond, and as presenting a distinct issue upon that point, and thereby imposing upon the plaintiff the onus of showing the loss, then the question was one for the jury and not for the court. When the plaintiff alleges the loss or destruction of the bond by accident, it is merely an excuse for the omission to produce it in court, and to enable him so prove its contents; and, as already stated, this is a matter for the determination of the court. But the defendant may, if he pleases, by plea controvert the loss of the bond, and he may traverse the excuse for the omission of a profert. The counsel for the defendant have themselves produced the authorities for this, some of which may be found in 1 Chitty on Plead. 379, and note; *Poreh v. Cresswell*, 14 Eng. Law & Equity R. 385; *South Pad-dock v. Higgins*, 2 Root R. 482.

320 *Whether a plea of this sort is a plea in bar or in abatement, is a question not free from difficulty. The point does not arise in this case, and we need not answer it. A traverse necessarily involves an issue of fact to be tried by a jury, as any other issue in the case. The testimony adduced by the plaintiff bore directly upon the question of the loss of the instrument, and whether it was sufficient for the purpose was a question to be determined by the jury, and not by the court. Upon the most familiar principles the weight of the evidence is a matter for the jury exclusively. When, therefore, the circuit court excluded all the evidence upon the ground stated, it violated this principle and invaded the province of the jury.

But discarding this view entirely, we are of opinion that a sufficient foundation was laid to warrant the court in receiving secondary evidence of the contents of the bond. It was in proof that Mrs. Colley died in the year 1857. This suit was brought in 1860 by

her administrator, and was tried in 1873—sixteen years after the death of the obligee. During all this time the bond has been missing. The administrator, who was examined as a witness, did not find it among the papers of his intestate; he has never seen it or had it in his possession. It seems that Mrs. Colley died at the house of Andrew McDonell, where she had resided a short time. McDonell was dead when the case was tried. It was proved, however, he had possession of some of her papers; whether the bond was among them it is not material for us now to enquire. He certainly made a careful search for the missing paper in his house after the death of Mrs. Colley, and failed to find any trace of it. In addition to this evidence, every person with whom this lady lived, or who had ever had possession of her papers, was examined as a witness, with the
 321 exception of a *Mrs. Frazer; and it appeared that none of them could give any information of the bond. So far as Mrs. Frazer is concerned, the circumstances detailed by the witnesses exclude the idea that she could have thrown any light on the subject.

It must be borne in mind that the party setting up the instrument is only bound to establish a reasonable presumption of its loss. When a person with whom the obligee has lived and died, after a careful search, has been unable to find any trace of the paper—when the administrator, the legal and proper custodian, has never seen it, and can give no account after exhausting all the sources of information accessible to him, and when sixteen years have elapsed since the death of the obligee, and the bond is still missing, it may be fairly presumed that it is not in existence. In practice, when there is no ground of suspicion that the paper is intentionally suppressed, nor any discernable motive for deception, the courts are extremely liberal in regard to secondary evidence. The rule must be so applied as to promote the ends of justice and guard against fraud and imposition. If the circumstances justify a well-grounded belief that the original paper is kept back by design, no secondary evidence ought to be admitted; but where no such suspicion attaches, and the paper is of that description that no doubt can arise as to the proof of its contents, there can be no danger in admitting secondary evidence. This is the rule laid down in Cowen & Hill's notes to 4 Phillips on evidence, 1223, and approved by this court in Corbett v. Nutt, 18 Gratt. 624.

Here there can be no possible doubt of the contents of the paper; and so far from there being any suggestion that it is in existence and kept back by design, the defendant himself claims that the bond has been destroyed.

In every view that may be taken the
 322 court *erred in excluding the evidence.

The whole question was whether the bond had been lost or accidentally destroyed, or intentionally destroyed by Mrs. Colley, with a view of discharging the obligor from the payment of the debt. The evidence adduced on both sides bore directly on this point, and was peculiarly proper for the considera-

tion of the jury. By the form of the pleadings the onus was upon the defendant of showing the release claimed by him; and that was to be done by proof of the destruction of the bond by the obligee; and upon this issue he had the right to open and conclude. Young v. Highland, 9 Gratt. 16.

With respect to the first special plea in writing tendered by the defendant, no exception was taken to the action of the court rejecting it. That plea is, therefore, no part of the record, and we are not at liberty to consider it. Toneray v. White, 9 Leigh, 347.

Upon the whole, we are of opinion to reverse the judgment of the circuit court, to set aside the verdict, and grant the plaintiff a new trial.

The judgment was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the circuit court erred in excluding from the jury the evidence set out in the exceptions of the plaintiff in error. Wherefore, for the error aforesaid, &c. And this court, proceeding to render such judgment as the said circuit court ought to have rendered, it is considered by the court that the judgment of the said circuit court be reversed and annulled, the verdict set aside, and a new trial awarded the plaintiff in error.

Judgment reversed.

323 *Steptoe v. Flood's Adm'r.

January Term, 1879, Richmond.

1. **Issue out of Chancery—Evidence.**—On the trial of an issue out of chancery the plaintiff in the issue relies upon a receipt to which there is an attesting witness, but both the witness and the principal are dead. The plaintiff having proved the handwriting of the witness, the defendant may introduce the testimony of witnesses to prove that the name of the principal to the receipt is not in his handwriting.
2. **Appeal—Conflict of Testimony—Verdict of Jury.**—There being great conflict of opinion among the witnesses as to the genuineness of the handwriting of the principal to the receipt, the verdict of the jury against it will not be disturbed.
3. **Jurors Impeaching Verdict.***—The court will not set aside the verdict of the jury on the certificate or affidavit of two of the jurors, that they

***Jurors Impeaching Verdict.**—The general rule is that the testimony of jurors ought not to be received to impeach their own verdict. Danville Bank v. Waddill's adm'r, 31 Gratt. 469, citing principal case; Price's ex'or v. Warren, 1 H. & M. 385; Shobe v. Bell, 1 Rand. 39; Koiner v. Rankin's heirs, 11 Gratt. 420; Bull v. Commonwealth, 14 Gratt. 673; Thompson v. Commonwealth, 8 Gratt. 637; Elam v. Commercial Bank, 86 Va. 92; Harnsbarger's adm'r v. Kenney, 6 Gratt. 287; Reed v. Commonwealth, 22 Gratt. 924; Moses v. Cromwell, 78 Va. 671. Compare Moffet v. Bowman, 6 Gratt. 21; Cochran v. Sheet, 1 Wash. 79; Miller v. Wills, 95 Va. 351; Graham v. Bank, 45 W. Va. 703; State v. Cobbs, 40 W. Va. 724; Probst v. Braeunlich, 24 W. Va. 357; Reynolds v. Thompkins, 23 W. Va. 229.

thought the receipt proved and ought to be considered; but the other members of the jury insisted that the receipt had nothing to do with the case, and they were persuaded against their judgment to consent to the verdict, and that it is now against their judgment.

4. Same—General Rule.—It is the general rule in ordinary trials that a verdict will not be disturbed upon the affidavits of jurors; and this is so in the case of an issue out of chancery, especially.

The controversy involved in this case has been pending, in a variety of forms, for more than twenty years. It was founded on a check dated December 23, 1854, drawn by W. J. Read on the cashier of the Farmers Bank of Virginia at Lynchburg, payable to Quarles & Steptoe, or order, for five hundred dollars. The said Read claimed to have loaned the said check to the said Quarles & Steptoe, who were partners; and that they were jointly indebted to him in the amount thereof.

They having made default in the payment of said claim, *and he having transferred the same to Henry D. Flood, on the 12th day of January, 1857, an action of assumpsit was brought in the circuit court of Bedford county in the name of said Read, plaintiff, for the benefit of said Flood, against the said Quarles & Steptoe, defendants, to recover the amount of the said check. On the 29th day of April, 1857, the defendants plead non-assumpserant to the action, to which the plaintiff replied generally, and the trial of the issue thus joined was deferred until the next term. On the 28th day of April, 1860, the said issue was tried by a jury, which found a verdict for the plaintiff, and assessed his damages at five hundred dollars, with interest from the 23d of December, 1854, and judgment was thereupon rendered in favor of the plaintiff against the defendants for the said sum of five hundred dollars with legal interest thereon from the said 23d day of December, 1854, till payment, and his costs by him about his suit in this behalf expended.

Upon the trial of the cause the defendant Steptoe tendered three several bills of exceptions to opinions of the court, which bills were made a part of the record in the cause, and were to the effect following, to-wit:

In the first bill it is in substance stated, that when the cause was called for trial the defendant Steptoe moved the court for leave to withdraw the joint plea of both defendants (the defendant Quarles making no objection thereto) and to file his separate plea "that the said defendants did not assume upon themselves in manner and form as said plaintiff hath in his declaration alleged, and of this he puts himself upon the country"; the counsel for the defendant Steptoe stating that the defence relied on was, that the demand in controversy was the individual liability of said Quarles, and not of the firm of Quarles & Steptoe, and that he wished to introduce said Quarles as a

325 *witness to prove this defence, and for that reason he wished to plead separately for Steptoe; and the court refused to permit the joint plea to be withdrawn and

the above plea to be filed; and then said defendant asked leave to file said plea in addition to that heretofore filed; which the court refused. And to the said action of the court the defendant Steptoe excepted.

In the second bill it is in substance stated that "upon the trial of the cause the plaintiff offered to read in evidence the deposition of N. H. Campbell in the following words and figures, to-wit:" Then follows the said deposition as taken by Joseph C. Lawrence, a commissioner for the state of Virginia, at his office, in the city of New York, in the state of New York, on the 23d of April, 1858, in which deposition are the following questions, propounded by the plaintiff to the witness, and the following answers thereto:

"Question. Examine the accompanying account and protested check and state what you know of them?

"Answer. I have examined the account and protested check referred to in the question, and for their identification as the papers before me I have marked the protest 2, and the account S. I recognized the protested check as a paper which was placed in my hands as an attorney by William J. Read, the plaintiff, as evidence of the amount of a debt claimed by him of the defendants. The account I also recognize as a paper exhibiting the result and items of a settlement had in my presence, as hereinafter stated, between the plaintiff and the defendant, Quarles, of individual transactions theretofore had between them.

"Question. State whether you presented the check as evidence of Read's claim against Quarles & Steptoe, what took place at the time, and what was said by Quarles, what by Steptoe?

326 *"Answer. I did exhibit the check, and protest to each of the defendants stating the plaintiff's claim; that it had been loaned to them, and that he, having paid the same, was entitled to recover the amount so paid back from them. Quarles, whom I spoke to several times on the subject, uniformly admitted the statement on which the claim was based to be correct and just, as often declared that it should be paid. I also presented the claim to the defendant Steptoe along with an account for a small sum purporting to be due from the defendants to the plaintiff. On looking over the papers, Steptoe said he would pay the account, but the amount of the check was to be taken care of by Quarles; and that Quarles said there were unsettled individual accounts between Read and himself, upon an adjustment of which this sum would be included and settled; think the plaintiff was standing near enough to us for me to call to him and repeat the substance of what Steptoe had said. The plaintiff, in reply, stated to both Steptoe and myself that upon a settlement of individual matters between Quarles and himself that Quarles would fall considerably in his debt. I then remarked to Steptoe that Quarles admitted the check to have been loaned to Quarles & Steptoe by the plaintiff; and that upon that admission I thought it could be recovered at law, and if so it would be better

to settle it without suit. He dissented from me, but finally said he would again see Quarles in regard to it. He did so, and in a short time afterwards told me that he should not pay the claim. About the time that Steptoe told me his final determination not to pay it, Quarles came out and told the plaintiff he had better not press the matter further then, as it should all be made all right. Everything in the foregoing answer relating to the inter-

view *with Steptoe occurred in the street in Liberty, near the hotel."

There are other questions and answers in the deposition, but they need not be repeated here.

To the reading of the said deposition the defendant Steptoe objected, because it was taken without any commission, both because the paper purporting to be a commission was not signed by the clerk; and also because the commissioner who took it did not certify it was taken in pursuance of any commission, &c. The clerk and deputy clerk were also examined in regard to the commission and deposition; and thereupon the court permitted the deposition to be read as evidence upon the trial of the suit; to which action of the court the defendant Steptoe excepted.

In the third bill it is, in substance, stated that after the jury were sworn the defendant Steptoe offered to introduce the said Quarles as a witness to prove that the demand sued for was the individual debt of said Quarles, and that there was no liability of said Steptoe therefor, to which the plaintiff objected; and thereupon said Quarles offered to withdraw the plea, so far as related to himself, theretofore pleaded, but the court refused to permit him to do so; and then leave was asked to permit said Quarles to acknowledge the plaintiff's action to enable him to testify for said Steptoe, which the court refused to permit said Quarles to do; and the defendant Steptoe again offered said Quarles as a witness, the counsel for the defendants stating that Quarles was making no defence, and that the proof they offered applied wholly to said Steptoe, but the court again refused to permit said Quarles to testify. To all of which acts of the court in this bill mentioned the defendant Steptoe excepted.

On the said judgment an execution was issued and levied on the property of said Steptoe, who gave a *forthcoming bond, on which there was a judgment and award of execution, which execution was issued, but had not been returned on the 14th of December, 1860, when a copy was made of the said record; which was no doubt intended to be the foundation of an application for a writ of supersedeas to said judgment.

About the date last mentioned, the said Steptoe accordingly applied to a judge of this court for a writ of supersedeas as aforesaid, which was accordingly awarded, to-wit: in December, 1860, and the case was depending in this court from that time until the 27th of October, 1868, when the said judgment was unanimously affirmed by the court, as may be seen by reference to the case of

Steptoe v. Read, for, &c., 19 Gratt. pp. 1-13.

The plaintiff Read having died pending the said case in this court, a writ of scire facias was sued out after the said affirmance to revive the said judgment on the forthcoming bond, which was accordingly revived on the 7th of May, 1869; and more than a year having elapsed after the said revival, the said judgment was again revived by another scire facias, and a judgment rendered thereon on the 14th of October, 1870. It seems that an execution on the last-mentioned judgment having been returned "no effects," and both Read and his assignee, Flood, having died (the said Read long before), Thomas J. Kirkpatrick, as administrator of Flood, filed a bill in the said court to subject the real estate of said Steptoe to the payment of said judgment.

Pending said suit, and after a decree had been made therein for a sale of said real estate, to-wit: the 7th day of July, 1874, the said Steptoe filed his bill in the said court against the said Flood's administrator for the purpose of enjoining said sale and obtaining a new trial of the said cause upon the ground alleged in said bill, "that the check for \$500, upon which the said suit was brought and judgment rendered, was

given by said Read to said *Quarles in part payment of a draft drawn by said Quarles on Dickinson, Hill & Co., of Richmond, for \$1,300, and that said Read executed to said Quarles a receipt showing that fact, and by which it appeared that the said firm of Quarles & Steptoe were in no manner responsible for said transaction; but the said Quarles had mislaid said receipt, and on the trial of the case the same could not be produced to be used in evidence, and the said Quarles being an incompetent witness he could not testify, so that the defendants were deprived of the benefit of the receipt aforesaid, which would have necessarily defeated the action"; that the said Steptoe, "who was and is the only responsible member of the concern, knew nothing at the time of the existence of such a paper. Since the rendition of the judgment aforesaid, and its affirmance by the court of appeals, the said Quarles has found the said receipt and delivered it to the said Steptoe, who filed the same with the affidavit of said Quarles attached thereto as part of the said bill. It was further charged in said bill that said Quarles was insolvent; that the whole burden of said judgment falls upon said Steptoe; that at the time of the trial aforesaid he did not know of the evidence above referred to except from the declaration of Quarles, and had no means of producing the same; that he used due diligence to discover and produce all testimony favorable to him on the trial of the case, and that he has only discovered this testimony since the trial.

Exhibit No. 1, filed with said bill, being the affidavit of said Quarles, and receipt thereto appended as aforesaid, is in these words:

Affidavit.

"I, Jesse L. Quarles, do certify that the

receipt appended hereto, dated 23d day of December, 1854, was executed by W. L.

Read to me at the time it bears date.

330 *At the time of the execution of the receipt I gave to said Read a draft on Dickinson, Hill & Co. for \$1,300, which he collected in part payment of said draft. He gave me the check mentioned in the receipt for \$500, upon the Farmers Bank at Lynchburg, and it was made payable to Quarles & Steptoe at my request, as I intended to use it for them in a transaction which I was individually bound to pay. I further certify that when the suit was brought on said check for \$500, by the said Read against Quarles & Steptoe, and during its pendency and trial, I searched for said receipt to use as evidence to show that Quarles & Steptoe were not liable for the payment of the same, and that it was given in part payment of the draft on Dickinson, Hill & Co.; but after diligent search I was unable to find it, the same being mislaid. After the judgment was rendered in the court below, and while the case was pending in the supreme court of appeals, in looking over some papers I found this receipt and placed it in the hands of John R. Steptoe."

Receipt.

"1854, December 23d.

"I have this day received of Jesse L. Quarles his draft upon Dickinson, Hill & Co., of Richmond, for \$1,300; for which I have given him a check upon the Farmers Bank at Lynchburg for \$500. payable to Quarles & Steptoe, and the balance upon said draft of \$800 I am to pay to the said Quarles as he may demand it.

"W. J. Read,

"Teste:

"Sampson Karnes."

On the same day of the filing of said bill, to-wit: the 7th of July, 1874, an injunction was awarded by the judge of said court according to the prayer of said bill, on the

331 terms prescribed in the order awarding the same. *But it seems that the said Steptoe not having complied with said terms for several years, a sale of the real estate of said Steptoe was made under the decree obtained to subject the same to sale for the satisfaction of the judgment liens upon it, including the said judgment in the name of said Read's administrator for the benefit of said Flood's administrator. And it further seems that said Steptoe never did comply with said injunction order, and not until after the sale of his real estate aforesaid, to-wit: in December, 1875, did he sue out process on his said bill, which being returned executed on said Thomas J. Kirkpatrick, administrator of said Henry D. Flood, deceased, that defendant, in February, 1876, filed his answer to the said bill, to which the plaintiff replied generally.

In that answer the said defendant stated in substance, among other things, that he "denies that said check was given to said Quarles in part payment for a draft on Dickinson, Hill & Co., or in payment for any

other debt or thing. He denies that said transaction was on account of Quarles alone, and insists on said judgment as an adjudication of all questions relating to said transaction. Respondent, further answering, says that he is well acquainted with the handwriting of the said William J. Read, deceased, having had abundant opportunities for knowing it well, and upon this knowledge, as upon the judgment of several other excellent judges of his handwriting, he now says he does not admit that said Read ever executed the pretended receipt filed as exhibit No. 1 with the said bill. On the contrary, respondent believes and here declares that the same is not genuine. In support of this allegation and denial respondent refers to the record in the original suit, and particularly to the bills of exceptions taken on the trial by the plaintiff here and said Quarles, in which they declared that their de-

332 fence *was 'that the demand in controversy was the individual liability of Jesse L. Quarles, and not of the firm of Quarles & Steptoe;' and, again, it was then proved 'that said Quarles had uniformly admitted the statement on which said claim was based to be correct and just;' this, too, very shortly after the date of the transaction, when the memory thereof must have been fresh with all concerned. So that then no pretence was made of the existence of any such paper, or of any such contract in the matter, as is now set up, and respondent therefore says that said plaintiff is estopped from now making said new defence.

"Respondent, further answering, says he does not admit that said pretended receipt came to the plaintiff's possession since the affirmance by the court of appeals of said judgment; but says that said plaintiff, since this last suit was instituted, declared to respondent that it came to his possession before the death of William J. Read, which occurred not later than in 1862.

"Respondent, further answering, says that said plaintiff ought not to be allowed to make his said defence to said judgment now, because, after he discovered said receipt—if the same be held to be genuine—and before he propounded it for the purposes of this suit, the said Read, the said Flood, and N. H. Campbell, who, as attorney for Read, was well acquainted with the transaction almost from its origin, and who was probably the principal witness upon whose testimony the verdict was given in the original suit, have all departed this life, so that now this respondent would be unable to defend the estate of his intestate as he might otherwise be able to do. Nor ought said plaintiff to be allowed to set up his said defence to said judgment now, because this respondent says

that he, said plaintiff, after he was in **333** possession *of said pretended receipt, abandoned all idea of setting it up against said judgment, and more than once in the lifetime of H. D. Flood promised him to pay said judgment. Indeed, respondent says that since he qualified as administrator of said Flood the plaintiff has repeated said promise to him.

"Respondent, further answering, says that after the plaintiff recovered possession of said pretended receipt he allowed more than twelve years to elapse before he propounded it as a defence to said judgment, and that he is now barred of all action thereon by the statute of limitations, and respondent insists on this defence as if the same were here fully pleaded."

Before setting out the grounds of the said answer the respondent demurred to the bill for the following causes:

"1st. That said complainant has not by his bill made such a case as entitles him to any relief against him.

"2d. That said defendant has failed to make Jesse L. Quarles a party to his said bill.

"3d. That he has in said bill joined two separate causes of action against distinct and different parties who are in no wise connected.

"4th. That he wholly fails in said bill to give any sufficient reason why his defence therein made was not made to the suit at law therein referred to.

"5th. That he wholly fails in said bill to assign any reason or excuse for his laches in neglecting, for so long a time, to produce and set up his said defence after the evidence thereof was in his possession."

Sundry depositions were taken and filed on each side as evidence in the cause at different times between the 7th day of March and the 4th day of September, 1876, mainly in regard to the handwriting of the signature of

William J. Read to the said receipt, 334 *filed as exhibit No. 1, the following in behalf of the plaintiff, to-wit: William S. Myler, William Arrington, B. L. Owen, Thomas M. Wilkinson, and Sampson Karnes; and the following in behalf of the defendant, to-wit: John A. Clement, T. J. Kirkpatrick, Odin G. Clay, William E. Holley, and E. T. Read. The evidence in regard to the handwriting of the said signature, "W. J. Read," was very conflicting. The witness Sampson Karnes, in his deposition, being asked by said Steptoe whether he was a subscribing witness to said exhibit No. 1, which was then shown to him, purporting to be W. J. Read's, dated 1854, December 23d, and whether the same was acknowledged in his presence by said Read, answered: "My name as a witness to the paper shown to me is in my handwriting; I do not remember much about it. Read and Quarles had a good many transactions with each other, and I witnessed several papers for them." Being further asked by the same where he was living at the time the paper bears date, to-wit: in December, 1854, he answered: "I was living at the Bedford House, a hotel in the town of Liberty, kept at that time by Quarles & Steptoe." He was then cross-examined, and among other things, being asked when was the first time he saw the said paper after it was witnessed by him, he answered: "This day; if I ever saw it before since I signed it, I do not recollect it." Being further asked to examine the paper and say who wrote the body of it, he answered:

"I think 'tis the hand of Jesse Quarles." And being further asked in whose handwriting the word "teste" is written just above his signature to said paper, he answered: "It looks like the handwriting of Jesse Quarles. It is not mine." Being further asked what was his business while living with Quarles & Steptoe, he answered: "I was keeping 335 bar and tending about *the house."

And being further asked, "Do you now remember that you lived with them in December, 1854?" he answered: "I recollect living there about that time; I think it was about that time I witnessed that paper." This witness died after the 7th of March, 1876, when his deposition was taken, and before the 4th of September, 1876, when the witness William S. Myler proves that he was dead.

On the 13th of September, 1876, on the motion of the plaintiff, by counsel, leave was given him to dismiss the said bill as to the defendant John A. Clement (against whom, as one of the co-defendants with the said Kirkpatrick, administrator of said Flood, it had been originally filed) without prejudice to his right to proceed in any separate action or bill against the said Clement for the same cause alleged against him in the present bill, and the same was dismissed accordingly.

And thereupon the cause came on to be heard as between the plaintiff and the defendant Thomas J. Kirkpatrick, administrator of Henry D. Flood, deceased, upon the bill of the plaintiff, demurrer and answer of the said defendant, replication to said answer, exhibits and examination of witnesses, and was argued by counsel.

Upon consideration whereof (the defendant waiving his objection as to Jesse L. Quarles not being a party to said bill, assigned as the second cause of demurrer) the court overruled the said demurrer and decreed that an issue be made up and tried before a jury at the bar of the said court on its common-law side, to ascertain whether the debt for which the judgment in the bill mentioned of "Read, for, &c., against Quarles & Steptoe," was recovered, was the individual debt of Jesse L. Quarles, or was really the debt of Quarles & Steptoe, and that the verdict of the jury thereupon be certified to the court; and upon the trial of said 336 issue the said John R. Steptoe *shall be plaintiff, and the defendant Kirkpatrick, administrator as aforesaid, shall be defendant.

On the 5th, 6th, 7th and 8th of September, 1877, the said issue was tried by a special jury, and on the last-named day a verdict was found by the jury in these words: "We, the jury, find that the debt for which the judgment in the bill mentioned of Read, for, &c., v. Quarles & Steptoe was recovered, was really the debt of Quarles & Steptoe, and not the individual debt of Jesse L. Quarles." Whereupon the court ordered that the said verdict be certified to the chancery side of the said court.

Two bills of exceptions were taken by the plaintiff to opinions given by the court on the trial of the said issue.

In the first of the said two bills it is stated that on the trial of the issue, the plaintiff, to sustain the same on his part, introduced a paper in the following words and figures, to-wit: (Here is inserted the receipt marked exhibit No. 1, filed with the bill and already copied in this statement), and proved that the subscribing witness, Sampson Karnes, was dead; and further proved that the signature of said Karnes was his genuine signature; and then read the said paper as evidence to the jury. Whereupon the counsel for the defence introduced witnesses to prove that they were acquainted with the handwriting of W. J. Read, and that in their opinion the signature W. J. Read to said paper was not in the handwriting of said Read; to the introduction of which testimony the plaintiff's counsel objected, because, if the execution of the paper was proved by the proof of the handwriting of the subscribing witness, it was immaterial whether the signature was written by the said W. J. Read or not, and testimony as to the genuineness of the signature was calculated to mislead the jury; but the court overruled said objection and admitted the testimony; to which opinion of the court the plaintiff excepted.

337 *In the second of the said two bills it is stated that after the verdict of the jury upon the issue in this cause had been rendered and certified to the chancellor, the plaintiff moved the court to set aside said verdict and grant a new trial on the grounds:

1st. That the verdict was contrary to the evidence.

2d. That the court had erred in allowing the defendant on the trial to give evidence before the jury tending to show that the signature of W. J. Read to the exhibit No. 1 was not his genuine handwriting, after the plaintiff had proved that the attestation of Sampson Karnes, the subscribing witness to said paper, who is dead, was in the handwriting of said Karnes.

3d. Because of the statement contained in the paper signed by two of the jurors who tried said issue, which is in the following words, to-wit:

"The undersigned, members of the jury that tried the issue out of chancery in the case of Steptoe v. Flood's ex'or, do certify that in determining the issue and arriving at the conclusion that was reached the jury did not pass upon the genuineness or validity of the receipt purporting to have been executed by W. J. Read and witnessed by Sampson Karnes. We were of opinion that the said paper was proved, and ought to be considered, but the residue of the jury insisted that the said paper had nothing to do with the case; that from the face of the check it appeared that the debt was a partnership debt, and ought to be so decided. We were of a different opinion, but were persuaded against our judgments to agree to the verdict, and regret now that we did consent to the verdict, and state that it is now against our judgments.

"J. M. Ragland,
"J. A. Dooley."

338 *Which motion the court overruled;

to which opinion of the court, refusing to set aside said verdict, the plaintiff excepted. And to give the plaintiff the benefit of his exceptions, the court certified that the following facts were proved to the jury on the trial of the issue by the plaintiff to sustain the issue on his part:

"It was proved by three witnesses that they were acquainted with the handwriting of Sampson Karnes, the subscribing witness to exhibit No. 1, and they believe his signature to said paper to be genuine, and the plaintiff then read the said paper as evidence to the jury (which paper has been hereinbefore copied), and then rested his case; and the defendant, to sustain the issue on his part, read to the jury the check on which the judgment was obtained in the case of Read, for, &c., v. Quarles & Steptoe, and proved by eight witnesses that they were acquainted with the handwriting of W. J. Read, and in their opinion the signature, W. J. Read, at the bottom of said paper, exhibit No. 1, is not his genuine signature, and one of the witnesses stated that he was acquainted with the handwriting of the complainant, J. R. Steptoe, and while it is difficult to judge of the handwriting of a person from one word alone, the word "teste" in said paper was more like the handwriting of said Steptoe than the handwriting of any other person he knew of; and further to sustain the issue on his part, defendant read to the jury from the deposition of N. H. Campbell, who is dead, the answer of said Campbell to the following question: "Examine the accompanying account and protested check; state what you know of them? (See the answer to this question before copied in this statement.) And then the plaintiff, to further sustain the issue on his part, proved by ten witnesses, by way of rebutting testimony, that they were acquainted with the handwriting of the said W. J. Read, and that they believed the signature to said paper to be his genuine *signature, and also read to the jury the deposition of the subscribing witness, Sampson Karnes, to said exhibit No. 1, taken in his lifetime (the same hereinbefore copied).

On the 12th day of September, 1877, the cause came on to be finally heard on the papers formerly read and the verdict of the jury upon the issue directed to be tried on the common-law side of the court, which verdict was certified to the court, and upon the motion of the plaintiff, Steptoe, to set aside said verdict, and was argued by counsel. On consideration whereof the court overruled said motion for a new trial, and signed and sealed the bill of exceptions tendered by said plaintiff to the action of the court in overruling said motion, and decreed that the plaintiff's bill be dismissed with costs.

From the said decree of the 12th day of September, 1877, the said Steptoe applied to this court for an appeal; which was accordingly awarded.

James F. Johnson, for the appellant.

Kirkpatrick & Blackford, for the appellee.

MONCURE, P., delivered the opinion of the court. After stating the case he proceeded:

There are but two assignments of error in the petition for the appeal in this case. They are:

First. That on the trial of the issue, after the plaintiff had proved the signature of the attesting witness to the receipt marked No. 1, filed with the bill and inserted in the bill of exceptions taken on the said trial, the circuit court erred in allowing the defendant to introduce as evidence to impeach said receipt testimony tending to show that the
340 signature of the person *whose name was subscribed to said receipt was not in his handwriting; and,

Second. That the circuit court erred in overruling the motion of the plaintiff to set aside the verdict and grant a new trial of said issue, on the grounds stated in bill of exceptions No. 2.

As to the first assignment of error, certainly a subscribing witness to a written instrument, if he attested it by request, express or implied, of the author of the instrument, which will be presumed to have been the case in the absence of evidence to the contrary, must be produced to testify as to the execution of the said instrument by the party who seeks to set it up or show its execution, provided the said witness is alive, and in the jurisdiction of the court, and competent to testify; but if not, the genuineness of his attestation to the said instrument must be proved by the said party, if it can be, by proof that the signature to the attestation is in the handwriting of the subscribing witness.

It may be out of the power of the said party to produce the attesting witness on the trial, or to prove his handwriting or the genuineness of his signature to the attestation; or the subscribing witness, if produced on the trial, may not recollect the execution of the instrument, or deny the genuineness of his apparent attestation thereof; or the proof of the execution of the instrument in that way may not be sufficient in the estimation of the party by whom it is introduced, or of the court in which the trial is pending. In any such case it is competent for the said party to prove the genuineness of the signature of the author of the instrument to the same by other evidence than that of the attesting witness, or proof of his handwriting if it cannot be produced on the trial. Such is the law of
341 evidence in regard to the party on *whom devolves the burden of proving the due execution of an instrument to which there is an attesting witness, and which may be offered in evidence on the trial of a controversy.

But whatever may be the evidence introduced by the party upon whom the burden of proving the due execution of an instrument may devolve in the trial of a controversy concerning the same, certainly it is competent to the adverse party to prove, if he can, that the name signed to the said instrument as that of its author is not in the handwriting of the party thus claimed to be such author.

That such is the well-settled law, there can be no doubt; and to show that it is, it can only be necessary to refer to standard elementary works on the subject and the cases therein cited, many of which are referred to in the printed argument of the learned counsel for the appellee. See 1 Greenleaf on Evidence, §§ 569-578; 1 Wharton on the Law of Evidence, §§ 723-730; and the notes thereto.

The attesting witness to the instrument in question in this case being dead at the time of the trial of the issue, the plaintiff, on whom devolved the burden of proving said instrument on the said trial, introduced evidence to prove the genuineness of the signature of the attesting witness; and both parties introduced evidence upon the question, whether the signature, "W. J. Read," to the said instrument as its author, was the handwriting of W. J. Read, assignor of Henry D. Flood, whose administrator, Thomas J. Kirkpatrick, is the appellee in this case.

The court is therefore of opinion that the circuit court did not err in allowing the defendant to introduce, as evidence to impeach the said receipt, testimony tending to show that the signature of the person whose
342 name *was subscribed to said receipt as its author was not in the handwriting of the alleged author.

As to the second assignment of error, the court is of opinion that the circuit court did not err in overruling the motion of the plaintiff to set aside the verdict and grant a new trial of the said issue, whether on the grounds or any of them stated in bill of exceptions No. 2 as aforesaid, or any other grounds whatever.

There are three grounds so stated, which, and our opinion in regard to them, are as follows:

"1st. That the verdict was contrary to the evidence." There is certainly a great conflict in the evidence as to the question whether the signature, "W. J. Read," to receipt No. 1, filed with the bill, is in the handwriting of W. J. Read, the assignor of Henry D. Flood, the intestate of Thomas J. Kirkpatrick, the appellee in this cause. The mere fact of the existence of such a conflict seems of itself to be a sufficient and unanswerable ground for affirming the action of the court below in overruling the motion of the plaintiff to set aside the verdict and grant a new trial of the said issue. It is the peculiar province of a jury to decide a question of fact arising in a cause, and upon the weight of the testimony on which it depends. They see and hear the witnesses testify in the cause, and when the judge who presides at the trial, and also sees and hears the witnesses testify, refuses to set aside the verdict, an appellate court, which has not that advantage, will not reverse the judgment upon the ground that the verdict is contrary to the weight of the evidence. This is an established rule of law well settled by many authorities, and among others the following decisions of this court cited by the counsel for the appellee, viz: Goode v. Love's adm'rs,

4 Leigh, 635; Brugh v. Shanks, 5 Id. 598; Patteson v. Ford, 2 Gratt. 19-23; Bell v. Alexander, 21 Id. 1; Blosser v. Harshbarger, Id. 214; Hilb v. Peyton, 22 Id. 550; Blair & Hoge v. Wilson, 28 Id. 165,

343 *175. Other strong reasons might be given in support of the same view, but the one already given is believed to be sufficient. We will therefore proceed to consider the two remaining grounds for setting aside the said verdict and granting a new trial stated in said bill of exceptions No. 2.

"2d. That the court had erred in allowing the defendant, on the trial, to give evidence before the jury tending to show that the signature of W. J. Read to the exhibit No. 1 was not his genuine handwriting. after the plaintiff had proved that the attestation of Sampson Karnes, the subscribing witness to said paper, who is dead, was in the handwriting of said Karnes."

The same question is here presented which is also presented by the first assignment of error, and we have, therefore, already expressed our opinion upon it; according to which it was clearly and insufficient ground for setting aside the verdict and granting a new trial of the issue.

"3d. Because of the statement contained in the paper signed by two of the jurors who tried said issue, which paper is in the following words and figures, to-wit:

"The undersigned, members of the jury that tried the issue out of chancery in the case of Steptoe v. Flood's ex'or, do certify that in determining the issue and arriving at the conclusion that was reached, the jury did not pass upon the genuineness or validity of the receipt purporting to have been executed by W. J. Read and witnessed by Sampson Karnes. We were of opinion that the said paper was proved, and ought to be considered, but the residue of the jury insisted that the said paper had nothing to do with the case; that from the face of the check it appeared that the debt was a partnership debt, and ought to be so decided. We were of a different opinion, but were persuaded against our judgments to

344 *agree to the verdict, and regret now that we did consent to the verdict, and state that it is now against our judgments.

"J. M. Ragland,
"J. A. Dooley."

It is certainly a general rule that affidavits of jurors to impeach their verdict should be rejected, first, because they would tend to defeat their own solemn acts under oath; second, because their admission would open a door to tamper with jurymen after they have given their verdict; and third, because they would be the means, in the hands of a dissatisfied juror, to destroy a verdict at any time after he had assented to it. 3 Graham & Waterman on New Trials, pp. 1428, 1450. There are, no doubt, exceptions to this general rule, but without attempting to lay down the exceptions, it is sufficient to refer to the work just cited and the notes thereto, and to say that in our opinion this case

comes within the general rule, and not any of the exceptions aforesaid. Indeed, it does not appear that the certificate of the two jurors aforesaid was even sworn to by them; but whether sworn to or not, our opinion as to its effect upon the verdict is as aforesaid. See Bull's case, 14 Gratt. 613, 626, and Read's case, 22 Id. 924, 947.

And such would be the case if this were an ordinary jury trial. But, instead of being so, it is a trial of an issue out of chancery, the object of which is to inform the conscience of the court of chancery which directs the issue. That court may disregard the issue after directing it, or decide differently from the jury which tried the issue. And especially if the issue be tried before the same court, which sees and hears the witnesses testify on its trial, and concurs as to the correctness of the verdict found by the jury upon the issue, the said court will not

set aside the verdict and order a new **345** trial of the *issue because one or more of the jury may certify, or even swear, to the effect of the certificate of the two jurors in this case. On this subject see the case of Steptoe v. Pollard, 30 Gratt. 689, and the cases therein referred to.

The issue in this case was "to ascertain whether the debt for which the judgment in the bill mentioned, of 'Read, for, &c., against Quarles & Steptoe,' was recovered was the individual debt of Jesse L. Quarles or was really the debt of Quarles & Steptoe"; and not to ascertain whether the signature, W. J. Read, to exhibit No. 1, filed with the bill, was in the handwriting of W. J. Read, the assignor of H. D. Flood, the intestate of T. J. Kirkpatrick, the appellee in this case. It is alleged by Steptoe, the appellant, that that paper was mislaid or lost for many years, and therefore was not produced nor relied on in this litigation, nor even mentioned until the filing of the bill in this case, on the 7th of July, 1874, which was filed with that bill as "exhibit No. 1." It is very clear from the evidence in the record that that paper, if really ever lost, was found many years before it was produced and relied on as aforesaid, after the death of W. J. Read, H. D. Flood and N. H. Campbell, three of the chief actors in the transaction, who might, perhaps, have fully explained it. The action was originally brought by Read against Quarles & Steptoe to recover the amount of his check to them drawn in 1854, not long after that check was drawn, when all the parties to the transaction were alive, and doubtless remembered everything about it. Quarles' liability to Read for the amount of that check was never denied by Quarles; but Steptoe contended that though the money was loaned by Read to Quarles by means of a check to Quarles & Steptoe, who were partners, and though the money was applied by Quarles to the payment of a partnership debt, yet that as between him and Quarles, the latter was

346 *bound to pay that debt, and therefore, as between the two, the debt created by the loan of the check was really and truly the debt of Quarles individually. It does not appear that Read had any knowledge or

information as to the state of accounts between Quarles and Steptoe, which, between themselves, may in fact have made this debt the individual debt of Quarles. So far as Read was concerned, he gave credit to the firm of Quarles & Steptoe, and his check was applied to the purposes of the firm, and there can be no doubt about the legal liability of the firm to him for the amount of the check. Even if the paper marked exhibit No. 1 ever was a genuine paper, a question upon which the evidence, as we have seen, is, to say the least of it, extremely conflicting, yet there must have been some arrangement between the parties concerned, made soon after the date of that paper and the check, to-wit: December 23d, 1854, which annulled the said paper and left the firm indebted to Read in the amount of the check; all of which might have been fully explained had the question been raised when all the parties were alive. Exhibit No. 1, if a genuine and unrevoked paper, as much tends to exonerate Quarles as Steptoe; and yet Quarles does not pretend, and never did pretend, that it exonerated him or that he does not still owe the debt. The same, doubtless, may be truly said of Steptoe, though the antiquity of the transaction and the death of some of the chief agents in it make an explanation of it by the appellee impossible at this late day.

The court is therefore of opinion that there is no error in the decree appeal from, and that the same ought to be affirmed.

The learned counsel for the appellees contended that his demurrer to the bill on some one or more of the grounds therein specially assigned ought to have been sustained; and

even if it ought not to have been sustained, *that the court of chancery ought to have dismissed the bill upon the pleadings and the proofs in the cause, without directing any issue therein. And he sustained his views on these subjects by a reference to various books and cases. But it is unnecessary to consider and decide the questions thus presented, and we therefore decline doing so; our opinion above expressed, that there is no error in the decree appealed from, and that it ought to be affirmed, being conclusive of the case in favor of the appellee, and just as much so as if all the points contended for by him were decided in his favor.

Decree affirmed.

348 *Crews & al. v. Farmers Bank of Va., for, &c.

January Term, 1879, Richmond.

I. In an action against the endorsers of a negotiable note bearing date the 26th August, 1865, they plead "*nil debet*" and file an affidavit that at the time the note was endorsed and when it was protested it was not stamped, as required by the act of congress of July 1st, 1862, but that it had been since altered by the collector of the United States revenue putting a stamp upon it—**Held:**

1. **Practice—Proof of Signatures Unnecessary.**—This affidavit not denying their signatures, it was not necessary for the plaintiff to offer proof before introducing the note.

2. **Act of Congress—Interpretation.**—The act of July 1st, 1862, was not in force when this note was made and endorsed. The act of congress of 1864 as amended by the act of March 3d, 1865, which was then in force, authorized the subsequent affixing of the stamp, and of this the endorsers were bound to take notice; and therefore the fixing the stamp subsequent to the endorsement and protest was not an unauthorized alteration of the note.

3. **Same—Intent to Evade Law.**—The stamps having been put upon the note by the collector of the revenue more than a year after its being made could only be done upon the payment of the penalty of \$50; the payment of the penalty does not tend to show that the failure to affix the stamp when the note was made was with intent to evade the law.

II. **Power of Congress.**—Congress has no power to declare by law what shall or shall not be evidence in a state court.

III. **Suits by Corporations—When Proof of Corporate Existence Necessary.**†—In a suit by a corporation the plea of "*nil tiel* corporation" unaccompanied by an affidavit denying the corporate existence of the plaintiff, does not put the plaintiff to the proof of its corporate existence.

349 *IV. **Special Pleas.**—Special pleas which only raise questions which are involved in the plea of *nil debet*, under which the defendant may rely upon the same matters in evidence which are set out in the pleas, are properly excluded.

V. **Negotiable Instruments—Presentment.**—A bank having ceased to carry on its banking operations in a city, to wind up its affairs in that place puts its notes, &c., falling due at that place in the hands of P, a private banker of that city, for collection, and makes his office its office of discount and deposit, and of this the maker and endorsers of a note had notice. A presentation and demand of payment at the office of P was a sufficient presentation.

VI. **Same—Effect of Bank Closing Its Affairs.**—A bank having, in pursuance of the act of February 12th, 1867, conveyed all its property to trustees for the purpose of closing up its affairs, a suit may be brought in the name of the bank for the benefit of the trustees upon a note discounted by the bank prior to the execution of this deed. Code of 1873, ch. 56, § 31, p. 843.

This was an action of debt in the circuit court of Danville, brought in September, 1870, in the name of the Farmers Bank of Virginia for the benefit of John M. Goddin and Samuel C. Robinson, trustees, against Crews, Rodenhimer & Co., partners, as endorsers of a negotiable note made by A.

***Practice—Special Pleas—General Issue.**—Where *nonassumpsit* had been pleaded, and the matters set up in special pleas offered by defendant are provable under that plea, there is no error in rejecting said special pleas. *Fire Ass'n v. Hogwood*, 82 Va. 342, citing principal case; 1 Min. Inst. (4th Ed.) 636.

†**Suits by Corporations—When Proof of Corporate Existence Necessary.**—See *Railroad Co. v. Sherman*, 30 Gratt. 602.

G. Taylor for \$2,000 in gold, bearing date the 26th of August, 1865, and payable in four months at the office of discount and deposit of the Farmers Bank at Danville.

At the March term, 1871, the defendants demurred to the declaration; but the court overruled the demurrer. They pleaded nil debet; and with their plea made oath that the note on which the said action is brought was not endorsed by them; that said note had been materially altered and changed since the same was endorsed by the defendants, and since the protest and notice of protest, to-wit: on the 9th day of June, 1870—in this, that the note at the time it was endorsed and protested and at the time notice of protest was given, to-wit: on the 30th of December, 1865, the said note was not stamped with the revenue stamp required

by the act of the congress of the
 350 *United States passed on the 1st day of July, 1862, or with any revenue stamp; that the said note was not stamped until long after said notice of protest was served on the defendants.

The defendants also filed a plea that at the time of the institution of this suit there was not such a corporation in the state of Virginia, incorporated by the laws of this state, as the president, directors and company of the Farmers Bank of Virginia, capable of suing at the time of the institution of this suit.

The defendants also filed three special pleas, in all of them averring that the note was not stamped at the time of the making, endorsing or notice of non-payment and protest thereof, and that the omission was intended to evade the provisions of the act of congress. To these pleas the plaintiffs replied that the omission was not intended to evade the acts of congress. These pleas were afterwards, upon the motion of the plaintiffs, stricken out; and the court overruled the motion of the defendants subsequently made to reinstate them.

Upon the trial of the cause the plaintiffs offered to read to the jury the note in the declaration mentioned, without having introduced any proof; and to this the defendants objected; but the court overruled the objection, and they excepted.

The plaintiffs, in the further trial of the cause, asked the court to give the following instruction to the jury:

The court, on motion of the plaintiff, instructs the jury, that if they believe from the evidence that the Farmers Bank of Virginia had selected the office of William S. Patton, a private banker, in the town of Danville, Virginia, as its office of discount and deposit, where the said note in this suit should be deposited for collection before and on the day it fell due, to-wit: the 29th December, 1865, of which removal the defendants had notice, that a demand at said office

of W. S. Patton, on the day it fell
 351 *due, as stated in said protest, was sufficient presentation; to the giving of which instruction the defendants objected, but the court overruled said objection, and gave said instructions to the jury; to which

action of the court the defendants except, and this their bill of exceptions is sealed by the court.

The jury found a verdict for the plaintiffs for the amount of the note, with interest, subject to certain credits endorsed upon it; and the defendants asked for a new trial on the ground that the verdict was contrary to the evidence; but the court overruled the motion and rendered a judgment upon the verdict; and the defendants excepted. The facts are stated in the opinion of Judge Anderson. Upon the application of the defendants a writ of error and supersedeas was awarded.

Ould & Carrington and Gilmer & Reily, for the appellants.

E. E. Bouldin, for the appellees.

* ANDERSON, J., delivered the opinion of the court.

On the 26th of August, 1865, A. G. Taylor made his note at four months, for two thousand specie dollars, to Crews, Rodenhimer & Co., negotiable and payable at the office of discount and deposit of the Farmers Bank of Virginia at Danville, which was endorsed by said Crews, Rodenhimer & Co., "credit drawer." This note was negotiated by the bank, and the amount of it paid in gold to the maker of the note, A. G. Taylor. It was afterwards, together with all the books, notes and assets of the bank, by a resolution of the board of directors of September, 1865, turned over by William S. Patton, cashier, to William H. Macfarland, president of the Farmers

Bank of Virginia (the mother bank),
 352 who placed *this note, with all the other notes and evidences of debt due the bank at Danville, in the hands of the said William S. Patton for collection, who was to be compensated by a percentage on the amount of his collections. It appears from the notarial protest that at the request of said William S. Patton, cashier, the said note was presented on the 29th of December, 1865, the date of its maturity, at the office of discount and deposit of the Farmers Bank of Virginia at Danville, and demand made of payment, which was refused, and that the same was thereupon protested for non-payment, of which notice was given the next day to the maker and endorsers by delivering to each a copy thereof in person.

On the 19th of January, 1867, the president and directors of the Farmers Bank of Virginia, pursuant to the requirement of the act of assembly of 12th of February, 1866, and to the authority with which they were invested by said act, made a deed conveying all the assets of the bank, real and personal, all debts, choses in action, bills, notes, accounts, and other evidences of debt, &c., wheresoever situated, to John M. Goddin, and Samuel C. Robinson in trust for the purposes therein named, and authorized them to sue in the name of the bank for the recovery of the same. And on the 11th of September of the same year, the said trustees caused this suit to be instituted in the name of the Farmers Bank of Virginia for their benefit. The de-

defendants demurred to the declaration, filed a plea of nil debet, a plea of nul tiel corporation, and three other special pleas, which were ultimately rejected by the court, and upon the two first pleas the plaintiff took issue. The plea of nil debet was accompanied with a special affidavit of defendants.

The demurrer was overruled; and upon the trial of the issues on the pleas, the plaintiff offered to read to the jury the note in controversy, without having introduced

353 *any proof; to which the defendants objected; but the court overruled the objection and permitted the note to be read to the jury; and the defendants excepted. By the statute (Code of 1873, ch. 167, § 39, p. 1094), proof of the handwriting of the maker and endorser cannot be required unless the fact be denied by an affidavit with the plea which puts it in issue. The plea of nil debet is not sworn to, and though it puts in issue the handwriting of the maker and endorser of the note, proof of the handwriting cannot be required unless it is denied by an affidavit with the plea, and if not so denied it may be given to the jury in evidence without proof. Now, the affidavit of the defendants does not deny the handwriting of the maker or endorsers of the note. Though it denies that they endorsed the note, it does not deny that the endorsement is their handwriting. On the contrary, the affidavit admits that it is the endorsement of the defendants, and affirms that because of the changes and alterations of the note since they endorsed it, the note upon which suit is brought is not the same note they endorsed, and therefore that the endorsement of the note declared on is not their endorsement. In other words, that they did not endorse the note declared on, and which was offered in evidence, because by material alterations of it is not the same note they endorsed. This is plainly the affidavit in effect. It does not deny the handwriting of the signature to the note, or of the endorsement, or that they are genuine, but rather that, although they are genuine, they were not attached to the note which was offered in evidence, but to a different note—the note which they endorsed having been so changed by subsequent material alterations that it is not the same note which they endorsed. This is plainly the purport

354 of the affidavit, and it proceeds *to state in what those changes and alterations consist.

It affirms that the note when made and endorsed, &c., was not stamped with the revenue stamp required by the act of congress of the 1st of July, 1862, or with any revenue stamp. But that act was not in force when the note in controversy was made and endorsed. It was in force only until the 1st day of August, 1864, (Bump's Internal Revenue Laws, p. 306,) and the withholding the stamp when the note in controversy was made, to-wit: on the 26th of August, 1865, could not have been a violation of that act. And though it was not stamped with any other revenue stamp, it does not affirm that there was any act of congress which required it, and which was thereby violated. There was an act of

congress in force when the note in controversy was made, endorsed, &c.—the act of 1864 as amended by the act passed on the 3d of March, 1865, but which was materially different from the act of 1st July, 1862, which the defendant relied on. (See U. S. Statutes at Large, vol. 13, pp. 481-2.) This act provides, in substance, that any person who shall make, sign or issue any instrument, document or paper of any kind, or shall accept, negotiate or pay any bill of exchange, draft or order, or promissory note for the payment of money without the same being duly stamped or having thereupon an adhesive stamp for denoting the duty chargeable thereon, with intent to evade the provisions of this act, shall for every such offence forfeit the sum of \$50, and such instrument shall be deemed invalid and of no effect. But to this enactment is a proviso: that hereafter in all cases of omission to affix the stamp required by law at the time of making and issuing the instrument, any party having an interest therein who shall be subsequently desirous of affixing such stamp to said instrument, may appear before the collector of the district, who shall, upon the payment of

355 the price of the proper stamp *and the penalty of \$50, affix the proper stamp to such instrument, and note upon the margin thereof the date of his so doing and the fact that such penalty has been paid. That is precisely what was done in this case. And it is further declared by said act that "such instrument shall thereupon be deemed and held to be valid to all intents and purposes as if stamped when made or issued."

The only ground of exception to the ruling of the court, set out in the bill of exceptions, is, that the plaintiff was allowed to give the note in evidence to the jury without proof. What proof was necessary? Before the statute, ch. 167, § 39, Code of 1873, supra, proof of the signatures of the maker and endorsers—that is, of their handwriting—would have entitled the plaintiff to give the note with the endorsement in evidence to the jury. But now, since the statute, such proof is not required unless the plea is accompanied with an affidavit which denies that it is the handwriting of the maker and endorsers. And we have seen that the affidavit filed with the plea of nil debet does not deny the handwriting or the signatures. Such proof was therefore unnecessary to allow its introduction in evidence. But the certificate of evidence shows that the note and its endorsement was afterwards, in the progress of the cause, proved; so that if there had been error in giving it to the jury without proof it was afterwards corrected.

And taking the affidavit to be true that it was not stamped at the time it was made or endorsed or protested, or when notice was given of the protest, it was not inadmissible as evidence on that ground. The provision of the act of congress does not apply to state courts. Congress has no power to declare by law what shall or shall not be evidence in a state court. *Hale v. Wilkinson*, 21 Gratt. 75, and cases cited; Bump's Internal Revenue Laws, p. 327, note a and cases cited. But it was stamped, and in the mode required

356 by the act of *congress, and that appeared by endorsement on the paper itself.

One of the pleas put in issue the fact of the existence of the bank as a corporation in whose name the suit was brought; but the plea was not sworn to, and was not filed with an affidavit denying the existence of the bank as a corporation. Proof consequently of its existence as a corporation was not necessary to the admissibility of the note in evidence; and the court is of opinion upon every ground that there was no error in permitting the plaintiff to give the note with the endorsements on it in evidence to the jury.

If it be within the constitutional power of congress to declare domestic contracts, entered into between citizens of the state, under state laws, and which have no bearing upon matters exclusively cognizable by the federal authorities, to be invalid and of no effect in the state courts, on which we deem it unnecessary to express an opinion in this case, we are of opinion that the note in controversy was not made void and of none effect by the act of congress, because it was unstamped at the time it was made, or endorsed, or protested, or when notice of protest was given. It was only made invalid by such omissions, and then only conditionally, when they were with intent to evade the law; that is, to defraud the government out of its revenue; which, to invalidate the instrument, must be shown. And being a charge of fraud, and the act being punitive, all reasonable presumptions should be in favor of the party charged. In this case it does not appear that the note was unstamped with any intent to evade the law; nor can it be implied from the payment of the penalty of fifty dollars; nor is it an adjudication by the internal revenue collector, that the withholding of the stamp was with such intent. To relieve the party interested, who desires to affix the stamp to

prevent a forfeiture, he is required to **357** pay the penalty of fifty dollars *to the collector, whether the stamp was withheld with intent to evade the law or not. And the collector is only authorized to release the penalty upon affidavit that it was omitted without any wilful design to defraud the United States when the application is made within twelve calendar months after making or issuing the instrument. In this case the application was made on the 9th of June, 1870, more than four years after the note was made, endorsed and protested; so that the bank had lost its right to be released from the penalty, upon making the affidavit required, by its delay in making the application. And the collector had no authority to release it, however convinced he may have been that there was no intent to defraud the government or to evade the law. But the bank was entitled by the terms of the act to have the instrument stamped, and to be relieved from the forfeiture, by the payment of the price of the stamp, and the penalty of \$50; and after that lapse of time, only by the payment of the penalty, were it ever so evident, and though he

were perfectly conscious that the stamp was not withheld with any intent to evade the law. The payment of the penalty in this case, therefore, cannot imply an acknowledgment by the bank that the stamp was withheld with intent to evade the law. Nor can the collection of the penalty, under the circumstances, imply an adjudication by the collector that the stamp had been withheld with such intent, inasmuch as he had no authority to affix the stamp, however innocent he might regard the parties in withholding it, unless the penalty was paid. The payment of the penalty under the circumstances of this case does not, therefore, even tend to show that the omission to stamp was with intent to evade the law, and there is no proof in the cause tending to establish such an intent. And it being necessary to show such intent by the term of the act of congress, to invalidate the instrument,

358 the jury did not err *in treating it as a valid instrument; and the remark of the court, which seems to have been addressed to the bar, "that it was immaterial whether the note had ever been stamped or not," though erroneous, and may have had influence upon the jury in coming to the conclusion they did, yet, as they came to a right conclusion, and such as they ought to have reached, if such remark had not been made, it is no ground for setting aside the verdict and reversing the judgment.

The court is also of opinion that the court did not err in striking from the record the three last pleas, third, fourth and fifth, and in subsequently overruling the defendant's motion to reinstate them. The third and fifth pleas are severally predicated of the invalidity of the note and endorsement, because the note was not stamped at the time it was made, or endorsed, or protested, or when notice of the protest was given, with intent to defraud the government. Now, it appears by the certificate of the collector noted on the margin of the note, that it was subsequently stamped in the mode prescribed and authorized by the act of congress; by reason whereof, as expressly declared by said act, "such instrument shall thereupon be deemed and held to be as valid to all intents and purposes as if stamped when made or issued." It may well be questioned whether said pleas were good without negating the fact that they had been post-stamped and the penalty of \$50 paid before the commencement of this suit, in accordance with the provision of the act of congress aforesaid. But, however that may be, it was entirely competent for the defendants to rely on the same matters in evidence under the issue of nil debet, which are set out in their pleas, and were consequently not prejudiced by the rejection of the pleas, especially as it appears that if the said pleas had been received and issue taken on them, they

359 could not have *been sustained by the evidence. The fourth plea denies that the said note ever was stamped in the manner and form required by the act of congress, and reiterates the charge of intent to evade the law. This matter of

defence could also have been given in evidence under the issue of nil debet, and is plainly unsustained by the evidence; and the rejection of this plea has therefore not prejudiced the defendants; and the rejection thereof, and the third and fifth pleas for these reasons, would not warrant the reversal of the judgment.

It was not made the duty of the bank to affix the stamp after it was negotiated and money paid, but it had the privilege of doing so any time thereafter; and only upon its failure to do so would the note become invalid and of no effect. To have had it stamped in the mode prescribed and authorized by the act of congress, the day before the suit upon it was brought, was as much the right and privilege of the bank and as efficacious as to have stamped it at the time it was protested, or when notice of the protest was given. If invalidity at any time was the result of its not being stamped, it was primarily the fault of the maker and the endorsers, who, upon the faith of it as a valid security, drew from the bank \$2,000 in gold; and the endorsers, by whose order it was paid to the maker, ought not to be relieved from the obligation to return it to the bank upon the plea that the note was not stamped.

The court is further of opinion that in the light of this transaction as we have viewed it, there is no ground for the assumption of the plaintiffs in error, that the endorsement made on the note by the revenue collector was such an alteration of the instrument as invalidated it in the hands of the holder. The maker and endorsers knew when the note
360 was *made and issued, endorsed and negotiated, that the same authority which required the note to be stamped, authorized the holder, if it had not been previously stamped, any time after it had been negotiated, to have it stamped precisely in the way the note in controversy was stamped. If the note was invalid for want of a stamp, it was invalid when it was negotiated, and if the holder, after its negotiation and delivery, had immediately affixed a stamp to it in the absence of the maker and endorsers, it might as well be contended that it was such an alteration as invalidated the note.

If it was material for the defendant to have been allowed to introduce proof to show that the stamp was withheld with intent to defraud the government—which, from the view we have presented, would not seem to have been material, inasmuch as if there had been such fraudulent intent it was atoned for by the bank by paying the penalty, and the note was stamped in the mode prescribed by the act of congress, and validated, just as it would have been if it had been stamped at the time it was made and issued—yet we do not understand the ruling of the court to have excluded evidence for such purpose.

The court is further of opinion that there is no error to the prejudice of the plaintiffs here in the instruction given by the court to the jury as to what constituted the office of deposit of the bank when the note was presented for payment and protested. Nor

is there any discrepancy in the allegation and proof as to the presentation, demand, and protest of the note. That it was presented and protested at the office of discount and deposit of the bank is proved by the certificate of the notary, and there is no proof to the contrary. The proof is, that the office of William S. Patton, the cashier of
361 the bank in Danville, *was then used as the office of deposit of the bank and for transacting its business, and it had no other at that time.

The court is also of opinion that under the act of assembly, Code of 1873, ch. 56, § 31, p. 543, this suit was properly brought in the name of the Farmers Bank of Virginia for the benefit of the trustees, who were trustees for the bank as well as its creditors, and who were authorized by the deed creating the trust to sue in the name of the bank. Upon the whole the court is of opinion that there is no substantial error in the judgment of the circuit court and to affirm the same.

Judgment affirmed.

362 *Woody v. Old Dominion Ins. Co.

[31 Am. Rep. 732.]

January Term, 1879, Richmond.

1. **Fire Insurance—Contract of Agent—Specific Performance.***—Where a contract for the insurance of a building has been made with the agent of an insurance company having authority to issue policies, and the premium has been paid, but before the policy is issued the building is consumed by fire, a court of equity has jurisdiction to enforce the payment of the policy at the suit of the assured against the insurance company.
2. **Same—Payment of Premium—Offset.**—The terms of the insurance company having been agreed upon between the applicant for insurance and the agent of the insurance company, the applicant tenders to the agent the money for the premium; but the agent living in the house, and being indebted to the applicant for rent, tells him he has in his hands money belonging to him for rent, and will credit him for that amount. This was a valid payment of the premium.
3. **Same—Ownership of Property—Condition in Policy.**†—A condition of the policy is that any interest in property insured not absolute,

***Fire Insurance—Contract of Agent—Specific Performance.**—Equity will enforce performance of a contract of insurance made with an agent having authority to issue policies or to bind the company to issue policies, in favor of one who has paid the premium. *Haden v. F. & M. F. Ass'n*, 80 Va. 683; *Morotock Ins. Co. v. Rodefer*, 92 Va. 752; *Croft v. Hanover F. Ins. Co.*, 40 W. Va. 512.

†**Same—Ownership of Property—Condition in Policy.**—In *Va. F. & M. Ins. Co. v. Kloeber*, 31 Gratt. 749, it was held, citing the principal case, that the contingent right of dower in the wife of the insured, if she was his wife at the date of the deed, was not such an interest as shows that the insured had less than a perfect title in the property insured; nor was it such an incumbrance as was contemplated by the parties to the contract of insurance should be disclosed by the assured on the pain of forfeiting his

or that is less than a perfect title, must be represented to the company and expressed in the policy. The insured has the fee simple estate in the building, conveyed by deed reserving a lien for the purchase-money, about \$350; the house worth \$1,700. The condition has reference to the quantity of the interest or estate, which is measured by its duration. Or, if not, the words used cannot have been intended to guard against mere incumbrances.

4. Same—Notice of Loss—Due Diligence.—

Due diligence in giving notice of the loss of the building under all the circumstances is all that is required.

This was a suit in equity in the chancery court of the city of Richmond brought in January, 1876, by James P. Woody against The Old Dominion Insurance Company to recover the sum of \$1,000, the amount which the plaintiff claimed he was entitled to on account of an insurance by the company upon a house in the town of Tappahannock

363 belonging to the *plaintiff. On the hearing on the 19th of April, 1877, the court dismissed the bill; but without prejudice to the right of the plaintiff to assert at law any legal rights he might have against the defendant or any other person by reasons of the matters involved in this suit. And thereupon Woody applied to a judge of this court for an appeal; which was awarded. The case is stated by Judge Burks in his opinion.

John B. Young and C. White, for the appellant.

Wm. W. Crump and Bev. T. Crump, for the appellee.

BURKS, J. This is an appeal from a decree of the chancery court of the city of Richmond, dismissing the bill of the complainant, James P. Woody, who is the appellant here.

The bill states, in substance, that on the 16th day of April, 1875, the defendant contracted with the complainant to insure his building in the town of Tappahannock, in Essex county, Virginia, against loss or damage by fire, to the amount of one thousand dollars, the risk to commence on the said 16th day of April, and continue one year; that the consideration for the insurance was a premium of twelve dollars and fifty cents, which was paid; that in consideration of the sum so paid, the defendant agreed to issue to him, on the said sixteenth day of April, a policy such as was usually issued to persons insured by the defendant; that the defendant neglected and refused to issue said policy on that day and has ever since declined and refused so to do, although the premium has been paid as aforesaid; that on the following day (the 17th of April) the

contract for failing to make the disclosure. See also *Insurance Co. v. Sheets*, 26 Gratt. 854.

Same—Payment of Premium—Offset.—In *Humphreys v. Patton*, 21 W. Va. 220, the attorneys cited the principal case as authority for the proposition that a tax-payer may be allowed to offset the sheriff's personal indebtedness to him against the taxes due the state. The court held that such an offset did not pay the taxes due.

building was destroyed by fire, and the complainant's loss exceeds the amount of the insurance; that the complainant has 364 complied with all *the terms and conditions of his contract, and has done everything necessary to entitle him to recover the amount assured, and yet that the defendant has refused and still refuses either to issue and deliver to him the said policy or to pay the amount assured; and the prayer of the bill is for a specific performance of the contract of insurance; that the defendant may be decreed to issue and deliver a proper policy to the complainant, and for general relief.

There was a demurrer to the bill, which the chancellor very properly overruled. The statements of the bill, if proved, make a case for equitable relief. *Taylor v. Merchants Fire Ins. Co.*, 9 How. U. S. R. 390; *Com. Mut. Marine Ins. Co. v. Union Mut. Ins. Co.*, 19 How. U. S. R. 318; *Post v. Aetna Ins. Co.*, 43 Barb. R. 351; *Angell on Fire and Life Ins.*, § 34; *Wood on Fire Insurance*, § 12 (p. 32), and authorities cited in notes.

In the case cited *supra* from 9 Howard, the contract of insurance was completed in all respects, except the issuing and delivery of the policy. The loss occurred, and then the insurance company refused to proceed further with the contract. The bill was filed substantially for the specific performance of the contract, but the prayer was for a decree for loss and for general relief.

The law is correctly expounded, I think, in the opinion of the court delivered by Mr. Justice Nelson, who, in answer to the objection that the plaintiff had an adequate remedy at law, proceeds to say that "had the suit been instituted before the loss occurred, the appropriate, if not the only remedy, would have been, in that court (a court of equity), to enforce specific performance, and compel the company to issue the policy. And the remedy is as appropriate after as

365 before the loss, if not as essential, in order to facilitate *the proceedings at law, but the proceedings would have been more complicated and embarrassing than upon the policy. The party, therefore, had a right to resort to a court of equity to compel the delivery of the policy, either before or after the happening of the loss; and being properly in that court after the loss happened, it is according to the established course of proceeding, in order to avoid delay and expense to the parties, to proceed and give such final relief as the circumstances of the case demand. * * * * * As the only real question in the case is the one which a court of equity must necessarily have to decide, in the exercise of its peculiar jurisdiction in enforcing a specific execution of the agreement, it would be an idle technicality for that court to turn the party over to his remedy at law upon the policy. And, no doubt, it was a strong sense of this injustice that led the court at an early day to establish the rule, that having properly acquired jurisdiction over the subject for a necessary purpose, it was the duty of the court to proceed and do final and complete

justice between the parties, where it could as well be done in that court as in the proceedings at law."

The result of the decision was that the complainant was entitled to a decree for his loss, and the case was remanded for such further proceedings as might be necessary to carry the opinion of the court into effect.

The answer of the company, as defendant in the court below, puts the burden of proof on the complainant. It denies all the material allegation of the bill—denies that there was any contract of insurance, or payment of premium, as stated in the bill, or that anything has been done by the complainant to entitle him to recover of the defendant the amount of insurance stated in the bill. It

admits that the defendant has heard **366** that the complainant *professes to have made the contract, under which he seeks to recover, with an agent of the defendant doing business for it at a distant place from its home office, and if such was the case, calls for strict proof of the terms and provisions of the contract, and of such compliance of the complainant therewith as was necessary on his part to entitle him to the relief prayed for in the bill.

The policy which the appellant claims to be entitled to under his alleged contract, and under which he claims indemnity for the loss sustained, contains the following stipulation or condition: "this company shall not be liable, by virtue of this policy or any renewal thereof, till the actual payment of the premium to the company or its authorized agent"; and it is contended by the appellee's counsel that this condition has never been complied with on the part of the appellant, and he is therefore not entitled to any recovery.

It is proved that William B. Rowzie, who resided at Tappahannock, was the duly constituted agent of the defendant company to take risks, collect premiums, and issue policies, and was supplied with policies regularly executed by the officers of the company, which he was empowered to fill up and deliver to persons desiring to be insured, without any occasion to communicate with the company before said policies were issued and delivered.

The appellant resided in Fredericksburg, and owned the building in Tappahannock, which was occupied by Rowzie, who was his brother-in-law, under a contract to pay rent. The appellant, who was a seafaring man, came on the 13th day of April to Tappahannock, where his vessel lay, preparatory to a voyage he was about to make to Baltimore. It seems that the building at Tappahannock had been insured in some company, which had an agency at Fredericksburg, but the policy had just expired, and, before

367 leaving Fredericksburg, *the appellant had directed his wife to have the policy renewed. On arriving at Tappahannock, ascertaining that Rowzie was the agent of the Old Dominion Insurance Company (the appellee) to effect insurances, the appellant concluded to have the building insured in that company. The value of the building and amount of premium being agreed upon,

it was further agreed, at the suggestion of Rowzie, that he should write to appellant's wife at Fredericksburg and ascertain from her whether she had taken out any policy at that place, as directed by her husband, and if she had not done so, Rowzie, as soon as he was so informed by her, was immediately to issue a policy on behalf of the appellee and forward it to appellant's wife at Fredericksburg. The terms of the contract being mutually assented to, the appellant thereupon tendered to Rowzie twelve dollars and fifty cents, the full amount of the premium, but Rowzie declined to take it, saying, "I have in my hands money belonging to you for rent, and will credit you by that amount." There is no doubt as to the actual tender. Rowzie says "he (Woody) pulled out his pocket-book and took out the money to pay me." Moreover, the company was then indebted to Rowzie, as he says, to the amount of nine dollars, advanced for it by him some time previous. This contract was made, as before stated, on the 13th day of April. The appellant then left with his vessel for Baltimore. Rowzie, pursuant to the agreement, wrote to appellant's wife, and on the 16th day of April received from her a letter in reply, informing him that she had not effected any insurance in Fredericksburg. As soon as this letter was received by Rowzie it became his duty eo instanti to issue and forward the policy to the appellant's wife, as he had agreed to do. He did not do so, however, and assigns as a reason for his

368 *neglect that he was busy that day about other matters and did not think it actually necessary to send the policy by that night's mail. In the early morning of the next day (the 17th) the building was entirely destroyed by fire. No policy was ever issued to the appellant by Rowzie or by the company, nor was the premium ever paid by the appellant unless the tender aforesaid, coupled with the agreement between the appellant and the company's agent (Rowzie), amounted to a payment.

Rowzie, it seems, has never had any settlement of accounts with the company. It was his duty, according to the proofs, to make daily and monthly reports of his transactions as agent to his principal. On the 21st of April he reported the destruction, by the fire of the 17th, of a building in Tappahannock which had been insured by him as agent, and at the same time mentioned that the adjacent building occupied by him was destroyed by the same fire, but he did not state that it had been insured. He explains this omission by saying that, as the policy had not been issued, he did not know what to do, and thought that Capt. Woody (the appellant) would confer with the company about it. Being asked, on cross-examination, whether he really considered that he had insured the house, he replied, "Not having heard of any similar case before, I did not know whether the property was considered as insured or not." The further question was put to him, "Isn't it true that you didn't consider it insured?" Answer. "I was in doubt." There is no conflict between the testimony of this witness and

that of the appellant, the only two witnesses in the case, as to the contract before stated, and it is obvious that the only "doubt" that Rowzie had was as to the legal effect upon the contract of the failure to issue the policy before the loss occurred. If the *money tendered had been accepted and actually placed in his hands, and retained by him, the same doubt would probably have been entertained by him because the loss occurred before the policy was issued, while, as we have seen from the authorities before cited, in such case equity would have enforced the contract.

Upon the proofs, then, was there a payment of the premium within the meaning of the before recited condition, so as to entitle the appellant to the policy before the loss occurred? Rowzie says that when the twelve dollars and fifty cents, the amount of the premium, were tendered to him, he is clear in his recollection that he at that time owed the appellant that amount for rent past due. If he had then paid over that amount to the appellant in discharge of the rent due, and the appellant had immediately handed it back to him for the premium, nobody will doubt that the premium would have been actually paid. Did not the transaction, which took place, amount substantially to the same thing? The appellant took the money from his pocket and offered it to Rowzie, who declined to take it, saying in terms, "I have in my hands money belonging to you for the rent, and will credit you by that amount." It seems to me that it would be extremely technical to hold that this was not a payment, when, if, instead of retaining the money, which he says he had in his hands belonging to the appellant, he had paid it over to him with one hand and taken it back from him with the other, all will admit that there would have been payment. In the latter case, the money paid would have become at once the money of the company in the hands of its agent, and so, I think, the money retained by the agent under the arrangement made became in like manner the money of the company,

the greater part *of which, in fact, (\$9,) was already in the hands of the company; for, according to Rowzie's statement, (and it is not contradicted,) the company owed him that amount, balance on account.

In the case of *Hallock v. Commercial Insurance Co.*, 2 Dutcher (N. J.) R. 268, one of the conditions of the policy was the same as in this case—that the insurance should not be binding until payment of the premium. The agent in that case was authorized to make surveys, receive proposals for insurance, and receive premiums on risks accepted by the company, but was not authorized to make insurances or issue policies. The proposals for insurance were, under the regulations prescribed, sent by him to the company at its home office, and if accepted by it, the policies were to be sent to him for delivery. It will be observed that the powers of this agent were not so large as those of the agent in the present case.

The agent, when applied to by the plaintiff

for insurance, made the survey, and told the plaintiff what the premium would be. The plaintiff thereupon offered him the premium, when he said he would consider it as paid, but would leave it (as he did) with the plaintiff, who was a banker, and with whom he kept his account, until the policy arrived, when he would call and get the money. The application was sent by the agent to the company, the risk was accepted to commence from a previous day, and the policy signed was forwarded by mail to the agent; but it turned out that the building insured was destroyed by fire on the very day the policy was signed, and two hours before it was so signed. The company being ignorant of the fire when the policy was signed countermanded the policy. It was held, that although the agent had not in fact received the premium, the contract was as binding upon the company as if the money had been actually paid over to the agent.

371 *The judge, in his opinion, said:

"Would it have made the payment any more real if the plaintiff had handed Breck (the agent) the money and Breck had deposited it with his banker? The money was, in legal effect, paid to Breck, and by him placed on deposit. It was, in contemplation of law, an actual payment to the company, as much so as if Breck had transmitted the money, as well as the application, to the company." And he adds: "but if not an actual payment, the defendants are estopped from saying that it is not. They must be considered as doing what Breck did, viz: saying to the plaintiff, on the 2d March, when he tendered them the money, we will consider it as paid." And here it may be asked, why does not the doctrine of estoppel apply as fully in the case under review as in the case just cited? See, also, *New York Central Ins. Co. v. National Protection Ins. Co.*, 20 Barb. R. 468; *Chickering v. Globe Mutual Life Ins. Co.*, 116 Mass. R. 321; *Goit v. The National Protection Ins. Co.*, 25 Barb. R. 189.

Several cases are cited and relied upon by the learned counsel for the appellee.

In *Buffum v. Fayette Mut. Fire Ins. Co.*, 3 Allen R. 360, cited, the agreement was between the insured and the treasurer of the insurance company, that the latter would see the premium paid, which he did not do, and the loss occurred without payment or tender made. It was held that the company was not bound by this arrangement. While this decision cannot be easily reconciled with the cases before cited in this opinion, it may be remarked of it, that it is, in its circumstances, unlike the case in judgment, in this, at least, that the treasurer had no funds of the insured in his hands, nor was he indebted to him. It is said that the courts of Massachusetts give the greatest effect to the by-laws of a mutual insurance company in restricting the powers

of the officers and agents of the company, and that it is *doubtful if the decision above cited from 3 Allen would meet with approbation in most of the states. May on Insurance, § 348. See, also, Wood on Fire Insurance, § 28, p. 69, note.

An examination of the case of *Hoffman v.*

John Hancock Mut. Life Ins. Co., 92 U. S. R. (2 Otto) 161, also cited, will show that the agent, without authority of the company, had agreed with the insured to accept personal property—a horse—in part payment of the premium, and upon the facts as proved it was decided that the transaction was a fraud upon the company.

The case cited from 68 North Car. R. 11, *Ferebee v. N. C. Mut. Home Ins. Co.*, seems to be more directly in point. There, the agent was indebted to the insured, and although there was conflict in the proof as to the alleged agreement that the agent should, in discharge of this indebtedness, pay the premium to the company, yet the court treated the case as if the agreement was proved, and held that it did not bind the company, because never authorized nor ratified by it.

This North Carolina case is the only authority cited by the learned counsel for the appellee which seems to directly support the proposition for which he contends, to-wit: that the agent of an insurance company, having authority to receive premiums, cannot substitute himself for the insured as debtor to the company he represents for the amount of the premium, which, by the terms of the policy, is required to be paid before the policy takes effect. The contrary doctrine, I think, is deducible from cases already cited in this opinion. I shall refer to only two additional cases.

In *Bouton v. The American Mut. Life Ins. Co.*, 25 Conn. R. 542, it was decided that an agreement made in good faith between an insurance agent having authority to receive an insurance premium and the insured, that the agent shall become personally responsible to his principals for the amount of such premium and the insured his personal debtor therefor, constitutes a payment of the premium as between the insured and the insurance company. The same principle was affirmed in *Sheldon v. Conn. Mut. Life Ins. Co.*, 25 Conn. R. 207.

In these Connecticut cases, the policies, as in the case in judgment, contained a stipulation to the effect that they were not to be binding on the company until the amount of the premium, as stated therein, was paid to the company or its accredited agent.

In the last named case, one Norton was the general agent of the company for the purpose of procuring applications, delivering policies and receiving premiums. His powers were not so extensive as in the case now to be decided. It seems he had no authority to issue policies; he could only receive proposals and forward them to his principal for acceptance, and when a proposal was accepted and policy signed by the proper officer of the company, the policy was returned to the agent for delivery. In the present case, the agent was supplied with policies duly executed by the officers of the company, and he had authority, in effect, to make the contract of insurance, fill up the policies, and then deliver them.

There was evidence to prove that Norton, the agent of the defendants, solicited Curtiss (the plaintiff's intestate) to become insured

in their office; that Curtiss declined being then insured and wished delay, because he had not money on hand to pay the premium, as the terms of the policy required; that finally Norton agreed that he would provide for the premium himself, and it should be considered and held to be paid to the company, and the note for the balance be given afterwards, and that the contract should be held to be good when the proposals were accepted in Hartford, and the policy should be made out at a future time, bearing date from that day. "It would seem as if this arrangement," says Ellsworth, J., delivering the opinion of the court, "if made out by the proof to the satisfaction of the jury, was material to the plaintiff's case, and would establish the validity of his claim to a proper policy of insurance. This arrangement is one of daily occurrence, where parties agree for an immediate insurance, but time is given for the payment of the premium and the execution and delivery of the policy of insurance, the thing to be done is agreed to be considered as done, so that the obligation to pay the premium is the payment, and the obligation to make out the policy is virtually the policy itself."

The appellant's case is even stronger than these Connecticut cases. In these last the premium was considered and treated as paid, although there was no actual payment, and no means of the applicant in the hands of the agent to be applied to the payment. There was a mere agreement that the agent should provide payment for the applicant. In this case there was an actual tender of payment and an appropriation of the means of the applicant in the agent's hands to the payment, and about three-fourths of the premium were already in the hands of the company.

Good faith, of course, is essential to the validity of such a transaction, and I see nothing in the record inducing the belief that it was not exercised by the appellant in this case, and I am of opinion that he has complied with the before recited condition of the policy which he contracted for.

The policy contains this further provision: "Any interest in property insured, not absolute, or that is less than a perfect title, or if a building is insured that is on leased ground, the same must be specifically represented to the company and expressed in this policy in writing, otherwise the insurance shall be void."

It appears that at the time the appellant contracted for the insurance of the building he had the fee simple estate conveyed by deed in which a lien was reserved for the payment of purchase-money, about \$300 or \$350 of which remained unpaid. It seems that the existence of this lien was not known to the agent, Rowzie, nor was it mentioned by the appellant; and it is contended by the appellee's counsel that the failure of the appellant to disclose it vitiates the policy.

The first part of this condition, "any interest in property insured, not absolute," has been judicially construed in other cases as referring to the character or quality of the estate. The term "absolute," in such a con-

dition, has been held to be synonymous with vested, and used in contradistinction to contingent or conditional. *Hough v. City Fire Ins. Co.*, 29 Conn. R. 10. And so, as it seems to me, the words, "or (interest) less than a perfect title," in the connection in which they are used, should be construed as referring to the quantity of the interest or estate, which is measured by its duration. The word "less" is a term denoting quantity; an estate or interest "less than a perfect title" may therefore mean one that is limited in its extent and duration—as an estate for life, for years, or at will—"less" than an estate in fee simple, or than one of unlimited duration. If this be not the true construction, I am still of opinion that under no proper construction can these words be taken to have been intended to guard against mere incumbrances. If such had been the intention, language more appropriate for the purpose would have been employed, as we find in policies where disclosure of incumbrances is required. In such the requirement is generally plainly expressed. The mere failure, therefore, of the appellant to make known the existence of the lien which appeared on the face of the deed (the policy not requiring such disclosure, and no inquiries being made,) did not vitiate the insurance, there being no fraudulent intent; and no such intent is to be inferred from the evidence. *West Rockingham Mut. Fire Ins. Co. v. Sheets & Co.*, 26 Gratt. 854.

The fact is, the property is proved to have been worth probably \$1,900. The amount of insurance was \$1,000, and the lien, at the outside, for not more than \$350. So that the risk was not seriously, if at all, affected by the incumbrance.

The policy further provides that "in case of loss the assured shall give immediate notice thereof," &c.

It is insisted by the appellee's counsel that the notice required was not given.

This provision in a policy requiring "immediate notice," or, as in some policies, what is equivalent, notice "forthwith," must have a reasonable construction. It has always been held, it is said, that due diligence, under all the circumstances, is all that is required. *New York Central Ins. Co. v. National Protection Ins. Co.*, 20 Barb. R. 469, 475.

Under the circumstances of this case, I think due diligence was used and the notice was sufficient.

The building was burned on the 17th of April. At that time the appellant was in Baltimore with his vessel. He received intelligence of the destruction of his house by letter from his wife on the 19th of April; and reached home on the 30th of the same month. On that day he took from Rowzie a sworn statement of the contract of insurance and of the loss of the building. On the 5th day of May following, (four days after he reached home), through his counsel, he gave notice of his loss to the company, sending at the same time the statement aforesaid, sworn to by Rowzie. The agent, Rowzie, was the occupant of the house at the time it was burned.

If the knowledge of the loss by the com-

pany's agent was not notice to the company, it is still a circumstance to be weighed in determining the question of due diligence; and it is especially to be considered, that no policy had been delivered to the appellant, by which, if delivered, he would have been apprised of the provision requiring immediate notice of the loss. The withholding of the policy was the neglect of the agent, and his neglect was the neglect of the company, and it should not be allowed to take advantage of its own fault or negligence to defeat a just recovery.

I am of opinion, for the reasons stated, to reverse the decree of the chancery court and give the appellant a decree for the amount of the insurance with interest and costs.

MONCURE, P., and CHRISTIAN AND ANDERSON, J's, concurred in the opinion of BURKS, J.

STAPLES, J., dissented.

The decree was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the said decree is erroneous. It is therefore decreed and ordered that the said decree be reversed and annulled, and that the appellee pay to the appellant his costs by him expended in the prosecution of his appeal aforesaid here. And this court now proceeding to render such decree as the said chancery court ought to have rendered, it is further decreed and ordered that the defendant, the Old Dominion Insurance Company, pay to the complainant, James P. Wooddy, the sum of one thousand dollars with interest thereon to be computed at the rate of six per centum per annum from the 30th day of January, 1876, until payment, and his costs by him about his suit in the said chancery court expended; which is ordered to be certified to the said chancery court of the city of Richmond.

Decree reversed.

379 *Stearns & als. v. Beckam & als.

January Term, 1879, Richmond.

1. **Specific Performance—General Principles.**—For the grounds and principles upon which a court of equity will or will not enforce the

***Contracts—Specific Performance—Equity.**—In a suit for specific performance, if the plaintiff fail to prove the contract as alleged, the court may go on to decree him compensation, and thus to complete the justice. *Walters v. Farmers' Bank*, 76 Va. 12, citing the principal case. But the plaintiff must establish the contract and prove it, as stated in the bill, and the contract must be certain, fair and just in all its parts. *Haskin v. A. F. Ins. Co.*, 78 Va. 700, citing principal case; *McComas v. Easley*, 21 Gratt. 33. Principal case reviewed and approved in *Fishburne v. Ferguson*, 85 Va. 321. See also *Halsey v. Monteiro*, 92 Va. 589; *Augsburg Land Co. v. Pepper*, 95 Va. 94, citing the principal case; 2 Min. Inst. (4th Ed.) 873, 874, 875, 884.

specific execution of a contract for the sale of land—see the opinion of BURKS, J.

2. Same—Accounting for Rents and Profits.

—For the grounds and principles upon which a court of equity, refusing to enforce a specific execution of a contract for the sale of land, will direct an account of the purchase-money and rents, &c.—See the opinion of STAPLES, J.

3. Same—Vendor's Incapacity.*—The committee of a vendor of land files a bill, which, on the death of the vendor, is revived in the name of his heirs, to set aside a contract and deed for the sale and conveyance of land on the ground of the vendor's incompetency, of the improper influence exercised upon him, and for inadequacy of consideration. The court sets aside the deed and directs that the vendees shall surrender the land, unless within ninety days they file a bill for the specific execution of the contract; which they do—**Held:**

1. Decision on the Evidence.—Upon the evidence that the court would not enforce or rescind the contract.

2. Vendor's Incapacity—Accounting for Rents and Profits.—It seems that in such case the court will direct an account of the purchase-money paid in Confederate currency by the vendees, and of rents and profits, though a large portion of the purchase-money was paid when the deed was executed, and the vendor was wholly incompetent to act.

3. Accounting—Balance Due a Lien.—If upon taking the account there is a balance found due, it is a lien upon the land, and may be enforced in equity.

4. Same—Same—Personal Liability.—The heirs of the vendor are not responsible personally for such balance.

In 1866, J. Thomas Beckham, as committee of James A. Beckham, brought a
380 suit in equity in the circuit court *of Culpeper county against John M. Botts and Franklin Stearns, to set aside a contract and deed by which the said James A. Beckham sold and conveyed to them his estate called Auburn, in said county, and a considerable amount of personal property. The grounds stated in the bill for the relief prayed for was the incompetency of said Beckham, the improper influence exerted upon him, and the inadequacy of the price. The defendants answered denying the allegations of the bill; and the cause coming on to be heard in August, 1868, the court dismissed the bill with costs.

James A. Beckham having died, the suit was revived in the name of his administrator and heirs, and they obtained an appeal from said decree; and on the 25th of November, 1875, the court of appeals reversed the same, set aside the deed, and sent the case back with direction that the appellees, or the persons claiming under them, should surrender the land to the appellants, unless within ninety days from the entry of the decree said Stearns and the heirs or devisees of Botts should file their bill in the said circuit court of Culpeper county for the specific performance of the contract.

***Alienation by Persons Non Compos.**—See 2 Min. Inst. (4th Ed.) 643.

After the cause had been sent back Stearns and the heirs of Botts, who had died since the decree in the circuit court, filed their bill for a specific performance of the contract for the purchase of the land, to which the heirs of James A. Beckham were made defendants; and they answered relying on the same grounds for avoiding the contract as those stated in their bill.

The cause came on to be heard on the 12th of June, 1877, when the court refused to enforce the specific execution of the contract, and directed that the plaintiffs should surrender the land to the defendants. But this decree was to be without prejudice to the right of the plaintiffs to institute any suit or action on the contract which they might be advised to bring. And from this

381 *decree Stearns and the heirs of Botts obtained an appeal to this court.

The case was decided by this court at the March term, 1878, when Burks, J., delivered the opinion; and the decree of the court below was affirmed. At the same term the court granted a rehearing on one point, and on that point Staples, at this term, delivered the opinion. It is impossible to give a statement of the evidence, which upon some of the matters testified to was conflicting. The view taken of the facts will be seen in the opinions of the judges.

Wm. J. Robertson and James J. Field, for the appellants.

T. J. Kirkpatrick and J. Alfred Jones, for the appellees.

BURKS, J. On the 29th day of November, 1862, John Minor Botts and Franklin Stearns, of the city of Richmond, undertook to purchase from James A. Beckham, of the county of Culpeper, his valuable landed estate in said county, containing by estimation about 1,940 acres, and also some personal property, at the gross price of \$100,000 cash, payable in Confederate States treasury notes. The contract was in the form of a written proposition of Beckham, under his hand and seal, to sell, and a written acceptance under seal, signed by Botts for himself and Stearns, and is in these words:

"I now offer to sell to Messrs. Franklin Stearns and the Hon. John M. Botts my Auburn estate, more or less, by my deeds, including the detached woodland below Brandy, with all the stock of all kinds belonging to me on the estate, all the farming implements

382 of all kinds, together with all the new corn in the *new corn-house, all the wheat in the stacks, and straw, &c., all the wheat straw, corn, provender, fodder and shucks on the farm as it now stands; also three negroes, viz: Spencer, Randall and John, for one hundred thousand dollars cash, in bankable funds, with the following reservations, viz: five choice hogs, the grain not enumerated above, one set of the blacksmith's tools; and the said Stearns and Botts shall agree to purchase at valuation all of the furniture that I shall not desire to keep for my own use. The hay shall be estimated and paid for at fifty cents per hundred, the fenc-

ing plank at seventy-five cents per hundred feet, and the locust posts at twelve and a half cents apiece.

"Witness our hands and seals this 29th November, 1862.

"James A. Beckham. [l. s.]

"I accept the above proposition.

"J. M. Botts, for himself and

"Franklin Stearns. [l. s.]

"Attest:

"W. B. Ross,

"D. W. Kennedy."

At the date of the contract Botts paid to Beckham, on account of the purchase-money for the property, forty-five thousand dollars in the check of Stearns on the Bank of Virginia, to his own order, endorsed by him to the order of Botts, and by the latter to the order of Beckham, for which payment he took the receipt of Beckham, signed by him, and endorsed on the contract in the following words:

"Culpeper County, November 29th, 1862.

"In confirmation of the within contract, I have this day received the sum of forty-five thousand dollars *from the within named John M. Botts with the understanding that the balance of fifty-five thousand dollars is to be paid within the next ten days, on the delivery of the deed.

"J. A. Beckham.

"Attest:

"W. B. Ross,

"D. W. Kennedy."

On the night of the third day of December following, James A. Beckham had a severe stroke of paralysis, which, for the time being at least, utterly prostrated him in body and mind. On the 10th day of the same month, Botts claims to have paid the fifty-five thousand dollars in the checks of Stearns, and took from Beckham a deed conveying the Auburn estate, which was admitted to record in the county court of Culpeper on the 15th day of that month.

On or about the 20th of the same month, Beckham was removed to Culpeper Courthouse, and Botts and Stearns took possession of the Auburn estate, claiming title under the deed and contract aforesaid.

At the September rules, 1866, of the circuit court of Culpeper, J. Thomas Beckham, a son of the said James A., who, at the next preceding August term of the county court of said county, had by said court been appointed committee of the said James A., adjudged to be a person of unsound mind, filed his bill as such committee against Botts and Stearns, praying a rescission of the deed and contract aforesaid and a restoration of the Auburn estate upon the grounds that at the dates, respectively, of the deed and contract the said James A. Beckham was mentally incompetent to enter into, execute and bind himself by such instruments; that they were

procured by the fraud, imposition and circumvention of the said Botts *for an illegal and grossly inadequate consideration, and were therefore null and void.

Botts and Stearns severally answered the bill, denying the alleged incompetency of Beckham, the illegality and inadequacy of consideration of the contract and deed, and all matters of fraud charged in the bill, and insisting on the validity of their title under the deed.

Many depositions were taken on both sides, and the case being brought to a hearing on the 24th day of August, 1868, after being revived in the names of the administrator and heirs-at-law of James A. Beckham, who had died since the last term, the circuit court dismissed the complainant's bill, declaring its opinion "that there was no fraud or undue influence in the procurement of the contract of the 29th November, 1862, in the bill mentioned; the consideration upon which it was founded was neither illegal nor in any legal or equitable sense inadequate; and that at the time of negotiating and signing the same the said James A. Beckham was neither insane nor in any sense of unsound mind, but was capable in law of contracting; and the said contract must therefore be held valid and binding. As to the deed of the 10th December, 1862, also mentioned in the bill and proceedings, the court deems it unnecessary to decide upon its validity except so far as to declare, as it does, that there was no fraud in the procurement thereof; for if it be void because of the grantor's mental incompetency at the time of executing the same, as to which the court expresses no opinion, still this court will not, under all the circumstances of the case, set aside the same, and thereby compel the defendants to sue for the legal title on a bill filed for the specific performance of the contract. Moreover, if the deed aforesaid be

void in equity, for the reason mentioned, *it is equally so in law, and there was no necessity for the plaintiffs to have come into this court with the view of putting it out of their way in any proceeding they might have instituted at law in order to force the plaintiffs to their suit for specific performance."

From this decree the Beckhams applied for and obtained an appeal from the district court of appeals, from which court the case was removed into this court for decision, and being heard here on the 25th day of November, 1875, this court pronounced the following decree:

"This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the decree aforesaid and arguments of counsel, is of opinion that the circuit court erred in not passing upon the validity of the deed of the 10th December, 1862, in the bill and proceedings mentioned. That court, upon the evidence before it, ought to have declared such deed null and void. At the time of the pretended execution the grantor, James A. Beckham, was prostrated by an attack of almost total paralysis (having previously had three attacks of partial paralysis), and could neither speak nor write, nor could he move without assistance, and was utterly incapable, mentally and physically, of exe-

cutting a deed or of entering into or consummating any important contract. The very 'mark' intended for a signature was made by another holding his head and useless hand and guiding the pen so as only to make a cross-mark. A deed executed under such circumstances conveyed no title to the grantees, but is a mere nullity.

"The court is therefore of opinion that for this error the said decree be reversed and annulled, and that the appellants re-

386 cover against the appellees their *costs by them expended in the prosecution of their appeal aforesaid here. And this court now proceeding to render such decree as the said court ought to have rendered, it is decreed and ordered that the deed bearing date the 10th day of December, 1862, purporting to have been executed by James A. Beckham, and purporting to convey to Franklin Stearns and John Minor Botts the tract of land in the bill and proceedings mentioned, known as 'Auburn,' be and the same is hereby declared to be null and void. And it is further decreed and ordered that the appellees, or those claiming under them, who may be in possession of said land, shall surrender the same to the appellants unless within ninety days from the entry of this decree the said Franklin Stearns and the heirs or devisees of the said John Minor Botts shall file their bill in the said circuit court of Culpeper county for the specific performance of the contract in the bill and proceedings mentioned, bearing date November 29th, 1862. And it is further decreed and ordered, that during the progress of such suit for the specific performance, and until its final determination, the said appellees shall not be disturbed in their possession of said land by any proceedings at law on the part of the appellants, or those claiming under them, to recover said possession."

After the cause had been remanded under this decree, Stearns and the heirs of Botts, who had died after the date of the decree appealed from, filed their bill for specific performance within the time prescribed by the decree, alleging that the contract of the 29th of November, 1862, had in all respects been fully performed on the part of Stearns and Botts, and praying a conveyance of the legal title to "Auburn." Referring to the payment of the \$55,000 in checks, they did not

387 expressly and directly allege confirmation, but *rather inferentially, by averring "that whatever may have been the temporary condition of the said James A. Beckham on the 10th day of December, 1862, in mind and body, he in a short while thereafter sufficiently recovered both his physical and mental vigor to attend to large and important business transactions; that he endorsed or caused to be endorsed the said checks for \$55,000, and invested the proceeds."

The defendants answered the bill, setting up as defence substantially the same matters which had been relied on by them in the bill filed for the rescission of the deed and contract, and as to the alleged payment of the \$55,000, averring that at the time the checks

therefor were delivered by Botts the said James A. Beckham was mentally incompetent to consummate the contract of the 29th November, 1862; and in response to allegations in the bill, denying that after the 10th day of December, 1862, he ever recovered to a considerable extent his physical health, or that his mind was at any time thereafter sound and discriminating, or that he ever negotiated any of the checks passed to him as a pretended payment for Auburn, or that he ever invested the proceeds thereof, or that he ever did endorse said checks to any one, or that he ever authorized any one to endorse them for him, or that he was at any time after the 10th day of December, 1862, able to look after his interests. They denied that the said James A. Beckham, after this time, had ever ratified and confirmed, or was capable of understanding or ratifying anything that had been done for him. On the contrary, they averred that after the 10th day of December, 1862, he was an utter imbecile, a child in helplessness and understanding, and never able to communicate, except in most simple and uncertain fashion, his own views or wishes. They further insisted that if there was any ratification or *confirmation of the alleged **388** payment of the \$55,000, it might and should have been shown and established by way of defence in the suit which was brought for the rescission of the deed and contract, and that the complainants were estopped by the decree aforesaid of this court in the determined suit from showing such ratification or confirmation in the present suit.

A great mass of testimony was taken, which, together with the record of the former suit of Beckham & others v. Botts & others, agreed to be read and considered as evidence in the cause, makes a printed record of five hundred pages. When ready, the cause was heard before the Hon. G. A. Wingfield, holding a special term of the circuit court of Culpeper county, on the 12th day of June, 1877, when the learned judge, for reasons stated in a written opinion filed with the record, dismissed the bill of the complainants at their costs, and ordered them to deliver up and surrender the possession of the lands in the bill and proceedings mentioned to the defendants; the decree to be without prejudice to the right of the plaintiffs to institute any suit or action on the contract of the 29th November, 1862, which they may be advised to bring.

Whether there be any error in this decree, from which an appeal has been allowed the complainants, this court has now to determine.

The rule that it is as much a matter of courts for courts of equity to decree specific performance of a contract for the sale of real estate as it is for courts of law to give damages for a breach of such contract is true only when the contract is in its nature and circumstances free from objections. The sufficiency or insufficiency of the objections in any case must be determined by the court in the exercise of a power involving discretion; for it is a principle in equity juris-

389 prudence, settled by a *long course of decision, that a decree for specific performance is not a matter of absolute right, but one resting in judicial discretion; not indeed an arbitrary or capricious discretion, dependent upon the mere pleasure of the judge, but a sound and reasonable discretion, which governs itself, as far as it may, by general rules and principles; but, at the same time, which withholds or grants relief, according to the circumstances of each particular case, when these rules and principles will not furnish any exact measure of justice between the parties. 1 Story's Eq. Juris. § 742, and authorities there cited, § 693; Kerr on Fraud and Mistake, 357; King v. Hamilton, 4 Pet. R. 311; Willard v. Tayloe, 8 Wall. U. S. R. 557; Anthony v. Leftwich, 3 Rand. 238, 245, 261; Miss. & Mo. R. Road Co. v. Cromwell, 1 Otto U. S. R. 643. While no positive rule can be laid down to govern the court in all cases in which it is called upon to exercise this extraordinary jurisdiction, yet it may be safely said that in no case will the court lend its aid to enforce a contract in the procurement or execution of which fraud or imposition has been practiced by the party seeking the relief, or undue influence exerted, or undue advantage taken. An agreement, to be entitled to be carried into specific performance, ought to be certain, fair and just in all its parts. 1 Story's Eq. § 769; 2 Rob. Prac. (old ed.) 170.

A man who calls for specific performance must be able to show that his conduct has been clear, honorable and fair. It is a principle in equity that the court must see its way very clearly before it will decree specific performance, and that it must be satisfied as to the integrity and good faith of the party seeking its interference. Kerr on Fraud and Mistake, 358.

The unfairness, which will disentitle a plaintiff to call for specific performance at the hands of a court of equity, may be either in the terms of the contract itself, or it

390 *may be in matters extrinsic and the circumstances under which it was made. The unfairness need not amount to actual fraud; for there are many instances in which, though there is nothing that actually amounts to fraud, there is nevertheless a want of that equality and fairness in the contract which are essential in order that the court may exercise its extraordinary jurisdiction in specific performance; and in judging of the unfairness the court will look not merely at the terms of the agreement, but at all the surrounding circumstances, such as the mental incapacity of the parties, though falling short of insanity, their age or poverty, the manner in which the agreement was executed, and the like; and whenever there are evidences of distress in the party against whom performance is sought, or he was an illiterate person, or whenever there are any circumstances of surprise, or want of advice, or anything which seems to import that there was not a full, entire and intelligent consent to the contract, the court is extremely cautious in carrying it into effect; and where the parties contracting are

on unequal terms, the onus of proof rests on the party who seeks to uphold the contract to show that the other performed the act or entered into the transaction voluntarily and deliberately, knowing its nature and effect, and that his consent to perform the act or become a party to the transaction was not obtained by reason of any undue advantage taken, or of any undue influence exerted over him. Kerr on Fraud and Mistake, 190; Fry on Specific Perform. §§ 233, 234, 239, 240, 241; Twining v. Morrice, 2 Bro. C. C. 326; Mortlock v. Buller, 10 Ves. R. 292, 305.

Whatever may have been the doctrine of the earlier cases, it seems now to be the settled rule of the English chancery, that inadequacy of consideration, unconnected with any other circumstance, constitutes no valid objection to the specific execution of a contract through the medium of a court of equity unless the inadequacy be **391** *so great as in itself to be sufficient evidence of fraud. To give it this effect it must be so gross, as Lord Thurlow has observed, that "it is impossible to state it to a man of common sense without producing an exclamation at the inequality of it." (Gwine v. Heaton, 1 Bro. C. C. 8,) or, as it is generally stated, sufficient to shock the conscience; "a principle loose enough," as remarked by Lord Eldon, "but one by which judges in equity have felt themselves bound, and to act upon occasionally for the safety of mankind." Gibson v. Jeyes, 6 Ves. R. 273.

While, however, it may not alone be sufficient to warrant the court in the rescission of a contract or in refusing to execute it, it has an important bearing in either case, in connection with other circumstances, in determining the question of fraud or unfairness. The English rule has been followed by this court in several recent cases. Hale v. Wilkinson, 21 Gratt. 75; Talley v. Robinson's ass'ee, 22 Gratt. 888; Ambrouse's heirs v. Keller, 22 Gratt. 769; White & wife v. McGannon & als., 29 Gratt. 511.

The price stipulated by the contract of 29th November, 1862, to be paid for Auburn, was not so grossly inadequate as of itself to be conclusive evidence of fraud. I attach but little weight to the rather conjectural statements by the witness Wood of the prices paid by James A. Beckham for the several parcels constituting the estate, but it appears by the record that it was assessed for taxes in the year 1861 at \$40,597. This was most probably less than its value, as lands in this commonwealth are generally assessed for taxation at much less than they would bring in the market. The value at the commencement of the war, as estimated by the witnesses, ranges from \$60,000 to \$90,000. Confederate money, in November and December, 1862, according to the evidence, was depreciated, as compared with gold coin, in the

proportion of 2 to 3 of that currency to **392** 1 of *gold. According to this standard, after making a reasonable deduction for the personal property included in the sale, the price for the land was upwards of \$30,000 in gold coin. This is about one-third of the value of the land at the commencement of

the war, as estimated by some of the witnesses. But the land was not sold for gold coin, but for Confederate money, and, as was said in *Hale v. Wilkinson*, supra, "it could only have been sold for that kind of money, such being then the only currency of the country. Confederate money had a purchasing power, in regard to land and other property, which made it worth much more than its market value in gold with the brokers." It is shown by the evidence in this case that the \$100,000 in Confederate money paid for Auburn and the personal property sold with it would have bought "Farley," a landed estate in the same vicinity, then on the market, estimated by most of the witnesses to be more valuable than Auburn, and afterwards actually purchased by Mr. Stearns for that sum. In *Hale v. Wilkinson*, the price paid for the land, which was the subject of controversy, was \$10,000 in Confederate money. The land was estimated to be worth at the time of sale and since the war \$6,000 in gold, and the value of the Confederate money when paid was in gold \$385; and yet this court affirmed the decree of the circuit court, carrying the contract into execution by directing the conveyance of the legal title to the purchasers, there being no other objection to specific performance than the alleged inadequacy of consideration. Upon the authority of that case and similar cases since decided by this court, if the alleged inadequacy of price was the only objection raised to the execution of the contract in this case, it could not, I think, avail.

The bulk of the evidence in the case relates to the condition, mental and physical, of James A. Beckham, *and the circumstances attending the negotiation for the sale and the execution of the contract and deed. Possessed by nature of a sound physical constitution and vigorous mind, although entering life poor, by his great energy and industry, sound judgment and good management, Mr. Beckham, at middle age, had acquired the Auburn estate and much valuable personal property. He was the owner, at the commencement of the war, of a large number of slaves, between twenty and thirty of whom, according to the testimony of his daughter, were laborers on his farm. Most of these escaped to the enemy during the war, and property in the residue, together with the greater part of the proceeds of the sale of Auburn, invested in Confederate securities, perished in the wreck of the Confederate government; he died in poverty in the year 1868, a little upwards of sixty years of age. He had a stroke of paralysis in the year 1855, another in 1856, a third, it would seem, in August or September, 1862, and a fourth and the last on the third day of December in the same year. The first attack produced entire paralysis of the right side, and confined him to his bed for a month or more. When sufficiently recovered to travel, he visited the Hot Springs, remained there for six or eight weeks, and when he returned was able to walk with a crutch and cane, and afterwards with his cane alone.

Paralysis of the entire left side resulted from the second attack; his mouth was drawn to one side, and his left eye is described as a little dull and drawn. It does not appear how long he was confined by this attack; he recovered, however, sufficiently to be able to ride about and attend generally to ordinary business. He managed his own farm with the assistance of an overseer and first one and then another of his oldest sons.

394 *Col. John S. Mosby, who remained at his house a week or ten days in November, 1862, thus describes his physical condition then: "He was very feeble. My recollection is, that at that time he was suffering from the effects of a paralytic stroke he had had before; he was on one or two crutches; he seemed to be the wreck of a man who had been once of a robust constitution."

Dr. George Ross saw him in September, 1862, after his third attack, and thus describes his condition at that time: "He was suffering from paralysis of the entire left side; he articulated indistinctly, his features were distorted, he was unable to grasp anything with his left hand, and dragged his left leg heavily. He was hobbling, when I saw him, on two crutches, in the hall of his house; had his left wrist bound to the crutch with a red silk handkerchief, and it coming loose, I retied it myself."

So much as to his physical condition previous to the 29th day of November, 1862 (the date of the contract), and the third day of December (the same year), the date of the last attack of paralysis.

The evidence as to his mental condition during this period is very conflicting. Many witnesses who had known him before his first attack of paralysis, and observed him afterwards, give it as their opinion that while the disease affected his locomotion to a limited extent, it did not at all impair his mental faculties, so far as they could discern, and that he was as capable of transacting business as he had ever been.

On the other hand, numerous witnesses of intelligence testify to the enfeebled condition of his mind and his want of capacity to contract. Amongst these is Dr. Clement R. Harris, whose testimony, I think, is entitled to great weight in this case.

He was the family physician of Mr. Beckham from March, 1857, to April, 1862.

395 After stating that Mr. *Beckham had been paralyzed some years before he knew him; that the paralysis was complete in one-half of his body, essentially impairing his gait, and, as a consequence, that his digestive organs were feeble, resulting in such condition as to require frequent treatment to prevent threatened recurrence of an attack of apoplexy, he says "his temper and disposition were irascible, and frequently he would not transact business of any kind which would tax in the least his intellectual powers. I did a large practice in his family. He always carried out and saw my prescriptions given until 1860-61, and part of 1862, when I noticed such a marked failure in his memory as to induce me to place them in other hands. I rarely had any business transactions with

him, outside of my professional engagements, until the spring of 1862, when I detected increasing failure in his memory. In 1862 I considered him as laboring under marked dementia, or the enfeeblement of intellectual power, the result of his disease. * * * In the month of April, 1862, in passing his house with my negroes and stock as refugee, I found his mind greatly disturbed, and his nervous system in an extreme condition of superexcitation and mobility, and with his memory at that time so much impaired, that I deferred a matter of business with him lest I might induce unpleasant and serious results. * * * His disease unquestionably had a tendency to affect his mind, and any repetition of his attacks would evidently impair his mental faculties to an increased extent. * * * I cannot say that I would have deemed him incompetent to make a contract prior to my leaving the county, although I had seen but little of him for a few months prior to my departure, except the morning I passed his house, at which time I should not have thought him competent."

Dr. Edward L. Wager, who had practised medicine in Beckham's family with Dr. Harris, and also after Harris *left in 1862, says: "I consider that he had changed very materially since my former association with him. He had been paralyzed in the mean time, and was suffering a good deal of nervous excitability. I thought his mental condition sympathized a good deal with his physical condition of impairment of health. * * * Such being the great nervous and mental excitability in which he was at that time, that I considered him hardly qualified to transact any grave and important business. I have frequently expressed my opinion to his and my friends that he was not competent to transact business about so grave a matter as the sale of his property."

It appears that Mr. Beckham was naturally quick-tempered, but after his first and second attack of paralysis he became much more irritable and excitable, and his harsh treatment of his only daughter, the particulars of which are detailed in the evidence, caused her to leave his house in December, 1861, to which she never returned until after his last attack of paralysis, in December, 1862. This unnatural conduct on his part is attributed by the appellants to his violent opposition to the marriage of his daughter with Dr. Ross, to whom she was engaged—an opposition based, it would seem, not so much on any dislike he had for Dr. Ross as on the apprehension and distrust engendered by the bad moral character of Dr. Ross' father, William B. Ross, who figures so conspicuously in this record. But it is proved that this bad treatment of his daughter commenced before her engagement to marry, and that his demeanor towards all his children was changed. "Previously," says Mr. Alcocke, his brother-in-law, "his conduct and demeanor to his daughter, and to all his children, was indulgent, kind and considerate. I think about the time of the difficulty with his daughter, his manner to all his children was considerably changed.

he being much more harsh, fault-finding and cross to them."

397 *His unkind treatment, apparently without cause, of his nieces Mary S. Gwin and Ella Gwin, while staying at his house in 1861 and 1862, is described in their depositions.

His excitability was no doubt aggravated by the too free indulgence in the use of ardent spirits, and further by the incursions, actual and threatened, of the Federal army, of which, although once a man of firmness, to use the language of one of the witnesses, "he had a mortal dread."

It has been seen that Dr. Harris stated that "any repetition of his attacks would evidently impair his mental faculties to an increased extent." Several witnesses speak of his mental condition in November, 1862, after his attack in August or September of that year. At the risk of being thought tedious, I select and transcribe what is said by Col. John S. Mosby, a gentleman of intelligence and observation. He staid at Mr. Beckham's house for two weeks in March, 1862, and a week or ten days in November, 1862. Referring to the last-mentioned period, after speaking of his feeble condition, physically, in the terms before stated, he says: "I think his intellectual condition was as feeble as his physical, compared with himself in the spring of 1862. It was evident to me he was rapidly becoming an imbecile; that he was in such a condition of mind as to make a judicious disposition of property, or to make a sale, I do not think; at the same time I do not think he was absolutely non compos. His mind was often lucid. Then he spoke sensibly about the condition of affairs. At other times his mind was wandering, and his conversation was loose and incoherent." * * * "I did not think him a man of sufficient discretion to be entrusted with the management and disposition of such an estate, but whether it had reached such a degree of imbecility as to produce an absolute legal incapacity to

398 contract, I cannot *say at this distance of time, but the inclination of my mind now is in favor of the opinion that at the time he did not have the capacity to contract." * * * "Of course, being in his house the length of time I was, I had a good deal of conversation with him, especially as he staid generally in the room with me. He was generally very childish in his talk; he was often very sensible and practical. I think he suffered a good deal from his physical condition. His intellectual condition seemed to be a good deal dependent on his physical condition." * * * "I think his condition in November, 1862, whilst it did not reach the point of idiocy or lunacy, was far below the average intelligence of men. There were symptoms of what had been a strong intellect, but which had become greatly impaired and enfeebled."

Thomas W. Parr, who saw him in September or October, 1862, says: "I went to see him at his instance, to transact some business for himself. When I reached his house I found him sitting in the porch, and he

seemed to be in low spirits, hardly recognized me, and seemed not to know that he had sent for me. I began to talk with him about the business he had sent for me to transact, which was to sell some mules and colts he had. His notion about the prices of the stock was absurd. He commenced fretting in such a manner as to cause me to leave him, and I remarked to a gentleman who was with me that I thought Mr. Beckham crazy. * * * The general impression left upon my mind was that he was incapacitated for business. He talked in a rambling way about the stock—about their bringing very large prices—some young mules and colts. He was not trying to sell me the stock; he wanted me to take them off to some place of safety and sell them for him. * * * I found him looking feeble and haggard, resembling a man worn down by disease. I was astonished to find him so irritable and cross."

389 *After a careful examination of all the evidence, although I am not prepared to say that on the 29th day of November, 1862, James A. Beckham had not capacity sufficient to make any valid contract, yet I do say that any man who dealt with him in his then condition, mental and physical, dealt at his own peril; and that when a transaction which involved the disposition of nearly his whole estate, and an estate of such magnitude as his, is drawn in question, a court of equity will scrutinize very closely every fact and circumstance connected with it.

This brings me to the consideration of the negotiations for the sale and the circumstances attending the execution of the contract of the 29th of November.

It is very clear to my mind that a short time before the sale Beckham had no purpose of selling. In the early part of November, Botts and Stearns, who were engaged in the purchase of lands for Confederate money, they having no confidence in that currency, visited the counties of Orange and Culpeper, where they had been informed there was a large quantity of valuable landed property for sale. After getting to Gordonsville they formed the acquaintance of Mr. William B. Ross, who informed them, as Mr. Stearns says in his answer, that he was authorized to sell several farms, amongst others the "Farley" estate, and invited them to go and examine it. By agreement they subsequently met at Culpeper Courthouse, proceeded to visit Farley, and at Ross' invitation stopped at Beckham's, where they staid two nights and part of a day during the time they were examining the Farley estate. "At that time," says Mr. Botts in his answer, "Mr. Beckham's property was not in the market, did not attract special observation, and not one word was exchanged and not one thought expended upon its purchase, as far as your respondent knows or believes."

400 this statement Mr. Stearns, in his answer, substantially concurs, and Ross, in his deposition, says: "It was not in the market at that time, nor did I or either of those gentlemen (Botts and Stearns), as far as I know, expect it to be; it was a subsequent de-

termination of Mr. Beckham's, made known to me by him after they had returned to Richmond and home." The exact date of this visit is not proved, but it may be approximated with reasonable certainty from what is proved. Two of the checks used in the payment for Auburn are dated 4th November. They were no doubt drawn and dated when Botts and Stearns left Richmond on the visit before spoken of, with the intention of using them in such purchases as they might make. Making due allowance for travel, it could not have been earlier than the 6th or 7th of the month, and it was probably later, when they left Beckham's on their return home. "About two weeks after this," says Mr. Stearns in his answer, "Mr. W. B. Ross called at his (respondent's) office, and as the agent of Mr. James A. Beckham offered to sell him the Auburn farm, with its stock, implements and crops, for \$100,000." Now, from the great eagerness of Ross to make the sale, as shown by the record, there can be no doubt that as soon as he undertook this agency he went at once to Richmond to effect the sale. This must have been between the 20th and 27th of the month, a few days only before the contract was executed; for, as soon as the proposition was made, Botts left Richmond with Ross, reached Beckham's on the night of the 28th, and the contract was signed next day (29th).

Several witnesses depose to having heard Beckham speak of an intention to sell his land; but on examination of their statements it will be found that all may be referred to the negotiations opened by Ross after the visit of Botts and Stearns to Farley, except the statements of one George Turner, 401 who professes to have *heard Mr. Beckham in September (1862) express a desire to sell his land, and says that he offered to sell it to him, but he did not have money enough to entertain the proposition. This Mr. Turner, it seems, was merely passing through the country and stopped a while at Mr. Beckham's in company with Mr. T. T. Gwin, Beckham's nephew. Gwin heard nothing of this conversation. Turner says he never mentioned it to him, and it seems incredible that it ever should have occurred; for, if Beckham had really entertained any wish to sell his land, is it to be supposed that he would not have mentioned it, or that Ross would not have mentioned it for him afterwards to Botts and Stearns, who were looking out for lands, and able to buy them, when they staid at Beckham's two nights and a day in November? Most of Mr. Beckham's friends and relatives, with whom he would be likely to confer, were either in the army or had removed from the county temporarily to places of safety. Coleman C. Beckham, his cousin, a near neighbor, with whom he was most intimate, left the county in the spring of the year 1862, and was in Lynchburg at the time of the last attack of paralysis. Being written for, he came, and was present when the deed was signed and attested it. He had never heard of Beckham's intention to sell until after the sale was made. Charles H. Wager, another relative and near neigh-

bor, a soldier in the army, was at home from 29th September until after 29th November. He was in the habit for some years of writing letters and making off accounts for Mr. Beckham, and it was the habit of Beckham to confer with him about his written contracts, deeds, &c., before executing them. He says he was not consulted about the sale, nor did he know that Beckham desired to sell his farm until after the sale. Only one of Mr. Beckham's sons was at home, and he a

402 boy in the sixteenth year of age. He says that he heard *no talk of the sale of Auburn, and does not remember ever to have heard his father speak of it until after Ross came back from Richmond. Thomas S. Alcocke, the brother-in-law of Beckham, who lived at Culpeper Court-house, a few miles distant, and who had more to do in the absence of others, during the war at least, with the business transactions of Beckham, and was oftener consulted than any one else, speaks of having been sent for by Beckham before he sold his farm, and the sale was the subject of conversation. His statements are somewhat confused as to his going to and returning from Beckham's each day, but I think he has reference to the periods commencing with the arrival of Botts on the 28th November; for he distinctly states that he did not know that Beckham intended selling until he was informed that Ross had authority from Beckham to look for a purchaser, and had brought Botts up to look at the farm, &c. He says that he did not advise Beckham to sell, and does not remember that Beckham ever sought his advice on the subject before Botts came to purchase the land. Who, then, did advise Beckham to sell, and how was the sale, never before contemplated, brought about? The record, I think, furnishes a satisfactory answer.

Ross, in his deposition, says: "Mr. Stearns and Mr. Botts, accompanied by myself, went to Farley, and after an examination they expressed themselves rather disappointed, or not so much pleased as perhaps they were led to believe they would have been; said it was very hilly or broken, and that they both liked the Auburn estate better at the same price; and afterwards, when I had both on the market and offered the same to them, they evinced their sincerity in the opinion they both advanced (contrary to my own, as expressed,) by purchasing the Beckham property." Stearns also purchased Farley very soon after the purchase of Auburn.

403 *Here, then, was an expression by Botts and Stearns to Ross, the land agent, of a preference for Auburn over Farley, at the same price, when Auburn was known by all parties not to be on the market. After Botts and Stearns left Beckham's, Ross is found at Beckham's soliciting him to sell. Mr. Lemuel A. Corbin was also present. He says: "Mr. Ross told me he was at Mr. Beckham's for the purpose of getting him to sell his farm, and he told me he was offered some sum, I don't remember the amount, but it seems to me it was over a hundred thousand dollars, and requested me to advise Mr. Beckham to sell his farm. This request was not

in the presence of Mr. Beckham. I did not tell him whether I would or not advise Mr. Beckham. Afterwards he named the matter to Mr. Beckham in my presence, and appealed to me to know if, in my opinion, Mr. Beckham ought not to sell. I replied to him that if I owned such a farm as Mr. Beckham's I could not be induced to sell it for Confederate money. That was about the amount that was said of the sale in my presence. After I declined to advise Mr. Beckham to sell, Mr. Ross said nothing further about it." The witness, being asked whether Mr. Beckham indicated in any way a response to this application, said: "I don't remember exactly the response. Mr. Beckham seemed unwilling to sell his land at that time, and was remarking continually 'I am a ruined man, ruined man.'"

Thus it seems William B. Ross had an offer from some source for the purchase of Auburn before its proprietor had ever been consulted about it, and he set himself to work to induce a sale, and endeavored to get others to assist him in his undertaking. He failed at first, but as soon as that "subsequent determination" of Beckham to sell, of which he speaks, was made known to him by Beckham, he went to Richmond, professing to be clothed

404 with an agency, and offered the property *to Botts and Stearns, and it does not appear by the record that he ever offered it to any other persons. The offer resulted in an agreement that Botts should accompany Ross to Culpeper and examine the property with a view to decide whether to accept or reject the offer. He did accompany him, and the two reached Auburn on the night of the 28th of November. On the next day (29th), Saturday of the week, Botts examined the land, but "partially," as Ross says, and then negotiations for the sale were commenced. Besides Botts and Beckham, the following persons were present, to-wit: William B. Ross, Daniel W. Kennedy, John G. Beckham (son of James A. Beckham), and Thomas S. Alcocke, (Beckham's brother-in-law,) who had been sent for by Beckham, it would seem, on that morning. In one of his depositions, John G. Beckham says that he thinks his brothers, Beverly and Camp, were also present, but that neither he nor they were advised with. The depositions of Ross, Kennedy, Alcocke and John G. Beckham were taken, and show what occurred.

According to Ross' statement, the proposition or offer to sell to Botts and Stearns included the Auburn estate and "all the crops, stock, farming implements, &c., then on the estate." The negotiation was commenced by objections on the part of Beckham, which will be best understood by transcribing parts of Ross' deposition, questions and answers relating to the subject.

He was examined by the plaintiffs, and in answer to a question propounded by their counsel, said:

"Mr. Beckham said that I had misapprehended his proposition, and transcended his authority in including all of the crops, when he intended half of the wheat to be in-

cluded in the sale, and I consented that to that extent my commission should be abated.

"Question. Try and recollect if any other objection was made during the conversation?"

405 *Answer. I think Mr. Beckham did also claim to reserve some corn; I do not recollect how much, and I am under the impression Mr. Botts yielded in that, as also in the claim to reserve some few other things, perhaps a lot of posts and sawed lumber, &c.

"Question. Do you remember any objection raised by Mr. Beckham to any threshed or clean wheat; if so, state it?"

"Answer. I am of the opinion now something was said about a machine, and perhaps clean wheat; the particulars, or how settled or disposed of, I do not recollect.

"Question. Do you know of any objection raised by Mr. Beckham about any hogs or hay being included in the sale; if so, state it?"

"Answer. My recollection of what passed on the subject of hay or hogs is indistinct; I think Mr. Beckham did claim a part of the hogs, what part, or all, if so, I do not recollect with certainty."

After these objections had been disposed of, Beckham raised other objections and still refused to enter into the contract. What ensued will be best stated in Ross' own language:

"I contended that the offer to Mr. Botts and Mr. Stearns was with his (Mr. Beckham's) authority; that it included only what he had told me; he adhered to his objection and would not otherwise consent to ratify the contract. I finally agreed that half of the crop of wheat, probably something (else) he contended for, should be valued and deducted from my commission. This, or something near it, was finally agreed on, when he proposed something else, I do not now remember what precisely, should be put in and deducted from my commission, to which I demurred. I think (I) got in a pet and started out in the porch, saying if he did not then confirm the understanding

and contract I should not come in
406 his house *again; he, or some one for him, called me back and he complied."

It was then, I suppose, that the contract which was finally signed was written. It was written by Ross, in the presence of Botts and Beckham, as Ross states, and according to what he understood the final agreement to be. But before Beckham "complied" and signed the agreement, according to the testimony of Kennedy, there were other occurrences of much importance, as will appear by the following questions and answers taken from his deposition:

"Question. State all that occurred on the day that the contract was signed, so far as you can now remember?"

"Answer. So much occurred on that day, it is hard for me to tell where to commence. They were chaffering and disputing all day long, and sometimes quarrelling, and I thought at one time that the whole thing was broken up; Col. Ross contending that he had author-

ized him to sell, Beckham saying he had misrepresented him, and refused to sign the contract. Botts and Ross continued to urge him, and they finally told him that it was reported that the Yankees had crossed the river and would soon be there, (that) that would knock everything in the head, and he might lose everything he had, and if he wanted to trade, that was the moment. After this was brought to bear on him, he was made to believe that it was the best thing he could do, and finally said 'let it go,' and signed the contract. He was very much excited at the time—seemed not to know whether he was doing right or wrong; and it is my judgment he would not have sold his land but for the influence brought to bear on him.

"Question. State whether at the time he signed the contract James A. Beckham was competent to transact the business?"

"Answer. In my judgment, he was not.

407 *Question. State whether or not the transactions of the day had excited and wearied him bodily and mentally, and what was his condition when he finally agreed to sign the contract?

"Answer. He was so wearied out that he seemed to be indifferent, and said 'let it go'; and was at the time incompetent to transact the business.

"Question. How did he look upon the Yankee army, and how did the prospect of their coming effect him?"

"Answer. He looked on the coming with perfect horror and dread.

"Question. State whether J. M. Botts showed a desire to purchase the land, and all he said about the treatment Beckham might receive if he held on to the land?"

"Answer. He said if the Yankees came, there was no telling what they would take, and hold the country, and would treat him (Beckham) and all of us as secessionists, and made the impression we might have nothing we could call our own. That was the kind of argument he used to persuade him to sell his land.

"Question. State whether Ross seemed anxious to make the sale, and what he said to you in regard to it?"

"Answer. He was very anxious to make the sale; said, if he made it, he would make a damned big fee; if he did not, he would lose it; said Beckham had treated him very badly about it. This was during the day before the contract was signed."

John G. Beckham says: "I was present. I think it (the sale) was mainly brought about through the influence of Col. Ross. * * * Mr. Ross wrote several contracts, I think, for my father to sign; some very noisy discussion took place between my father and Col. Ross in regard to the contracting; my father

I don't think seemed to know what to
408 do; high words *occurred between Mr. Ross and my father, and a good deal of feeling was shown, Mr. Ross being anxious that he should make the sale."

Thomas S. Alcocke does not recollect that any proposition, as to buying and selling, was made in his presence by either Botts or

Beckham. He left in the evening before the contract was signed, and was not prepared for the information received the next day, that the sale had been concluded.

Ross states it as his impression that the contract was signed in the forenoon of the day it bears date. Kennedy and John G. Beckham state that it was signed after dark.

While the evidence proves that Beckham was laboring under great excitement during the negotiations, and tends to show that he drank more or less ardent spirits, yet there is no proof whatever that he was induced to drink by Botts, Ross, or any other person.

After the contract was signed, John G. Beckham says his father retired to his room in a highly nervous and excitable state of mind, was very restless and kept his lamp burning all night, as well as he could remember. He always slept in the room with him.

The next day, says Thomas S. Alcocke, he was very much excited, and spent a good deal of his time in walking up and down the porch. He had several conversations with him, but does not remember the particulars. On the following day (Monday) there was an appraisal of furniture, which Botts was to take at valuation. After the appraisers had valued a lot of crockery at \$625 or \$650, a low price as they thought, and after Botts had declined to take it, Alcocke and Flint, the latter being one of the appraisers, told Beckham they would take the lot at that price, and not to sell it for less. The next morning, when Alcocke returned to Auburn,

he ascertained that Beckham had sold **409** the whole lot to *Botts, including some few other articles, for \$300. This conduct seemed to strike even Ross as strange. He also ascertained that in his absence Botts had bought from Beckham some hogs which had been reserved under the contract, but had not paid for them. Alcocke, without consulting Botts, took possession of the hogs and had them slaughtered at once for Beckham's use.

Whatever remedy at law the purchasers of Auburn and those claiming under them may have, a court of equity, under the principles governing its jurisdiction, can never aid them, as it seems to me, to carry into execution a contract of the nature and magnitude of the contract of the 29th of November, 1862, made with a man in Beckham's condition, mental and physical, and procured and executed under the circumstances proved in this case.

If full credit is given to Kennedy's testimony, the contract was procured by pressure and undue influence exerted upon a mind shown by other testimony as well as his to be too much enfeebled by disease to resist the improper appliances brought to bear upon it. If his testimony be altogether discarded, there is enough in the circumstances established by the testimony of Ross, a witness examined by the appellants, and others, to make the case of too doubtful a character to justify the active assistance of a court of equity to give the relief sought. Under the circumstances the burden was upon the complainants to make out a clear case for the

exercise of an extraordinary jurisdiction. They have fallen very far short of the requirements of the rule in such cases.

It was argued with great earnestness by the counsel for the appellants that the circumstances detailed by Ross show an active, enquiring and discriminating mind in Beckham. It does not so strike me. I rather

think they tend to show a mind weak **410** and vacillating, and *evince a want of fixedness of purpose and an unwillingness to adopt a proposition of sale that had been made for him, and was persistently and unduly pressed upon him, and that the final consent attributed to him was a constrained consent, and not that "full, entire and intelligent consent" which a court of equity requires to be shown in every contract before it will lend its aid to enforce it. Mr. Botts was present, and saw, heard and knew all that passed, and actively participated in the negotiations. When Beckham first claimed that half the wheat should be reserved, Ross consented, agreeing to abate his commissions to that extent. When Mr. Beckham next claimed to reserve the corn, Ross says that "Mr. Botts yielded in that claim, and also in the claim to reserve some few other things."

When objection after objection was made by Beckham, and one was no sooner removed than another was made, it must have been obvious to Mr. Botts that Mr. Beckham was unwilling to enter into the contract, and that the objections made were rather pretexts to avoid a sale. Mr. Botts should then have declined to proceed further in the matter. Instead of that, when, in the language of his answer, "this disagreement (between Ross and Beckham) was approximating warmth," he said to Beckham, "Well, Mr. Beckham, don't let us have any misunderstanding or chaffering about it; make your own proposition to me in writing, and I will at once accept or reject it." The proposition, Mr. Botts says, was then written by Ross as dictated by Beckham, and was "at once accepted in writing," as found in the record. Instead of suggesting and inciting this proposition, and then accepting it, after what had passed between the parties, as detailed by Ross, Mr. Botts should have declined all further negotiation.

If the whole amount of the purchase-money had been paid by Botts at the date of **411** the contract, instead of the *part which was paid, and no deed having been made, a bill had been filed for the title. I should have been of opinion, for the reasons already stated, that the bill should be dismissed and the parties left to their legal remedies, unless it were shown that the contract had been rendered enforceable by subsequent ratification or acquiescence equivalent to ratification. When the complainants (appellants here) undertake to show that the payment of the \$55,000 on the 10th day of December, 1862 (when, in the language of the decree of this court, James A. Beckham "was utterly incapable, mentally and physically, of executing a deed, or of entering into or consummating any important contract"), was subsequently confirmed by

him, the act of confirmation, to entitle them to specific performance, must extend to the contract—in other words, the subsequent recognition of the payment can only be relied on as evidence of the ratification of the contract, and to be effectual it must possess all the legal requisites of such an act.

The law on this subject is well stated in a recent English treatise of merit:

In order that an act may have any effect or validity as a confirmation, it must clearly appear that the party confirming was fully apprised of his right to impeach the transaction, and acted freely, deliberately and advisedly, with the intention of confirming a transaction which he knew, or might or ought, with reasonable or proper diligence, to have known to be impeachable. If his right to impeach the transaction be concealed from him, or a full disclosure be not made to him of every circumstance which it is material for him to know, or if the act takes place under pressure or constraint, or by the exercise of undue influence, or under the delusive opinion that the original transaction is binding on him, or if it be merely a

412 continuation of the original transaction, a confirmation *operates as nothing. Kerr on Fraud and Mistake (Am. ed.) 296.

The same learned author, speaking of acquiescence, says, to fix acquiescence upon a party, it must unequivocally appear that he knew or had notice of the fact upon which the alleged acquiescence is founded, and to which it refers. Acquiescence imparts and is founded on knowledge. A recognition resulting from ignorance of material facts goes for nothing. The question as to acquiescence cannot arise unless the party against whom it is set up was aware of his rights. A man cannot be said to acquiesce in what he does not know, nor can he be bound by acquiescence unless he is fully apprised as to his rights and all the material facts and circumstances of the case. Nor, indeed, is a recognition of avail which assumes the validity of a transaction, if the question as to its validity does not appear to have come before the parties. * * * The proof of knowledge lies on the party who alleges acquiescence, and sets it up as a defence. If the transaction has taken place under pressure or under the exercise of undue influence, it must clearly and unequivocally appear that the party against whom acquiescence is alleged was sui juris, and was released from the influence or the pressure under which he stood at the time of the transaction, and acted freely and advisedly in abstaining from impeaching it. Acquiescence goes for nothing so long as a man continues in the same situation in which he was at the date of the transaction. Idem, p. 300.

After Mr. Beckham had been removed from Auburn to Culpeper Courthouse, (a few days after his last attack of paralysis, in December, 1862,) he continued to reside there until about the middle of the year 1867. He was then removed to Alexandria, where he died

in the summer of 1868. If he was ever in a condition to ratify any previous transaction connected with the sale of his property, 413 *or the payment of the purchase-money, or did at any time or in any way so ratify it, it will not be denied that it was incumbent on the appellants to show it, and, under the authorities, to show it clearly, before any claim could be based upon it.

There is as much conflict in the evidence touching Beckham's mental condition after his last attack of paralysis as before. Notwithstanding his utter physical prostration, many intelligent witnesses express the opinion that he possessed mind sufficient to transact business. Some of them say that he seemed to take an interest in the events of the war, recognized old friends, made enquiries after the families of those who came to see him, and manifested an interest in occurrences of the day. But the decided weight of the evidence is that he was almost totally demented. Six physicians testify to his imbecility, none to his capacity.

Dr. Harris, speaking of him in 1864, says he was then "a melancholy and perfect wreck of both body and mind, the result of cerebral apoplexy, now in both hemispheres of the brain, causing paralysis of both sides."

Dr. Rixie describes him in 1863 as "physically very feeble, and his mental condition was such as lawyers term dementia. By reason of partial general paralysis, the brain was unable to perform its functions, the body its motions, the limbs failed to obey his remnant of will, his tongue to articulate distinctly, and his face was drawn."

Dr. Thompson saw him on several occasions from 1863 to 1865, and describes him as "almost perfectly helpless. * * * Mentally he was a perfect imbecile. He was totally unfit to transact business of any kind, being helpless, and, in fact, idiotic."

John G. Beckham, who, with filial duty, attended him as a nurse, thus describes his condition in the years 1863, 1864, 1865 and 1866: "He was as helpless as an infant,

414 *and had to be treated as such. He had to be taken out of the bed in the morning, and washed and dressed and fed by the assistance of myself and a servant. * * * His spirits were generally very low. He became very weak and childish, shed tears upon the most trivial occasions, sat frequently without attempting to converse with any one for hours at a time; and towards the close of his life seemed to lose his spirits, and was hard to move—seemed to take no interest in anything."

An intelligent lady, Mrs. Eliza Thompson, gives this graphic account of him in 1865: "He was a paralytic, perfectly useless, completely helpless in the hands of the servants, who carried him about the house. When he was on the bed he could not raise up without assistance, and when seated in a chair he could not rise without the help of his attendants. His condition was dreadful and distressing to behold, and sometimes when he was moved he would scream and make a noise more like some wild beast than a man, and on some of these occasions I would go over to

see what was the matter. * * * Judging from his conversation, he had no intelligence. In his conversation he never alluded to the past, though he had known me from a child. I looked upon him as a perfect imbecile. His countenance indicated absence of all intelligence, and he reminded me more of an animal strapped up than a human being. I went to see him out of pure sympathy."

It would seem absurd to attribute to a man in Mr. Beckham's condition the deliberate and intelligent ratification of a transaction of such magnitude as the sale of his fine estate for \$100,000 in Confederate money under the circumstances proved in this case, the collection of the proceeds in checks, the negotiation of the checks, and the investments made. To enable him to make such ratification valid and binding he must have

415 had the mind to recall these transactions *as they occurred, to comprehend them clearly and fully in all their details, to know and understand his rights in regard to them, and to deliberate and determine upon his course of action; and, with this capacity, he must have acted with the view to ratification. I care not to comment, at length and in detail, on the testimony of Thomas S. Alcocke. I believe he intended to do what he thought was right and best under the circumstances. Mr. Beckham's sons, except the youngest, a boy of fifteen years, were all in the army. His near relatives and friends had left the county. Alcocke had transacted business for him, especially attending to his money matters, for years. He knew he had the confidence of Mr. Beckham and his family. He therefore took charge of his business as if he had been his committee. He received the checks, had them endorsed by Beckham's daughter, negotiated them, collected the money on them, paid (as he says) part to Mrs. Ross as her marriage portion, invested the residue in Confederate securities, collected the interest as it matured, and applied it, together with other moneys in his hands, to the support and maintenance of Mr. Beckham and his children. In all this he claims that he had the approbation of Mr. Beckham, and speaks of his orders and directions. But the authority under which he assumed to act seems to be based on presumptions, inferences, and deductions. From his deposition I take the following questions and answers as indicating the kind of sanction under which he acted:

"Question. Did Mr. Beckham ever know that you had collected all the purchase-money for the Auburn estate upon the checks given by Stearns?

"Answer. I presume so.

"Question. Did he ever know how you had invested the same?

416 *"Answer. I should think he did, as he knew his income came from this investment, and of this he spoke frequently.

"Question. Did he ever complain or approve of the mode in which you had invested this money?

"Answer. I never heard him, as well as I recollect, either complain or approve."

It most concerned the appellants to establish, if they could, the recognition and sanction of the payment of the \$55,000. The necessity of doing so was most obvious, for on the day the check for that sum was passed by Botts, Beckham was wholly incompetent to "consummate any important contract" or transact any important business. It does not appear that the transactions of that day were ever brought before the mind of Beckham by Alcocke or any other person, or that he ever afterwards made the slightest allusions to them. If he ever undertook any business transaction after this last attack of paralysis, which occurred on the 3d day of December, 1862, it has not been proved. The acts attributed to him on that day were not his; they were the acts of others, but they were scarcely less his than the endorsements made for him on the checks a very short time afterwards. So of the advancement made to Ross and wife; an act equivocal at most, as an act of ratification, even if Beckham had been competent to direct it, for at the time it was made it would seem that Alcocke had in his hands money belonging to Beckham, other than the proceeds arising from the sale of Auburn, sufficient to pay it.

The question as to the liability of Ross and wife and the other heirs of Beckham for any money they may have received from Alcocke arising from the sale, if they received any such, is not made by the plead-

417 ings in this cause, and cannot affect the determination *of the only matter which the court is required to decide, to-wit: whether or not the appellants are entitled to a specific performance of the contract of the 29th November, 1862.

It is unnecessary to discuss or pass upon the question of estoppel, raised by the appellees in their answer to the bill of the appellants, as the case is disposed of on other grounds, and this opinion has already been extended further than I could have wished, in a discussion, deemed proper and necessary, of other important questions involved in the decision of the case.

When I first read the record, I rather inclined to the opinion that the contract which is the subject of the suit should be rescinded upon equitable terms, but on further examination and mature reflection, I have come to the conclusion that rescission cannot properly be ordered.

A party seeking as plaintiff to rescind a contract is required to make out a stronger case for the relief sought than he would be required to make if as defendant he were resisting specific performance of the same contract. Upon the same facts proved he might succeed as defendant in the latter case when he would fail as defendant in the former. A court of equity is always reluctant to rescind, unless parties can be put back in statu quo. If this cannot be done, it will give relief only where the clearest and strongest equity imperatively demands it. 1 Story's Eq. Jur. § 769; Grimes v. Sanders & others, 93 U. S. R. (3 Otto), 55; Graham v. Pancoast, 30 Penn. Rep. (6 Casey) 89.

After the great lapse of time and the changes which have taken place since the date of the contract in this case, it would be very difficult, if not impossible, to put the parties in statu quo; but, in addition, the decree of this court made in the case of

418 Beckham * & others v. Botts & others would seem to be an insuperable barrier to any decree for rescission in this case. The object of that suit was not only to cancel the deed of the 10th of December, 1862, but also to rescind the contract of the 29th of November. The circuit court refused to do either. On appeal, this court reversed the decree of the circuit court, and entering such decree as the circuit court should have rendered, set aside and overruled the deed, but did not rescind the contract. On the contrary, liberty was granted the then appellees (who are the appellants here now) to file a bill for specific performance. This was substantially an adjudication, that although it was a case in which the purchasers of the property might perhaps show themselves entitled to performance, it was not a case in which the vendors were entitled to rescission. The adjudication of the question of rescission in that case is conclusive of the same question in this case between the same parties.

Upon the whole matter I am of opinion that there is no error in the decree appealed from, and that it should be affirmed.

ANDERSON, J., concurred in the opinion of BURKS, J.

STAPLES, J., concurred in the opinion as to the refusal of the specific performance of the contract.

MONCURE, P., and CHRISTIAN, J., dissented. They thought the specific execution of the contract should be enforced.

Upon the rehearing:

STAPLES, J. A decree was entered at the March term of this court affirming the

419 decree of the circuit court of *Culpeper.

The effect of that decision was to place the appellees, the heirs of Mr. Beckham, in possession of the "Auburn estate," and to leave the appellants, Stearns and the heirs of Mr. Botts, to their action at law to recover damages for a breach of contract. A petition has been since filed for a rehearing of so much of the decree as dismisses the appellants' bill without decreeing a return of the purchase-money.

The sole question we now are to consider is whether the decree shall be corrected in that particular. I do not propose even to attempt to notice all the points made by counsel, or all the authorities cited. My effort will be in as brief a way as possible to give my own views of the law governing the case, and of the facts as shown by the record. In the first place, I think there is a wide distinction between an application to a court of equity to assess damages arising from a failure to convey, and an application for the repayment of the purchase-money, when the vendor is unable or unwilling to convey. In the first case, as is universally conceded, a

court of law is generally the more appropriate tribunal, where the jury, being confronted with witnesses, may award the purchaser such damages as he may have sustained by the breach of the contract. The second case relates to matters of accounts, questions of rents and profits, improvements made, and payments of the purchase-money, which can be most satisfactorily settled by a commissioner under the supervision of a chancellor than any jury that can be impanelled. This distinction was recognized by Lord Eldon in *Todd v. Gee*, 17 Ves. R. 273, 277. He there said he should be inclined to support the whole force of previous authority against Denton and Stuart, not being aware that this court would give relief in the shape of damages, which is very different from giving compensation out of the purchase-money. His opinion was that a court

of equity ought not, except under very 420 peculiar *circumstances, as there may be upon a bill for specific performance, to direct an issue or reference to the master to ascertain damages—that is, purely at law. It has no resemblance to compensation. And in *Anthony v. Leftwich*, 3 Rand. 238, 265, Judge Green took the same view. He said, as to the measure of compensation, it ought to be precisely what Anthony, the purchaser, was out of pocket in consequence of the acts done by him upon the contract. No allowance can be made to him for any disappointment in the non-execution of the agreement. That would be to decree damages, and no damages can be decreed in equity.

A failure to advert to this distinction has given rise to much of the confusion and difficulty in the various cases on this subject. Because the equity courts have, as a general rule, refused to entertain bills for damages, it is taken for granted they will equally refuse application for compensation, except specially as incidental to some other relief. But whatever may have been the rule heretofore, there is no doubt that a court of equity, even where specific performance is refused, will now decree compensation to the purchaser in many cases. It will do so where there is no adequate remedy at law, where some peculiar equity intervenes; it will do so to prevent multiplicity of suits, and where it has obtained jurisdiction of the case on other grounds. Where the bill is framed with a double aspect and contains a prayer for alternative relief, if the court is unable to execute the contract, it will go on to decree the repayment of the purchase-money. I do not mean to affirm it will do so in every instance. There may be cases in which the conduct of the purchaser is such as to preclude him from all relief in the equity form. What I mean to say is that upon a bill properly framed the court, as a general rule, will decree the purchaser his purchase-money instead of turning him around to an

421 action at law to recover it. In *Virginia this doctrine may be regarded as now firmly settled. I shall content myself with a simple reference to the decisions on the subject without attempting to discuss or

comment upon them. *Anthony v. Leftwich*, 3 Rand. 238; *Payne v. Graves*, 5 Leigh, 561, and the authorities there cited; *Bowles v. Woodson*, 6 Gratt. 78; *McComas v. Easley*, 21 Gratt. 23-31; *Nagle v. Newton*, 22 Gratt. 814.

The same view is taken by the supreme court of the United States in *Watts v. Waddle*, 6 Peters R. 389; *Holt and wife v. Rogers*, 8 Peters R. 420-434; *King's heirs v. Thompson and wife*, 9 Peters R. 204; and by Chancellor Kent in the several cases referred to in the Virginia decisions.

There are numerous other American authorities to the same effect. *Aday v. Echols*, 18 Alab. R. 357; *Payne v. Atterbury*, *Harrington Eq. R.* 414; *Shirley v. Shirley*, 7 Black. R. 452; 2 Chy. R. 196; 5 Jones N. C. Eq. 155; and other decisions in vol. 2, part 2, 1153, *Leading Cases in Equity*.

In some of these cases it is held that the court will go on to decree compensation under the prayer for general relief; and if this cannot be done consistently with the case made in the bill, leave will sometimes be given to amend the pleadings in order that the plaintiff may properly present his case. In *Parkhurst v. Van Cortlandt*, 1 John. Ch. R. 273, Chancellor Kent refused to execute the contract, and although the plaintiff did not in his bill ask any relief on account of improvements, not looking to the alternative of losing it, yet the chancellor directed an account to be taken between the parties, crediting the purchaser with a reasonable compensation, and charging him with a reasonable rent.

There is another class of cases in which a court of equity will decree compensation although specific performance cannot be enforced. Whenever the court
422 *obtains rightful jurisdiction of the parties and the subject matter for one purpose, it will make its jurisdiction effectual for all purposes. This principle is adverted to by Mr. Justice Nelson in *Taylor v. Merchants Fire Ins. Co.*, 9 How. U. S. R. 390, 405. In that case he said "it will be an idle technicality for a court of equity to turn the party over to his remedy at law." And no doubt it was a strong sense of this injustice that led the court at an early day to establish the rule, that having properly acquired jurisdiction over the subject for a necessary purpose, it was the duty of the court to proceed and do final and complete justice between the parties when it could be done as well in that court as in proceedings at law.

This rule has been recognized and enforced in numerous cases in Virginia. Among them are *Hoover v. Calhoun*, 16 Gratt. 109; *McComas v. Easley*, 21 Gratt. 23; *Hendricks v. Gillispie*, 25 Gratt. 181; in each of which the court, having refused specific execution, decreed compensation to the proper parties, upon the ground that the court being in possession of the case it would put an end to the controversy by giving complete relief.

Let us now enquire whether this court, consistently with these principles, is authorized to decree in favor of the appellants the value of the purchase-money if upon

equitable grounds they are entitled to it. The case has been argued throughout by the counsel for the appellees as if it rested exclusively upon the bill for a specific performance filed by the appellants under the direction of this court. It seems to be forgotten that the case was first brought into court upon the bill to rescind the contract and to have the land restored, filed by Mr. Beckham's committee, and afterwards revived in the name of his heirs. It was
423 at the instance *and for the benefit of the vendor a court of equity first obtained the jurisdiction of the cause.

Upon that bill a decree was rendered vacating the deed and directing the purchaser to surrender the land unless they should file their bill for a specific performance within a certain time prescribed by the court. If the parties had not been required to file a bill for specific performance, and the cause had proceeded to a final decree upon the original bill, is it to be believed that this court would have annulled the deed and ordered a return of the land without at the same time directing all proper accounts to be taken, so as to make an end of the whole cause? Would it have required the vendees to surrender the land and then turn them over to another forum to litigate their claim to the purchase-money? Such a course would have been utterly inconsistent with the maxim "that as the vendors wished equity, they must do equity." It would have violated the principle that the court, having rightfully obtained jurisdiction of the cause, would go on to settle the rights of the parties, do complete justice between them, and close the controversy forever.

I beg to ask how it is the filing of the bill for specific performance has so completely changed the entire aspect of the case and the rights of the parties? That bill was a mere continuation of the original suit; it was part and parcel of it. It was filed for a particular purpose, and that was to bring before the court the question of the appellants' right to a specific performance, and to place them in the position of invoking the extraordinary powers of the court in their behalf, and as to that question, and that question only, giving to the appellees all the advantages of a defensive position. That bill subserved all the
424 purposes for which it was designed. It had its day in court, and *was dismissed. The decision settled that the appellants were not entitled to a specific performance, but it settled nothing else. The dismissal of the bill left the parties precisely where they were before it was filed. It left the original bill and all the proceedings therein in full force. That bill is still pending, and has never to this day been disposed of. If this be not so, by what authority was it that the judge of the circuit court, after dismissing the bill for a specific performance, undertook to decree the return of the land to the appellees? The decree of this court first pronounced did not require an unconditional surrender of the land; it merely declared that the appellants should do so in less than ninety days, unless they filed their bill for specific performance. So

soon, therefore, as the bill was filed, the duty of the appellants to surrender the land ceased, and they will not thereafter be turned out of possession except by action of law or by a further decree of the court.

When the bill for specific performance was dismissed, two courses were left open, either of which might be pursued. One was, to leave the vendors to their action of ejectment for the recovery of the land, and the purchasers to their proper action for the recovery of their purchase-money. The other was, to go on under the original bill, settle all the matters in controversy and end the litigation between the parties. If the court had properly obtained jurisdiction of the case, this latter course was most just and reasonable, and most consonant with the rules and practice in Virginia. One of the counsel for the appellees tells us his clients are defendants; they ask nothing, and cannot be put upon terms; their day of seeking is ended. This is an entire mistake; they asked that a deed of conveyance, executed by their ancestor,

should be annulled and put out of the way, and they *further asked that the subject of controversy should be taken from their adversaries and turned over to them. If the day of seeking is ended, it is only because all their demands have been granted. Surely if it was competent for the court, upon dismissing the bill for a specific performance, to decree the appellees the possession of the land, it was competent to decree the appellants their purchase-money.

It is said, however, that the appellants' bill contains no alternative prayer for the return of the purchase-money; no issue has been made upon that question, and the appellees will be taken by surprise. Whose fault is it that there is no such prayer and issue? Not the appellants, certainly; they were required by this court to file just such a bill as was filed. A prayer for alternative relief would have been irrelevant and foreign to the main purpose of that bill, which was to present a single issue touching the execution of the contract. Nor was it necessary, because the appellees had by their original bill placed the whole matter of controversy under the control of the court, and might justly be required to submit to equitable terms as a condition of relief.

But this is not all. Any one looking through the two voluminous records in this case will see that every fact connected with repayment of the purchase-money, every circumstance bearing upon it, has been as fully investigated as if a direct issue had been presented by the pleadings. And now, after a controversy so long continued, it is altogether impossible that any new fact can be established, or new witness found, upon any point arising in the case.

These considerations satisfy me that there is nothing in the pleadings or in the present condition of the case to preclude the court from ordering all proper accounts to be taken, and administering complete and final relief.

On the other hand there are various reasons sufficient to *show that this relief ought now to be afforded without

turning the parties over to a court of law for redress.

In the first place, if the appellants are compelled to bring a new suit for the recovery of the purchase-money, they are liable to be defeated by the statute of limitations.

As more than five years have elapsed, and as the action must be *assumpsit*, I cannot see what there is to prevent the operation of the statute. I admit that if a party improperly resorts to a court of equity and is there defeated, he cannot be heard to say that the court ought to retain the case merely because he may be met in a court of law by a plea of the statute of limitations. But that is not this case. Here the appellants were first brought into chancery by the appellees, and they have been kept in that court by the action of their adversaries and the decree of this court until their remedy at law, if not entirely lost, is certainly inadequate. In the next place, the death of Mr. Beckham has changed the entire aspect of the case.

An action at law must, of course, be against his personal representative only. Inasmuch as there are no assets, such an action will, of course, be unproductive. A judgment against a personal representative would not be binding upon the heirs; and if evidence at all, certainly not conclusive against the latter in a proceeding to subject the land. So, after years of fruitless and unnecessary litigation with Mr. Beckham's administrator, the appellants must, at last, return to a court of equity, and in that forum renew the controversy.

But in the mean time, while the appellants are litigating with the personal representative, the land may be aliened by the heirs, or encumbered, or so deteriorated in value as to afford no adequate indemnity or security to the appellants. I lay it down as indisputable

that if the appellants are entitled in equity and good conscience *to recover the purchase-money paid, or its value, they are entitled certainly against the heirs of Mr. Beckham to a lien on the land as a security for its repayment. Whatever doubts there may have been on this subject, it is now clearly settled that such a lien does exist in favor of the purchaser, and will be upheld by a court of equity. The authorities sustaining it are almost innumerable, as may be seen by reference to 1 *Leading Cases in Equity*, part 1, page 474; 3 *Parson's on Contracts*, 278; *Adams' Equity*, 284; 2 *Nash on Real Estate*; 1 *Jones on Mortgages*, § 223; and many other authorities not necessary to mention. Two cases may be especially noticed; one of them is *Wythes v. Lee*, 3 *Drew R.* 396, 25 *Law Journal*, 177. There the estate was sold by a mortgagee for 380,000 pounds, of which thirty-eight thousand pounds, part of the purchase-money, was paid by way of deposit. A bill having been filed by the purchaser claiming a lien on the estate for his deposit, a demurrer to the bill was overruled. The Vice-Chancellor, S. R. Kendersly, said: "Suppose a person, absolute beneficial owner in fee of an estate, contracts to sell it, and the purchaser pays a deposit in part payment of the purchase money, and by reason of the

vendor being unable to make a title, or from any other reason, not being misconduct on either side, the contract goes off and cannot be completed, has the purchaser a lien on the estate for the deposit? That is the most important question. As there is a right of lien, as that is a right in equity, it follows that it must be capable of being enforced by bill. Now, that question I have looked at from three different points of view. First, in reference to natural justice, irrespective of any specific rule of law, and it does appear to me that it is consistent with natural justice that if a purchaser, on the faith of the contract being accepted and the estate becoming his, has advanced money in payment or part payment for the purchase, he has advanced it under circumstances which

428 *entitle him to say: 'If you cannot complete, not only are you bound to give me back my money, but I have a right to a lien on the estate.'

The learned judge then proceeds to discuss the difference between this lien of the purchaser and the implied lien of the vendor for the unpaid purchase-money. He admits that in their origin they are not the same. "But when a contract is made, and then goes off, in principle and in justice the equity of the purchaser to a lien on the estate ought to stand on as good a footing as the lien of a vendor after conveyance."

The other case is that of *Rose v. Watson*, decided by the House of Lords, reported in 10 House Lords Cases, 672. There Lord Cranworth said that when the purchaser has paid the whole or part of the purchase-money, and gets no conveyance, he thereby acquires a lien exactly in the same way as if the vendor had executed a mortgage to him of the estate to that extent. "It seems to me" (he said) "that that is founded upon such solid and substantial justice, that if it is true there is no decision affirming that principle, I rejoice that now, in your lordship's house, we are able to lay down a rule that may conclusively guide such questions for the future. I think, however, there are some authorities which have been pointed out which have established that rule, in principle if not in terms. But I think it is unimportant to go into that, because it is now established, and will from henceforth be established, as a very sound principle founded on solid justice."

Whether, as intimated in a number of cases, an independent bill may be filed to enforce the purchaser's lien, where specific performance is impracticable, it is not material now to enquire. Nothing can be clearer than when the vendor resorts to a court of equity for relief, the court cannot decree him 429 the land without, at the *same time, giving to the purchaser the benefit of his lien for the purchase-money.

My opinion, therefore, is that the appellants are entitled to an account if they desire it.

I never had any difficulty with respect to the \$45,000 paid to Mr. Beckham on the 25th November, 1862, when the contract was made, and so expressed myself when the case was last decided.

I had, however, great difficulties with regard

to the \$55,000 paid on the 10th December following, when, as this court held, Mr. Beckham was physically and mentally incapacitated to enter into an important contract.

Subsequent reflection has, however, satisfied me that the two payments stand substantially on the same ground. At least there is no such difference between them as will justify the court in sustaining the one and wholly rejecting the other. It is important to bear in mind that neither in the opinion of the circuit judge, nor of any judge of this court, has it been held that Messrs. Botts and Stearns were guilty of fraud in procuring the contract of the 29th November, 1862. Nor has it been held that Mr. Beckham was legally incompetent to make that contract. Nor did this court, or the other court, refuse to decree the specific performance because the \$55,000 was paid when Mr. Beckham was incapacitated to make an agreement for the sale of his land. If that payment had been made on the 29th of November, the result would have been precisely the same.

The ground upon which the decision was based, was that in any case specific performance is a matter of sound discretion. The court will not exercise this extraordinary jurisdiction unless the agreement is just and fair in all its parts, and entered into with the free and intelligent consent of all the parties. And in the present case it was manifest that Mr. Beckham's mind had become greatly

430 impaired by disease; that while no undue influence may have been *exerted by Mr. Botts, it had been exerted by others in his presence; that Mr. Beckham had at no time given his full and intelligent consent to the sale of his land; and that these facts and others, coupled with the great inadequacy of compensation, renders it a case peculiarly improper for specific execution. In that view I fully concurred, and I have never had any reason to doubt the justice and soundness of the decision. But it does not follow that because the purchaser is denied specific execution, he must also be denied return of his purchase-money. So far from it, the very fact that he is refused a conveyance of the land is a conclusive reason for the repayment of the consideration.

And it is worthy of note that while Judge Wingfield and the majority of this court refused, under the circumstances, to execute the contract, they also declined to set it aside, leaving the appellants to their remedy at law for compensation and damages; which was quite a vain thing if Mr. Beckham was incompetent on the 29th of November, 1862, even to make an agreement to receive the purchase-money. I have already said the two payments must stand substantially on the same ground.

When, on the 10th of December, Mr. Botts paid the \$55,000, he paid what he had stipulated to pay, and on the identical evening Mr. Beckham had agreed to receive it at the time of the entering into the contract. The payment was made in checks, receivable by the brother-in-law of Mr. Beckham, his friend and agent, and endorsed by his daughter. The greater portion of that money

was invested along with the \$45,000—about \$85,000 in all—in North Carolina bonds and Confederate registered and coupon bonds—the very securities Mr. Beckham had, several months previous, indicated in the event he made sale of his land. Such an investment was deemed as safe, at the time, as any that could be made; and if the fund has
 431 been lost, it was not due *to the fact of Mr. Beckham's incompetency when the payment was made, but the disastrous failure of the Confederacy. The money thus invested yielded a very large interest, which was regularly drawn throughout the war and applied to the support of Mr. Beckham and his family, and, as the evidence shows, constituted their only means of subsistence. There is not a shadow of doubt that if Mr. Beckham had been in the same condition on the 10th of December as he was on the 29th of November he would have received the money and invested it in the way it was invested.

It is proper, also, to mention that about \$15,000 of the money paid by Mr. Botts was received by a daughter of Mr. Beckham as her marriage portion, and with his knowledge and consent.

I have no doubt that both payments were made by Messrs. Botts and Stearns in good faith, and in the execution of what they believed to be a valid contract, and which was so treated by all the parties at the time.

The appellees received the benefit of it, to a large extent, and they ought not to escape a just accountability because the investment has turned out to be unfortunate.

Upon the whole case my opinion is that the appellees ought to be charged with the value of the payments made on the 29th day of November, 1862, and the 10th day December, 1862, and interest thereon. The amount paid on the 10th of December has been treated as if it were \$55,000. It appears, however, that a part of it was for the purchase of personal property. There can be no difficulty in ascertaining how much of it was in payment of the land. On the other hand, the appellants are to be charged with the sum of \$16,000, or whatever may have been re-

432 ceived from the Federal government, or from any other source, on *account of the property, and with interest thereon.

They are also to be charged with a fair annual value of the land in the form of rent, to be estimated according to the condition of the property at the time possession was taken by Messrs. Botts and Stearns; and they are to be charged with interest upon such rent according to the principles settled by this court in *Bolling v. Lersner*, 26 Gratt. 36. They are further to be charged with any loss or damage arising from the destruction of the property occasioned by their neglect or mismanagement during the time they or those under whom they claim have had the property. They are, however, to be credited with taxes paid, and with the value of any lasting and beneficial improvements made by them on the property during the time of such possession. These matters must be referred to a commissioner, with directions

to take an account between the parties, on the principles here announced. If on the return of the report it shall appear that a balance is due the appellants, the same is to be treated as constituting a lien on the land in controversy, to be enforced, if necessary, by a sale of the premises. On the other hand, if the balance shall be in favor of the appellees, a decree is to be rendered in their favor against the parties properly chargeable with the same. And with a view to a final adjudication of all matters in controversy, the personal representatives of John Minor Botts and James A. Beckham must be made parties to the suit before the said account is taken. I am well aware that this decision but tends still further to protract this unfortunate controversy, now already too long continued, but surely it is preferable to the trouble and expense of a trial by jury, with all chances of writs of error and appeals to this court. Whatever may be the rights of the parties, it is better they should be now anticipated and finally adjudicated *in this court, than that they

433 should be turned over to a costly and troublesome litigation in another form. The appellants in asking this decree must of course be held to release all their rights under the contract, and to surrender every claim for damages both in equity and at law.

MONCURE, P., and CHRISTIAN, J., were still of opinion that the contract should be enforced, but they concurred in the opinion of STAPLES, J., as coming nearer to what should be done than the original decree.

ANDERSON and BURKS, J's, adhered to their opinion.

The decree was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the decree aforesaid, and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the appellants are entitled to recover the value of the Confederate treasury notes paid by Botts and Stearns to James A. Beckham on the 29th November, 1862, and the 10th December, 1862, upon the purchase of the Auburn farm, with interest thereon from the date of such payments respectively; said value to be estimated in gold as of the time of said payments.

The court is further of opinion, that the appellants are to be charged with the fair annual value of the said Auburn estate, in the form of a rent, with interest thereon from the end of each year, during the time they or the said Botts have had possession of the property; the said rent to be estimated according to the condition of the prop-

434 erty at the time possession *was taken; they are further to be charged with the sixteen thousand dollars, or whatever has been received by them, or by Botts and Stearns, or either of them, from the Federal government, or from any other source, on account of said property, with interest thereon from the time the same was so received; they are also to be charged with any loss or

damage resulting from the deterioration of the property occasioned by the waste, mismanagement or neglect of the appellants or those under whom they claim. On the other hand, the said appellants are to be credited with all taxes paid and all other sums which would have constituted a proper and legal charge upon the property in the hands of James A. Beckham or his representatives, with interest thereon, and with all necessary expenses actually incurred in recovering the money aforesaid from the Federal government.

These matters must be referred to a commissioner with instructions to state an account between the parties on the principles herein indicated; the costs of taking said accounts to be equally divided between the parties. If, on the return of the report, it shall appear that a balance is due the appellants, said balance is to be treated as constituting a lien on the property, to be enforced, if necessary, by a sale of the premises upon the terms prescribed by the third section, chapter 174, Code of 1873, page 1123; but the appellees are not to be held liable personally for such balance, or any part thereof. On the other hand, if, upon the return of said report, it shall appear that a balance is due the appellees, a decree is to be rendered in their favor for the same against such party or parties as may be chargeable therewith.

But before said account is taken the appellants are required to amend the original bill filed by them, and to make the personal
435 representatives of John Minor *Botts and James A. Beckham, respectively, parties to the same.

It is therefore ordered and decreed, that the contract of the 29th March, 1862, between James A. Beckham and Botts and Stearns be set aside and annulled; and that so much of the decree of the circuit court, and also of the decree of this court, of the 14th March, 1878, as is in conflict with this decree be reversed and annulled, and in all other respects affirmed; and that the appellants pay one half of the costs, and the appellees the other half, incurred in this court; which is ordered to be certified to the said circuit court of the county of Culpeper.

Decree reversed.

436 *Reynolds' Ex'or v. Callaway's Ex'or.

January Term, 1879, Richmond.

R's executor brought an action of debt upon a bond against the executor of C. C was one of four obligors on the bond, all of whom were dead but T, and T was a discharged bankrupt. The only issue in the case was on the plea of payment—
Held:

1. Witnesses—Competency.*—That T having been released from the payment by his dis-

***Witnesses—Competency.**—See *Radford v. Fowlkes*, 85 Va. 820; *Tunstall's adm'r v. Withers*, 86 Va. 892; 4 Min. Inst. (2d Ed.) 764-769. In *Goodell v. Gibbons*, 91 Va. 610, the court approves the view taken in the principal case that the statutes referred to in the second headnote were designed to remove

charge in bankruptcy, was a competent witness at common law for the defendant, to prove payment of the debt.

2. Same—Same—Statutes.—The statute, Code of 1873, §§ 21, 22, was intended to remove incompetency in certain cases, and not to create it in any case, and T being a competent witness at common law, is not rendered incompetent by the statute. And this especially since the act of April 2, 1877, Sess. Acts of 1876-77, ch. 256, amending the former act, which, though passed after the suit was brought, was in force at the time of the trial, and therefore governs the case.

The case is stated by Judge Moncure in his opinion.

Haymond, for the appellant.

J. A. Early, for the appellee.

MONCURE, P., delivered the opinion of the court.

This is a writ of error to a judgment of the circuit court of Franklin county, rendered on the 16th day of August, 1876, in an action of debt brought by Stephen Watts, executor of Charles B. Reynolds, deceased, against

437 George E. Dennis, executor of James S. Callaway, deceased. *The action was brought on a single bill, obligatory for the sum of four hundred and forty-six dollars and forty-five cents, dated the 30th day of March, 1853, executed by the said James S. Callaway and Peter G. Price, Peter H. Callaway and Thomas Callaway, as joint obligors, and payable on demand to the said Charles B. Reynolds. The action was tried on a single issue, joined on a plea of payment by the defendant's said testator. On the said trial the jury found a verdict for the defendant, and the court rendered judgment on the said verdict accordingly.

Two bills of exceptions to rulings of the court on the trial of the action were made parts of the record on motions of the plaintiff; but it is necessary to notice here only the first of them, which is in these words:

"Be it remembered, that at the trial of this cause, the defendant offered to examine Thomas Callaway as a witness in his behalf, to which the plaintiff, by counsel, objected, on the ground that said Callaway was not a competent witness, he being one of the obligors to the bond in the declaration mentioned, and the other obligors and the obligee being dead, the said T. C. Callaway having been discharged in bankruptcy; but the court overruled said objection, and permitted the said witness to testify. To which ruling of the court the plaintiff, by his counsel, excepted, and prayed that this, his bill of exceptions, be signed, sealed and made a part of the record, which is accordingly done."

The plaintiff applied to a judge of this court for a writ of error and supersedeas to the said judgment; which were accordingly awarded.

incompetency in certain cases and not to create it in any case. See also *Mutual Life Ins. Co. v. Oliver*, 95 Va. 450; *Knick v. Knick*, 75 Va. 12; *Borst v. Nalle*, 28 Gratt. 434.

The only assignment of error in the said judgment made by the said plaintiff by counsel is:

"That the said circuit court erred in its ruling that Thomas Callaway, the only surviving party to the bond sued on, which bond was the subject of investigation
438 in *said action, was competent to testify in behalf of the defendant, whose interest was adverse to that of the plaintiff, whose testator was the obligee to said bond. (See §§ 21 and 22, ch. 172, Code of 1873.)"

It was admitted on the trial that the said Thomas Callaway, whose testimony tended to prove that the debt sued for had been paid more than fifteen years before the action was brought, had been discharged in bankruptcy before he gave his testimony. He was therefore released by his said discharge from any liability for the said debt, and was, on common-law principles, a competent witness in the said action to prove the payment of the said debt. It is not pretended, and was not on the trial of the action, so far as the record shows, that the debt was not such a one as was released by the said discharge in bankruptcy, and it must be presumed that it was, in the absence of evidence to the contrary. That a discharge in bankruptcy removes the incompetency of a person as a witness in such a case, on common-law principles, is well settled by authority, as is clearly shown in the books referred to by the learned counsel for the defendant in error. 1 Phillips on Evidence, p. 133, Cowen & Hill's edition; 1 Greenleaf on Evidence, § 430; Murray v. Judah, 6 Cow. R. 484.

Then, Thomas Callaway having clearly been a competent witness on the trial of the action according to the principles of the common law, the only remaining question is, did the statute referred to in the said assignment of error render him incompetent?

That statute was enacted to remove incompetency in certain cases, and not to create it in any case. The sections and chapter referred to are sections 21 and 22 of chapter 172.

Section 21, in very broad terms, removes incompetency by declaring that "no witness shall be incompetent to testify because of interest; and in all actions, suits or
439 *other proceedings of a civil nature, at law or in equity, before any court or before a justice of the peace, commissioner or other person having authority by law, or by consent of parties to hear evidence, the parties thereto, and those on whose behalf such action, suit or proceeding is prosecuted or defended, shall, if otherwise competent to testify, and subject to the rules of evidence and practice applicable to other witnesses, be competent to give evidence on their own behalf, and shall be competent and compellable to attend and give evidence on behalf of any other party to such action, suit or proceeding, except as hereafter provided."

Certainly, there is nothing in that section which can create incompetency in any case. Its only purpose is to remove incompetency in certain cases where it existed. Then the

question is, whether there be anything in the next section which could render incompetent a witness who was thus made competent by principles of the common law?

Section 22 was obviously and professedly intended only to enumerate and define the exceptions contemplated and referred to in section 21, and not to create incompetency in any case where it did not exist at common law. Its language is: "Nothing in the preceding section shall be construed to alter the rules of law now in force in respect to the competency of husband and wife as witnesses for or against each other, during the coverture or after its termination, nor in respect to attesting witnesses to wills, deeds or other instruments; and where one of the original parties to the contract or other transaction which is the subject of the investigation is dead, or insane, or incompetent to testify by reason of infamy, or any other legal cause, the other party shall not be admitted to testify in his own favor, or in favor of any other party having an interest adverse to that of the party so incapable of testifying,

unless he shall be first called to testify
440 in behalf *of such last-mentioned party; and where one of the parties is an executor, administrator, curator, or committee, or other person representing a dead person, an insane person or a convict in the penitentiary, the other party shall not be permitted to testify in his own favor, unless the contract or other transaction in issue or subject of investigation was originally made or had with a person who is living or competent to testify, except as to such things as have been done since the powers of such fiduciary were assumed."

It is plain that neither this section nor the next preceding was intended to apply to a person offered as a witness in a cause who had no interest in the subject in controversy in the cause, and was therefore not incompetent to testify because of interest. As before stated, section 21 is a general provision removing the incompetency of a witness to testify "because of interest," but containing an exception in these words: "exceptions hereafter provided;" and section 22 embraces the exceptions thus referred to in section 21. These two sections are to be construed with that view, if the words therein used will reasonably admit of that construction, as we think they will. The words, "the other party shall not be admitted to testify in his own favor," in section 22, plainly indicate that the party here referred to is a person having an interest in the subject of controversy. How else could he be admitted to testify in his own favor? But this meaning is rendered still more plain by the words which immediately follow the words last quoted from the same section: "or in favor of any other party having an interest adverse to that of the party so incapable of testifying," &c. The words "other" and "interest," in this section, show that the true construction of the words "in his own favor" is as aforesaid.

See what is said by Judge Burks in delivering the opinion of this court in the

441 case of *Borst v. Nalle & als.*, 28 *Gratt. 423, 434, referred to by the counsel of the defendant in error in this case.

But if there could have been any reasonable ground for doubting that such was the true construction of section 22 as it stands in the Code of 1873, the question is conclusively settled by the act approved April 2, 1877, entitled "an act to amend and re-enact section 22, chapter 172, Code of 1873, in relation to parties to suits testifying in certain cases"—Acts of Assembly 1876-77, p. 265, chap. 256. That act concludes with a proviso in these words: "provided, however, that no witness who would have been competent to testify as the law stood before the passage of this and the preceding section shall be rendered incompetent hereby."

This act was in force from its passage, which was before the trial of the action in this case, and therefore the act governs the case. This act was passed after the decision of this court in *Borst v. Nalle & als.*, supra, and no doubt in consequence of what was said by the court in that case. At least, the proviso aforesaid was adopted in consequence of what was said.

We have examined the two cases referred to by the learned counsel for the plaintiff in error—*Mason & als. v. Wood*, 27 Gratt. 783, and *Grigsby & als. v. Simpson, ass'ee, &c.*, 28 Id. 348—but they do not affect the view above presented. We therefore deem it unnecessary to comment upon them.

We are therefore of the opinion that there is no error in the judgment of the circuit court, and that the same ought to be affirmed.

Judgment affirmed.

442 *Kenny v. Hoffman & als.

January Term, 1879, Richmond.

1. Specific Performance—General Rule.—

Specific performance of a contract for a sale and purchase of land will only be decreed as a matter of favor, where the vendor is not prepared to comply with his covenants until the hearing; and such favor will only be granted in cases where it can be granted without prejudice to the rights of the vendee. This indulgence will not be granted when the defect to be remedied was known to the vendor or his attorney at the time of the contract, and was concealed from the purchaser. And more especially will such an indulgence be denied when beside the failure to disclose the existence of incumbrances, an account is necessary to ascertain the state of the title, the extent, nature and amount of such incumbrances.

2. General Warranty—Incumbrances.—A contract for the sale of land which provides that the vendor shall convey to the purchaser a clear title, entitles the purchaser to a conveyance of the land with general warranty and free from incumbrances.

3. Specific Performance—This Case.—A purchaser of land buys with a view of immediately removing his family to it, and is assured it is free from incumbrances except one deed of trust to se-

cure a specific debt. Soon after the purchase he ascertains it is covered by several deeds of trust, and by a number of judgments against a prior owner, of unascertained amounts—*Held*: He is well justified in refusing to carry out the contract; and specific performance will not be enforced against him, though in a suit brought by the vendor, after two years he has had the liens ascertained, and they may be paid out of the purchase-money.

This was a suit in equity in the circuit court of Fauquier county, brought on the 28th December, 1868, by Charles W. Hoffman against P. G. Kenny and several others, to have specific execution of a contract by which said Hoffman sold to said Kenny a tract of land of five hundred and eighty-five
443 acres in said *county, at \$25 per acre, and to have the liens by deeds of trust and judgments ascertained in order that he might make a clear title to the purchaser.

The written contract bears date on the 10th August, 1868, and after setting out the land and the price to be paid, provides that Hoffman shall deliver immediate possession of the land, except certain specified parcels, and of these possession was to be given on the 1st of January next. And it further provides "that Kenny is to pay to said Hoffman the whole amount of the purchase money as soon as a clear title is made to him."

Kenny resisted the specific execution of the contract on the ground that immediate possession was the important inducement to the purchase by him, and that he ascertained after the contract was made that the land was incumbered by various deeds of trust and judgment liens, and he therefore refused to carry out the purchase, and gave notice thereof to Hoffman.

The cause was pending and strongly contested for two years, and two or more reports were made by a commissioner as to the liens upon the property by deed of trust and judgments; and all the liens by deed, but one for a specific amount, having been removed, and the judgments and their amounts ascertained, the cause came on to be heard on the 29th of September, 1870, when the court held that the plaintiff was entitled to have a specific execution of the contract, and decreed that P. G. Kenny should pay to R. Taylor Scott, who was appointed special commissioner for the purpose, the sum of \$14,635.32 within thirty days from the date of the decree; and that upon the payment of the said sum of money to said special commissioner, he, the said special commissioner, should deliver to the

said Kenny the deed from C. W. Hoffman
444 man *and wife to said Kenny, filed in the cause with the bill; and the sheriff was directed to put the said Kenny in possession of the land. Should the said Kenny fail to pay the said sum of money within the time aforesaid, then it was further decreed that commissioners named should proceed to sell the land at public auction, on the terms of cash for so much as was necessary to cover expenses, and for the balance on a credit of one, two and three years, and make report, &c.

In February, 1871, the commissioners re-

See *Stearns v. Beckham*, 31 Gratt. 379 and note; *Wood v. Walker*, 92 Va. 28.

ported that they had sold the land, and that C. W. Hoffman had become the purchaser at \$18.50 per acre. And on the 17th of April the court made a decree confirming the sale. From these decrees Kenny applied to this court for an appeal; which was allowed.

The view taken by this court of the facts attending the purchase of the land, and the clouds upon the title, are set out in the opinion delivered by Judge Anderson. The deed of Hoffman and wife to Kenny, filed with the bill, conveys all their legal and equitable interest in said land, and all others claiming by or through them.

John S. Mosby and William H. Payne, for the appellant.

Brooke & Scott, for the appellees.

ANDERSON, J., delivered the opinion of the court.

This is a suit by Charles W. Hoffman against William B. Walters, John Carr, Snowden C. Hall, John H. Downing, John Jett and P. G. Kenny to ascertain and remove incumbrances from a tract of land which the plaintiff had sold to said
445 Kenny; to that end to *convene the judgment creditors of Thomas S. Hall, a former owner of the land, to enjoin the sale thereof by W. B. Walters, trustee under a deed of trust; in a word, to clear the title of the said Hoffman, and to enforce the execution of the contract of sale and purchase which he had made with the said Kenny.

It appears that Mr. Kenny was a citizen of the state of New Jersey, and wishing to transfer his domicile to the state of Virginia, came to Fauquier county about August, 1868, to purchase a farm as a home for himself and family, with the intention, if he purchased, to plant vines and fruit trees the ensuing fall. He was in treaty with a Mr. Marshall for a farm in Fauquier county, which Marshall declined to sell until he could consult the owner, who was absent in Europe. The appellee, C. W. Hoffman, being aware of it, called on Mr. Kenny and offered to sell him an adjoining farm, known as Linden, which contains 585 acres and a fraction, and informed him, as testified by Kenny, that he could give him possession, and a deed for it, in a week or ten days, and that there was only one claim on it, a debt due Mr. Carr. They made a verbal contract for the sale and purchase of said tract of land, as is further testified by said Kenny. at the price of \$25 an acre, \$600 of which Kenny paid in hand; and Hoffman left the same day for Alexandria, and promised to put the papers in the hands of Col. John S. Mosby the following Monday to prepare the deed. Three days after, the paper marked C, and exhibited with plaintiff's bill, evidencing the contract, he says was handed to him by his son, and was signed by him without much examination. It bears date the 10th of August, 1868, and purports to be a sale to Kenny by Hoffman of the tract of land in controversy, and stipulates that immediate possession shall

be given, except of certain parcels
446 mentioned, *possession of which should be given on the 1st of January, 1869, Kenny to pay the whole of the purchase-money as soon as he got a clear title. Hoffman returned to Linden after a week's absence, and stated that he had not left the papers with Col. Mosby because of their being some other claims on the land, which had been paid, but satisfaction of them not entered; that the following Tuesday-week court would sit in Warrenton, and he would have all the claims settled and put the papers in Col. Mosby's hands. Kenny then returned home to make arrangements for moving his family to the farm he supposed he had purchased in Fauquier county, Virginia. There is no conflict with the foregoing statement of the case unless there is in the deposition of C. W. Hoffman in relation to his representation as to the incumbrances on the land, which we will notice hereafter. Mr. Kenny, learning that the land was greatly incumbered with uncertain amounts; that a cloud was resting upon the title; that suits were depending to subject it to the liens of judgments and deeds of trust for uncertain amounts; that the land had been advertised to be sold under a deed of trust; and that he could not get possession under a clear title in time to plant vines and fruit trees, which seems to have been regarded by him in making the purchase as an object of great importance, notified the said Hoffman that he would not proceed with the purchase, and demanded a return to him of the money (\$600) which he had advanced upon it.

The record shows that the bill in this suit was filed on the 28th of December, 1868, and C. W. Hoffman testifies that he made and tendered to Col. John S. Mosby, the agent or counsel of P. G. Kenny, the deed which is filed as an exhibit with the bill on the last
447 day of December, 1868, and that he refused to accept *or receive it. Ought he to have received it? Did the deed tendered convey to him a clear title, such as the contract obliged C. W. Hoffman to make? Was it in time? It is very evident that time was an important element in the question of purchase by Kenny. His purpose was to move his family, if he purchased, to their new home without delay. It was important that he should get possession in time to prepare the ground for planting vines and fruit trees. If he failed in it he would be postponed a year in planting, which would be a serious loss. For this reason it seems he gave up the purchase of the farm he wanted rather than wait until the owner, who was then in Europe, could be consulted, and entertained the proposition of C. W. Hoffman, who told him he could give him possession and make him a deed in a week or ten days. Doubtless Mr. Hoffman was aware of this when he gave him that assurance. He testifies: "Early possession was a necessary element in any contract I would make, as I would not otherwise have purchased any place, my object being to put the land in such condition as that it could be planted in

vines and fruit that fall." And again: "I fully believed, from what Hoffman told me, that he could give me a deed for his property, vesting a clear title in me, in a week or ten days; otherwise I would have had nothing to do with the property." He was a stranger in the country, had made no investigation of the title, and had had no access to its records, but testifies that in making the contract he relied alone on the representations of Hoffman. In the foregoing statements he is not contradicted by Hoffman or any other witness.

But if possession was so important, why did he not take it? It was tendered to him according to the terms of the written contract. Mr. Hoffman says he did take possession, and employed his son to plow the

448 land for *him, and employed an agent to take charge of the place for him.

About this they differ, and neither the son nor the agent, nor the witness to the contract are introduced by Mr. Hoffman to testify. But that does not seem to be material, as it is admitted by Kenny that possession was tendered. Was it his duty under the contract to take part possession then, or full possession when it would have been given, on the 1st of January following? He was under no obligation to take possession until he got a clear title. Possession, without a title, would have been no advantage to him. If he had taken possession and moved his family to the place, and expended money and labor in the improvements he contemplated, and the seller was unable to make him a title, his labor and expenditures would have all been lost; his time would have been wasted, and others would have enjoyed the fruits of his labor and expenditures. Under the circumstances, we think it was prudent and judicious in him, and not in conflict with the rights of any one, not to proceed with the contract until a clear title was secured to him, and consequently his vendor had no right to complain if he refused to take possession until he was made sure of his title. Before Mr. Hoffman left for Alexandria, he informed him that there was but one claim on the land—a debt due to John Carr, which, of course, he expected to be arranged, as he told him he would put the papers in the hands of Col. John S. Mosby to prepare a deed, and could give him possession and convey him a good title in a week or ten days. On his return, a week afterwards, he informed him that he had not left the papers in Col. Mosby's hands, because he had ascertained there were other claims on the land, which, however, he informed him had been paid; but that he would have the claims all settled at the next court at Warrenton, which would sit the next Tuesday week, and put the papers

449 in the hands of Col. Mosby. Mr. Hoffman had not told *him all, but he told him enough to justify him in declining to take possession, and in deciding not to proceed further with the contract until he got a clear title. And he wrote to Col. Mosby requesting him to see that Mr. Hoffman made him a good title, and soon after returned to his home in New Jersey.

C. W. Hoffman, whose deposition is in the record, does not contradict any of the foregoing statements. But in answer to the eleventh question of his counsel, "Have you or not tendered to said Kenny a deed, with general warranty?" &c., said, "I made such a deed and tendered it to the agent or counsel of Mr. Kenny on the last day of December, 1868, which said deed is filed with the bill in said cause, and is marked exhibit ——— with bill." By an inspection of the deed, it will be seen that it contained no general warranty, but only conveys the legal and equitable interest of the grantors in said land and all others claiming by or through them. He further says, "I have complied on my part with all the covenants and agreements specified in the written contract referred to." That is matter of opinion. We construe the written contract; and they are not in the deed not only with general warranty, but free from incumbrance. "a clear title." But he adds, "the items of the contract are specially set forth (Where?) stating that the liens were to be paid out of the money received for the land." We find no such specifications in the written contract; and they are not in the deed filed as "exhibit ——— with bill." The witness is evidently mistaken. In answer to twelfth question by same: "When the contract for sale was made with Kenny, was he or not informed that your title to this land was incumbered?" He answers to that part of the question: "Mr. Kenny, at the time of our contract, was informed that the land was incumbered." It is admitted, as we have seen, by Kenny, that he was informed

450 that there *was one incumbrance on it, and that was only one claim. The answer does not thus far conflict with this. But in answer to the latter part of the question, "Was or was not the understanding between you that he should take the land subject to its incumbrances, but see that the purchase-money should be applied to the discharge of said incumbrances according to their priorities?" he says: "The understanding was as you have stated, and was so explained to the witnesses to the contract." Yet no witness to the contract has been examined to prove such an understanding. It is directly in conflict with the testimony of P. G. Kenny, and is contradicted by the written contract; and is excepted to by the defendant Kenny as illegal testimony; and was clearly inadmissible, and ought to have been excluded.

Was the tender of the deed on the last day of December, 1868, or the offer to make a deed prior thereto, such a compliance with the contract on his part as entitled him to a decree for specific performance? We have seen that the deed tendered was not such a conveyance as the defendant Kenny was entitled to receive. Does the bill and record of this suit make a case which would warrant a court of equity, in the exercise of a sound discretion, to enforce the specific performance against the defendant P. G. Kenny?

The bill shows upon its face that clouds were resting upon the plaintiff's title from deeds of trust, upon one of which the amount

of the debt secured was disputed and in litigation, and from unascertained judgment liens, for the enforcement of which a suit was depending, and that the land was advertised to be sold under one of the said deeds of trust. Under these circumstances, was it incumbent on the defendant to proceed with the contract? Was it incumbent on him to move his family from a distant state to Virginia, and accept of a conveyance to a tract of land which was shingled over with
 451 deeds of *trust and unascertained judgment liens to an unknown amount—to accept the possession of the farm which he had purchased for a home, with the promise of a clear title, with the view of planting it in vines and fruit trees during the ensuing season, after the season for planting was passed, and which was thus encumbered, and then actually involved in suits?

"A court of equity is anxious to protect a purchaser and give to him reasonable security for his title; not compelling him to take a title, not knowing whether it is good or bad." 1 Sugd. Vend., top p. 577, ch. 10, § 3, art. 1. In *Garnett v. Macon & als.*, 2 Brock. R. 185, 244, Chief Justice Marshall said: "Both on principle and authority, I think it is very clear that a specific performance will not be decreed on the application of the vendor unless his ability to make such a title as he agreed to make be unquestionable." "This objection is not confined to cases of doubtful title. It applies to incumbrances of every description, which may in any manner embarrass the purchaser in the full and quiet enjoyment of his purchase." Those citations of authority are made with approval in *Hendricks & als. v. Gillispie*, 25 Gratt. 181. The doctrine on this subject is very fully stated by Judge Staples, and authorities reviewed, in *Christian v. Cabell*, 22 Gratt. 82.

It cannot be doubted that the difficulties hereinbefore stated "presented to the mind of a prudent man (as remarked by Chief Justice Marshall in *Garnett v. Macon*, 6 Call, 309, 367, and cited by Judge Staples in the case *supra*) contemplating the purchase of an estate, and desirous of performing his contract according to its terms, might have serious influence on his conduct, and might deter him from making the purchase. If informed of them after making the contract, but before its execution by the paying of the purchase-money and receiving a conveyance, he would have such strong motives for
 452 *stopping entirely, or at least for pausing until the impediments could be removed, as would, I think, justify him for so doing in the opinion of any reasonable man." No one can suppose that the appellant would have made this purchase if he had known the condition of the title. He might well refuse to complete the purchase after he was apprised that it was incumbered with deeds of trust and judgment liens of unknown amounts, liable at any time to be sold, the very possession of which might involve him in vexatious and expensive law suits.

Specific performance will only be decreed as matter of favor, when the vendor is not prepared to comply with his covenants until

the hearing, and such favor will only be granted in cases where it can be granted without prejudice to the rights of the vendee. This indulgence will not be granted when the defect to be remedied was known to the vendor or his attorney at the time of the contract, and was concealed from the purchaser. "And more especially will such indulgence be denied when, besides a failure to disclose the existence of incumbrances, an account is necessary to ascertain the state of the title, the extent, nature and amount of such incumbrances." (*Christian v. Cabell*, *supra*, pp. 103-4.) Judge Staples said, in delivering the opinion, in which the whole court concurred: "I have seen no case in which it has been held that a purchaser has been required to wait the institution of a suit and the settlement of contested accounts between third persons to afford the vendor an opportunity of removing incumbrances and perfecting his title."

After Kenny ascertained that he could not get a clear title to the land; that it was covered with judgment and deed-of-trust liens of unknown amounts, and that suits were depending to enforce some of them, and the land had been advertised to be sold under one of the deeds of trust, and a cloud was resting upon the title which he
 453 *could not see how or when it would be removed, if ever, it was certain not in time for him to get possession for the purpose which seems to have been his leading design in contemplating the purchase, and that to proceed with the contract would involve him in an expensive and annoying chancery suit, the result of which he could not foresee, he prudently resolved not to go on with the purchase, and refused to accept a deed which did not convey him a clear title, notified Hoffman that the contract was ended, and demanded the return of the \$600 he had advanced upon it. Long after this, Hoffman brought this suit against third parties for an account, to clear his title and to enjoin the sale of the land under one of the deeds of trust, and, against said Kenny, to enforce specific performance of his contract, and tendered him a deed which only conveys, without general warranty, all the legal and equitable interest of his wife and himself in the land in controversy, which was tendered to Kenny's attorney, and which he refused to accept. And after a litigation of two years in the endeavor to clear the title, the decree which is appealed from was pronounced, holding Kenny to the specific performance and requiring him to pay within thirty days the sum of \$14,635.32 to a special commissioner; upon the payment whereof the commissioner was to deliver to him the deed aforesaid, and upon failure to pay the land was to be sold and proceeds applied to the payment thereof.

It does not appear, even after two years' litigation, that the plaintiff at the hearing had removed all the impediments to the execution of the contract on his part, or that it was in his power then to make the appellant a clear title. There still remained, a

shown by the commissioner's reports, a considerable amount of judgment liens on that part of the tract which lies in the county of Fauquier, besides a large debt due John Carr, which was secured by deed of trust,

the amount of which was uncertain
 454 *and disputed until settled by this decree. The commissioner in his last report, which seems to be the basis of the decree, states that a part of the tract lies in Warren county, and that there are a number of judgments unsatisfied, obtained in the courts of said county, some of which are upon the lien docket, and some not, and that the deed of trust from Hall to Hall has never been recorded in that county, nor the deed from Hall to Hoffman; and that a suit in chancery is depending in the circuit court of Warren to subject that portion of the land which lies in that county to the satisfaction of said judgments. The number and amount of said judgments are not ascertained and determined by this suit, though they are evidently a lien upon a part of the land which Hoffman sold to Kenny. But we are of opinion, if all the impediments had been removed at the hearing of this cause to the conveyance of a good title by Hoffman to Kenny that, under the circumstances of this case as hereinbefore detailed, both upon principle and authority, it would be inequitable to enforce the specific execution of the contract against the appellant. We are of opinion, therefore, to reverse the decree of the circuit court with costs.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the appellee, C. W. Hoffman, is not entitled to a specific performance of the contract in question, upon the case made by the record; and that the court below erred in decreeing against the appellant the specific performance of said contract instead of its rescission. It is therefore ordered and decreed that the said decree of the circuit court of Fauquier county be reversed and annulled, and that the appellee, Charles W. Hoffman, do pay to the appellant his costs expended

455 *in the prosecution of his appeal here.

And this court proceeding to render such decree as ought to have been rendered by the court below, it is adjudged, ordered and decreed that the appellee, Charles W. Hoffman, do pay to the appellant, P. G. Kenny, the sum of \$600, the money he had advanced him on the purchase of the land in controversy, with interest thereon from the 10th day of August, 1868, at the rate of six per centum per annum until payment, and his costs expended in the defence of this suit in the said circuit court; and if the said sum of \$600, with interest as aforesaid, be not paid within ninety days from this date, that the said Kenny have liberty to apply to the said court, by petition in this cause, for such order as may be necessary and proper to subject the said land or the rents and profits to the payment thereof.

Decree reversed.

456 *Boynton & als. v. McNeal & als.

January Term, 1879, Richmond.

Homestead Exemption—Right to Claim against Creditors.—B conveys a house and lot to H in trust for the separate use of B's wife. M, a creditor of B, files a bill to set the deed aside as fraudulent and void as to creditors of B, and so the court decrees. B then executes a deed of homestead of the house and lot, and files his petition in the cause to be allowed his homestead. B is entitled to his homestead in the house and lot as against M, the creditor.

This was a suit in equity in the corporation court of the city of Alexandria, brought in April, 1871, by McNeal & Beacham, partners, and James H. Stevenson, to set aside a deed made by E. S. Boynton, dated the 25th of January, 1871, by which said Boynton conveyed to George Hewes a house and lot in the city of Alexandria in trust for the separate use of Caroline E. Boynton, the wife of said Boynton. The bill charged that the firm of E. S. Boynton & Co. was indebted to the plaintiffs McNeal & Beacham \$210.74, and to Stevenson & Co. \$222.04, for goods sold to Boynton & Co. in December, 1870, and that the deed was made to hinder, delay and defraud the plaintiffs, and without any consideration deemed valuable in law.

On the 14th of December, 1871, the court held that the deed was null and void so far as it concerned the several amounts therein decreed to the plaintiffs, and decreed that E. S. Boynton should pay to the plaintiffs McNeal & Beacham \$210.74, with interest, and to Stevenson \$222.04. And unless this was done in thirty days a commissioner named should sell the house and lot on terms stated in the decree. This decree, so far as it directed a sale of the property, was afterwards set aside.

457 *In February, 1872, E. S. Boynton executed his deed of homestead, and filed his petition for appraisers under the homestead law. He also filed his answer to the bill, in which he averred that when the deed was made he was solvent, and denied that it was intended to hinder, delay and defraud the plaintiffs. But if the deed should be held to be void, then he claims his homestead in the house and lot aforesaid, and asked the court to protect him in his rights.

On the 21st of January, 1874, the cause came on to be heard, when the court decreed that E. S. Boynton was not entitled to claim a homestead in the house and lot, and his application therefor be overruled. That as to the debts due to the plaintiffs the deed to Hewes

***Homestead Exemption—Right to Claim against Creditors.**—Where there is a fraudulent conveyance of property, which is subsequently annulled at the suit of the creditor, the grantor is not estopped as against the creditor to assert his right of homestead in the premises. *Wray v. Davenport*, 79 Va. 19; *Marshall v. Sears' ex'or*, 79 Va. 49; *Hatcher v. Crews' adm'r*, 83 Va. 371; *Wilkinson v. Merrill*, 87 Va. 513; 1 Min. Inst. (4th Ed.) 910, 911. See also *Mahoney v. James*, 94 Va. 180; *Shipe v. Repass*, 28 Gratt. 716.

was fraudulent and void; and a commissioner was directed to report whether the rents and profits would pay these debts within five years.

The commissioner reported that the rents would not pay the debts in five years. And the cause came on again to be heard on the 14th of March, 1874, when the court made a decree appointing commissioners to make a sale of the house and lot on terms stated in the decree. And thereupon E. S. Boynton, Mrs. Boynton and the trustee Hewes applied to this court for an appeal; which was allowed.

F. L. Smith, Jr., for the appellants.

D. L. Smoot, for the appellees.

STAPLES, J. One of the appellants, E. S. Boynton, on the 25th January, 1871, executed a deed conveying a house and lot in the city of Alexandria to a trustee for the sole benefit of his wife, Caroline E. Boynton. At that

time the appellant, as a member of the
458 firm of E. *S. Boynton & Co., was indebted to certain creditors to the amount of five hundred dollars. In August, 1871, these creditors, the appellees here, filed a bill in the corporation court of Alexandria to set aside this deed, upon the ground it was intended to hinder and delay creditors, and was not upon consideration deemed valuable in law. The case coming on to be heard at the December term, 1871, that court entered a decree declaring the deed null and void, and setting it aside so far as it affected the claims of the appellees. Thereupon the appellant, E. S. Boynton, filed his application asserting a claim of homestead in the property; but the application was rejected by the court, and the claim to the homestead denied. From that decree an appeal was allowed by one of the judges of this court.

The question is substantially the same as that which arose in *Shipe, Cloude & Co. v. Repass et als.*, decided at Wytheville, and reported in 28 Gratt. 716, 729. It was there held by a majority in a court of three judges that when a conveyance is set aside for fraud at the suit of the grantor's creditors he is not estopped as against them to assert his claim of homestead in the property embraced in the deed. At the time that decision was made, the court had access to but few of the authorities bearing upon the question. A reference to the opinion will show the grounds upon which it was based, and it is not proposed to repeat them here.

Since the present case has been under consideration, I have taken occasion to re-examine the whole subject, and to look more fully into the authorities, and I find no reason to doubt the correctness of the former decision. In *Thompson on Homestead and Exemptions*, the most recent work on the subject, the cases are collected, and the question carefully considered on reason and authority. I propose to quote somewhat extensively what he
459 has *said as my own argument in the present case. After stating the rule in question, he proceeds as follows:

"The reasons for this rule may be deduced

from the cases: first, that the homestead privilege is created for the benefit of the wife and children, as well as that of the husband and father; therefore it is not right that the former should be prejudiced by the wrongful act of the latter; second, that the conveyance being void as to creditors, it stands as to them as though it had never been made. If it had not been made, the debtor (or his wife) could have asserted the right of homestead in the premises against them, and they, the creditors, cannot assume the inconsistent positions of asserting the nullity of the conveyance, and claiming a right under it. In other words, a fraudulent conveyance does not enlarge the rights of creditors, but leaves them to enforce the rights they would have had if no such conveyance had been made. Expressed in still another way—the interest which the creditor has in the property by virtue of his lien is a derivative interest, proceeding from the debtor and dependent upon his title. Hence the creditor cannot acquire a right under the debtor's title, and at the same time impeach that title. He cannot sell under his execution the debtor's title, and at the same time deny the debtor's right of homestead on the ground that the latter has no title. By attempting the sale the creditor affirms that the debtor has a salable interest, and the law means that interest should not be taken away and the debtor disturbed in his possession by judicial process. When the law declares that a debtor's disposal of his property with intent to defraud his creditors shall be voidable at the instance of his creditor, and at the same time declares that specific property of the debtor shall be exempt against his creditor's adverse claims, the provisions are in *pari materia*, and must be

construed together, and the latter provision must be held to except *this
460 exempt property from the operation of the former provision. Certainly it would be very inconsistent to say that a debtor's disposal of his property, and which property, in so far as the creditor and his claims are concerned, may be said to have no existence at all, is a fraud upon the creditor. No creditor can be, in legal contemplation, defrauded by a mere conveyance made by his debtor of any of his property which such creditor has no right by law to appropriate, or even to touch by any civil process. A conveyance of the homestead by the husband to the wife cannot be held fraudulent as to creditors, for the reason that being exempt it was no more beyond their reach than before."

To my mind this reasoning is not only just and sound, but is absolutely unanswerable. There is much more on the same subject in the same work, but the limits of this opinion will not justify further citation. It will be seen, however, that one of the reasons given by the author for the rule stated is, that the creditor cannot be said to be hindered, or delayed, or prejudiced by a fraudulent conveyance embracing property subject to the homestead, because the debtor is entitled to hold it exempt from the payment of his debts. A striking illustration of this principle is furnished by the cases respecting property

exempt from execution at law. According to the course of English decisions, it was long settled that to make a voluntary conveyance void as to creditors it must transfer property which would be liable to be taken in execution for the payment of debts. The reasoning upon which this doctrine was based was, that the statute of frauds and perjuries was not intended to enlarge the remedies of creditors or to subject any property to execution not already in law or equity subject to the demands of creditors. A voluntary conveyance of property not so subject would

not be injurious to them nor within the
 461 *purview of the statute, because it would not withdraw any fund from the power of the creditor which the law had not already withdrawn from it. And it would be a strange anomaly to declare that to be a fraud upon creditors which in no respect varied their rights or remedies. And hence it has been held that a voluntary settlement of stock or of any other property not liable to execution is valid, whatever may be the condition of the grantor. This is the doctrine held by some of the most eminent judges in England. 1 Story Eq. Pl. §§ 367, 368. It is true that Chancellor Kent and other American jurists have very justly questioned its soundness upon the ground that although property thus conveyed could not be reached at law, equity might interfere and give the necessary relief; for otherwise a debtor might convert all his property into stock, and settle it upon his family, in defiance of the claims of creditors. But neither Chancellor Kent nor any other American judge, in discussing this question, ever maintained that a fraudulent or voluntary conveyance enlarged the rights of the creditor, or that he would be prejudiced by a conveyance of property which is exempt both at law and in equity from the payment of debts. Take, for example, the property exempt from levy and distress under what is known as the poor-debtor's law. It will scarcely be maintained that if the debtor should make a fraudulent deed conveying this property along with other property subject to his debts he would thereby forfeit his claim to exemption as against the creditors.

The language of the constitution is equally emphatic with respect to the homestead. It declares that every householder or head of a family shall be entitled, in addition to the articles now exempt from levy or redress for rent, to hold exempt from levy, seizure,

sale under execution, order or other
 462 process, *his real and personal property, &c., to the value of not exceeding \$2,000, to be selected by him.

It is said, however, that by the express terms of this provision the debtor can only claim the homestead in property which is his own, and not in that which is another's. The supreme court of Ohio in *Sears v. Hanks*, 14 Ohio St. R. 298, has given so complete an answer to this question I will content myself with quoting a part of Judge Scott's opinion in that case: "Although estoppels are mutual, the plaintiffs claim a right, notwithstanding the conveyance, to regard the

property as still belonging to the debtor, and at the same time disregarding the decree which they have asked and obtained, to insist that their debtor has no interest whatever in the premises. The debtor is estopped equally from claiming and from disclaiming, while the creditor may do either, and each in turn, as his interest may dictate. Such a position can hardly be maintained. The rights of the plaintiffs in this action are only those which belong to creditors seeking to set aside a voluntary conveyance of their debtor made in fraud of their rights, and to enforce their judgment liens against the property so conveyed. Their claim is not under or through the fraudulent conveyance, but adverse to it, and when at their suit it has been set aside and declared wholly void as against them, they cannot be allowed as creditors to set up this void conveyance, against which they are claiming, for the purpose of enlarging their rights or remedies against their debtor, or for the purpose of estopping him from the assertion of the rights which he would otherwise have as against them. As between creditor and debtor, the deed is simply void, and cannot, therefore, affect the rights of either. A judgment creditor's lien is only

upon the property of his debtor, and the
 463 purchaser at a sale *on execution takes in general only the debtor's title.

If the debtor has no title or interest in the property levied on, there is nothing for the creditor to sell, and it is not competent for the creditor while selling the alleged title of his debtor to deny his right to a homestead on the ground that he has no interest in the property about to be sold. If he has an interest in the homestead property which the creditor can sell, he has an interest enough to secure his homestead from sale. The validity of the fraudulent conveyance as between the parties to it is no concern of the creditor's when it has been set aside as to him. All he can ask is, that against him it shall confer no rights upon any one. Were these plaintiffs judgment creditors of the fraudulent grantee, and levying their execution as such, the case would have been entirely different, and it might then well be said, in response to the present claim of Hanks, the creditor, that one person cannot have a homestead in the property of another."

I might also quote a very clear and satisfactory argument of Judge Dillon in *Cox v. Wilder*, 2 Dill. R. 45, 49, and of the supreme court of Wisconsin, 11 Wisc. R. p. 114, to the same effect; but the citations already given contain all that is necessary upon this particular point.

All that has been said relates, of course, to a controversy between the debtor and creditor exclusively. The deed being valid between the parties, no claim or assignment of homestead can affect the rights of the fraudulent grantee. But if he raises no objection, if he does not rely upon the estoppel, and the controversy is narrowed to a contention between debtor and creditor, I can see nothing to preclude the former as against the latter from asserting his claim of homestead.

We have heard much of a sound "public

policy," which requires the courts to intervene for the suppression of fraud; all of which is well enough as a guide for
 464 *judicial discretion when properly understood and defined. But what is "public policy?" As a basis of judicial decision it is wholly unreliable. In *The License Cases*, 5 Wall. U. S. R. 462, the supreme court of the United States has said: "This court can know nothing of the public policy except from the constitution and laws, and the course of administration and decision. It has no legislative powers. It cannot amend or modify any legislative acts. It cannot examine questions as expedient or inexpedient, as politic or impolitic. Considerations of that sort must in general be addressed to the legislature. Questions of policy determined there are concluded everywhere.

It is idle to say a man cannot take advantage of his own fraud. How is he taking advantage of his fraud in claiming property not subject to his debts? Now, if the attempted fraud of the debtor is in all cases to defeat the homestead, the result will simply be to give to the creditor a profit out of the transaction at the expense of the family of the debtor, for whose benefit the exception is mainly intended. And it becomes a grave question to be considered how far "public policy" requires that the family of the debtor shall be punished for his misconduct.

But why do we look only to the cases of actual fraud? Instances of constructive fraud are much more numerous, and more frequently the subject of judicial investigation. Many a man, whose actual indebtedness bears but a small proportion to his property, makes a settlement upon his wife or children, and afterwards spends or loses so much of his estate as not to leave enough to discharge his debts. No one doubts that a settlement of this sort may be made with a perfectly honest intent, and yet the law pronounces it fraudulent, and it will be set aside at the suit of the creditors. The case of *Johnston v. Gill*, 27 Gratt. 587, is just such a case.

465 The books abound with others *of a similar character, in which there is not a whisper of actual fraud. And yet, according to the reasoning of those who advocate a "sound public policy," the settlement defeats the homestead and confers upon the creditor rights he would not have had without the settlement. In this very case there is no reason to suppose any actual fraud was intended. All the circumstances rebut any such conclusion. At the time the deed was executed the indebtedness of the appellant did not exceed \$500; there were no liens upon the property, nor have any been since acquired, except such as resulted from the mere filing the bill. If the appellant, instead of conveying the property for the benefit of his wife, had filed his claim of homestead, the result would have been nearly the same, and the transaction would have been entirely legitimate. But it seems that in this particular case the form of the investment stamps the transaction as fraudulent; the wife loses the benefit of the provision made for her, the husband forfeits the home-

stead, and the creditor acquires title under a deed to a third person, which is a nullity as to him. A course of reasoning which leads to such results must be radically wrong and vicious. It cannot receive the sanction of my support. I know that cases will sometimes occur in which the deed is tainted with actual fraud. If, in such cases, it is deemed advisable to deprive the debtor of the homestead for the benefit of the creditor, the legislature can apply the remedy under such limitations as may be needful and proper. Whatever may be said with respect to the general policy of these homestead provisions, as long as they remain it is the duty of the courts to sustain them liberally by the express mandate of the constitution.

In conclusion, I will state that the views here expressed are fully sustained by
 466 the decisions of the supreme courts *of Mississippi, Alabama, Louisiana, Kentucky, North Carolina, Massachusetts, Maine, Vermont, New Hampshire, Iowa, Michigan, Wisconsin, Texas and Missouri; by the opinion of Judge Dillon in *Cox v. Wilder*, 2 Dill. 45; and the opinion of Judge Hopkins in *McFarland v. Goodman*, 6 Bissell R. 111; and by the several authors who have treated the subject. See Smyth on Homestead and Exemptions, § 532; Thompson on Homestead and Exemptions, §§ 406 to 418; and Bump. on Fraudulent Conveyances, p.—, where all the cases are cited.

There are some opposing decisions, I admit, but they will be found generally to relate to conveyances of chattels as affected by particular statutes of the several states. Thompson, § 425, et sequitur. The case of *Brackett v. Watkins*, 21 Wend. R. 68, relied upon in the dissenting opinion in the *Wytheville* case, it seems has been overruled in New York by *Wilcox v. Hanley*, 31 New York R. 648. It would seem also that the case of *Mandlove v. Burton*, 1 Ind. R. 39, also cited in the same opinion, if not overruled, was certainly not followed in the subsequent case of *Vandibur v. Love*, 10 Ind. R. 54; Thompson, § 429.

The Pennsylvania cases proceed upon the ground that the exemption laws of that state were intended for honest men, and not for cheats and rogues—words interpolated into the statute by the honorable court. Upon the same principle I do not see why in every case upon an application for a homestead an issue should not be directed to determine whether the applicant is an honest man. According to my understanding, these exemptions are allowed without reference to the merit or demerit of the debtor. They are founded upon a policy that has no relation to the character or conduct of the parties claiming the benefit of them. Neither our

constitution nor our statutes make any
 467 such exception, and *without at all concurring in the observation that every man is a cheat and a rogue who makes a conveyance invalid as to his creditors, until the legislature thinks proper to interpose I shall be content to follow the authorities which hold such a conveyance as to them (the creditors) at least does not divest the

debtor of his right to a homestead. My opinion, therefore, is that the decree of the corporation court is erroneous, and must be reversed and remanded for further proceedings in conformity with the views here expressed.

MONCURE, P., and ANDERSON, J., concurred in the opinion of STAPLES, J.

CHRISTIAN, J., dissented. He referred to his opinion in the case of *Shipe, Cloud & Co. v. Repass*, 25 Gratt. 716.

BURKS, J., also dissented.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the appellant, E. S. Boynton, as against the appellees, his creditors, is not estopped to assert his claim to a homestead in the property conveyed by the decree of the 25th of January, 1871, by reason of anything contained in said deed, and the said corporation court erred in so deciding. It is therefore ordered and decreed that for this error the said decrees of the 27th October, 1873, and January 21, 1874, be reversed and annulled, and the appellees do pay to the appellants their costs by them expended in the prosecution of their appeal aforesaid here. And it is further ordered and decreed that the cause be remanded to the said corporation court with a view to the appointment of
468 *appraisers according to the prayer of the appellant's petition, and to the assignment of homestead to the appellee, E. S. Boynton, unless it appears he is not entitled to the same on other grounds.

Decree reversed.

469 **Danville Bank v. Waddill's Adm'r.*

January Term, 1879, Richmond.

I. **Appeal—Evidence—Review.***—On an exception to the refusal of the court to set aside the verdict and grant a new trial on the ground that the verdict is contrary to the evidence, if the evidence and not the facts is certified, the appellate court will not reverse the judgment unless, after rejecting all the parol evidence of the exceptor, and giving full faith and credit to that of the adverse party, the decision of the court still appears to be wrong.

II. **Practice—Saving Exceptions.**†—If an in-

***Appeal—Evidence—Review.**—See *Daingerfield v. Thompson*, 33 Gratt. 136 and *note*; *Proctor v. Spratley*, 78 Va. 254; *Moses v. Old Dominion I. & N. W. Co.*, 81 Va. 22; *Hanriot v. Sherwood*, 82 Va. 4; *Moses v. Old Dominion I. & N. W. Co.*, 82 Va. 19, dissenting opinion; *Muse v. Stern*, 82 Va. 33; 4 Min. Inst. (2nd Ed.) 827; *Dean's Case*, 32 Gratt. 912 and *note*.

†**Practice—Saving Exceptions.**—4 Min. Inst. (2nd Ed.) 826; *Cose v. Marple*, 24 W. Va. 354, citing the principal case with approval; *Telegraph Co. v. Hobson*, 15 Gratt. 122; *Martz v. Martz*, 25 Gratt. 368; *Peery v. Peery*, 26 Gratt. 320; *Winston v. Giles*, 27 Gratt. 530; *Page v. Clopton*, 30 Gratt. 415 and *note*; *Dank v. Rodecaver*, 26 W. Va. 294.

struction is given to the jury without objection at the time, and no exception, or notice of exception, is taken or given before the verdict is rendered, the giving the instruction cannot be a ground for setting aside the verdict and granting a new trial of the cause.

III. **Statement of Case.**—In an action of *assumpsit* to recover a sum of money in gold which had been delivered by the plaintiff to the defendant for safe-keeping, the only plea in the case was *non assumpsit*. There was no question as to the delivery of the gold to the defendant, but the defence was that he had been robbed of it, and the effort of the plaintiff was to prove a fraudulent appropriation of it by the defendant conspiring with another person—HELD:

1. **Evidence—Character of Defendant.**—

Evidence of the general character of the defendant by him is not admissible, and therefore the failure to produce it is not any ground for an inference unfavorable to his integrity.

2. **Same—Same—Instruction.**—The counsel

for the plaintiff in his argument before the jury having relied on the fact that the defendant had introduced no proof of his character, after the argument was concluded the court properly, of its own motion, instructed the jury that the character of the defendant as a party to the suit was not involved in the issue to be tried; that he had no right to introduce proof of his general character, and that the jury should disregard all *argument made before them by the plaintiff's counsel, based on the failure of the defendant to introduce such evidence.

470 IV. **Jurors Impeaching Verdict.***—A new trial properly refused, which was asked based upon the affidavit of two of the jurors, that they had misapprehended the instruction of the court, and thought it required them to give full credit to the testimony of the defendant who had given his testimony in the case; the instruction given by the court having been accompanied with the further instruction at the instance of the plaintiff, that the plaintiff might introduce evidence to impeach the defendant's character as a witness.

V. **Conspiracy—Admission of Evidence.**†—

Before evidence of the acts or declarations of one who is claimed to have been a conspirator with another to commit any offense, or actionable wrong, the judge must be satisfied that, apart from them, there are *prima facie* grounds for believing in the existence of the conspiracy.

VI. **Same—Same—Declarations of Conspirators.**—

In such a case, after the conspiracy has been consummated, the common purpose carried fully into effect, no subsequent declarations of any of the conspirators, not made in the presence of the others, are admissible as evidence against the latter.

***Jurors Impeaching Verdict.**—See *Stephoe v. Flood's adm'r*, 31 Gratt. 323 and *note*; 4 Min. Inst. (2nd Ed.) 844, 845.

†**Conspiracy—Evidence.**—As sustaining the rule laid down in the principal case to the effect that before the declarations of a co-conspirator can be admitted in evidence against the accused there must be *prima facie* evidence in the opinion of the court of the existence of the conspiracy. See *Cain's Case*, 20 W. Va. 694, citing the principal case and *Williamson v. Comm.* 4 Gratt. 547; *Sands' Case*, 21 Gratt. 895; *Brown's Case*, 86 Va. 935.

VII. Agency—Liability in Case of Robbery.

—If a person to whom a sum of money has been entrusted for safe-keeping is robbed of it, he is not liable to the person who entrusted him with it for the money.

This is the sequel of the case of the Danville Bank *v.* Waddill, reported in 27 Gratt. 448. Waddill having died whilst the cause was pending in this court, on its return to the circuit court of Danville it was revived against his administrator with the will annexed. The case was assumpsit, and the only plea non assumpsit, and the object of the suit was to recover the sum of \$4,865 in gold, which the bank had put into the hands of Waddill for safe-keeping in April, 1865. There was no dispute as to the fact that the gold had been delivered by the directors of the bank to Pleasant Waddill for safe-keeping, it being the time when the enemy were approaching Danville. The ground of defence was that he had been robbed of

471 it, and the *only controversy before the jury was, whether he had been robbed, or whether he had fraudulently appropriated the money to his own use. And the plaintiff endeavored to establish the fraudulent appropriation by evidence of the possession of considerable quantities of gold, from 1865 down to 1868, by his son, John M. Waddill, and of what he did with it, and said about it.

On the trial of the cause the court excluded this evidence from the jury, and there was a verdict and judgment for the defendant. And the plaintiff obtained a writ of error and supersedeas.

Four bills of exceptions were taken in the case, but they all seem to have been taken after the verdict was rendered, and it does not appear that any notice of intention to except to the ruling of the court was given at the time, or at any time before the verdict.

The first exception is to the refusal of the court to grant the plaintiff a new trial on the ground that the verdict was contrary to the law and the evidence; and on the motion of the plaintiff the court certified the evidence. Waddill had given his evidence on the former trial, and his testimony as then given was proved on this, and there was the testimony of other witnesses which corroborated his statements.

The second exception relates to an instruction given to the jury. The plaintiff asked for a new trial on the ground that after the argument had been concluded, in which argument the counsel for the plaintiff relied upon the fact that the defendant had offered no proof of the character of Waddill, before the retirement of the jury the court of its own motion instructed the jury that the character of Pleasant Waddill, the original defendant in the cause, was, as a party to the suit, not involved in the issue to be tried, and that the

472 defendant had no right to introduce *proof of the general character of said Pleasant Waddill as a party to the suit originally; that the jury should disregard all argument made before them by the counsel for the plaintiff based upon the failure of the

defendant to introduce before the jury testimony as to the general character of Pleasant Waddill as a party to the suit. But the court, at the request of the plaintiff's counsel, accompanied the instruction with the following explanation to the jury, to-wit: that as the said Pleasant Waddill had testified as a witness at a former trial, and as this testimony at said former trial was proved before the jury at the present trial by a witness who heard it given, the plaintiff had a right at the present trial to introduce evidence before the jury to impeach the said P. Waddill as a witness by proving his general character; the plaintiff, by counsel, insisting that this instruction given by the court of his own motion was erroneous and calculated to mislead the jury, moved the court because of said improper instructions to set aside the verdict and award a new trial; but the court overruled the motion.

After the foregoing motion had been overruled the plaintiff renewed the motion, and offered to read in support thereof the joint affidavit of two members of the jury which rendered said verdict. In their affidavit they say they were induced to believe that the law required the plaintiff to prove that Pleasant Waddill was not robbed; that the said Waddill having stated in his testimony that he was robbed, in consequence of what the court said to the jury about the argument of counsel as to the character of Waddill, we were bound to give full credit to Waddill's testimony; we therefore concurred in the verdict of the jury for the defendant, which we would

473 not have done if we had believed that we were authorized to discredit *Waddill's testimony. But the court refused to receive the said affidavit, or permit it to be read, because the jury had been instructed that evidence might have been offered to impeach the character of Waddill as a witness, and overruled the motion. This was the third exception.

The fourth exception is to the refusal of the court to admit the deposition of P. A. Hay, offered by the plaintiff. This witness makes various statements in reference to the possession of gold by John M. Waddill, the son of Pleasant Waddill, and of what John M. Waddill stated to the witness. After the refusal of the court in the first instance to admit the deposition, the plaintiff's withdrew their offer of said deposition and introduced evidence tending to show that Pleasant Waddill, who was a man of large estate, had given to his son, the said John M. Waddill, \$1,700 of said gold subsequent to the 11th of April, 1865, viz: in 1866, 1867, and after having introduced said evidence the plaintiff again offered to introduce said deposition; to the introduction of which deposition as a whole, and to each question and answer thereof, the defendant objected. Whereupon the court examined said deposition, and struck from the same every question and answer asking or detailing any statements or admissions of said John M. Waddill. To the striking out which questions and answers the plaintiff objected; but the court overruled the objection; and the plaintiff excepted.

J. Alfred Jones and E. Barksdale, for the appellant.

Ould & Carrington, for the appellee.

474 *BURKS, J. This is the second time this case has been before this court.

At the first trial of the issues on the pleas of non-assumpsit and the act of limitations, the only pleas as shown by the record ever filed in the cause, there was a verdict and judgment thereon for the defendant. That judgment, on writ of error, was reversed by this court on the single ground that the circuit court erred in refusing to give a proper instruction to the jury bearing on the act of limitations. No other question was made by the record or decided by this court. 27 Gratt. 448. While the cause was pending here the defendant died. After it was remanded for a new trial, it was revived against the personal representative of the defendant, and at the second trial there was again a verdict for the defendant and judgment accordingly, the issues being the same as on the first trial, and the case is here on a writ of error to that judgment, awarded at the instance of the plaintiff.

The assignments of error are based on four bills of exception taken by the plaintiff to rulings of the court at the last trial, and I propose to consider them in the order in which the bills are numbered.

After the jury had rendered their verdict, the plaintiff by counsel moved to set it aside, on the ground that it was contrary to the evidence. The motion was overruled, and to this action of the court the first bill of exceptions was taken.

The assignment of error, founded on this bill, may readily be disposed of. The facts proved on the trial are not certified. The evidence only, as given to the jury, is set out on the motion of the plaintiff's attorney. It does not appear that there was any request to certify the facts.

If the rule, as laid down in the leading case of *Bennett v. Hardaway*, 6 Munf. 125,

475 was strictly applied, this action of the court could not be reviewed at all. The principle upon which that decision rests is, that the revising court should have the same lights and act upon the same data as the inferior court, and that it will not undertake to determine what credit should be given to the oral testimony of witnesses, whose credibility it has not the same means of testing as were possessed by the court and jury who saw and heard the witnesses testify and observed their whole demeanor. This decision has never been overruled; but while the principle on which it was grounded has been adhered to, the rule established by it has, by a long line of cases subsequently decided, been modified in its application. The following are some of the more important cases: *Carrington v. Bennett*, 1 Leigh, 340; *Ewing v. Ewing*, 2 Leigh, 337; *Green v. Ashby*, 6 Leigh, 135; *Rohr v. Davis*, 9 Leigh, 30; *Pasly v. English*, 5 Gratt. 141; *Vaiden's case*, 12 Gratt. 717; *Carrington v. Goddin*, 13 Gratt. 587; *Bull's case*, 14 Gratt. 613; *Gimmi v. Cullen*, 20 Gratt. 439; *Read's case*, 22 Gratt.

924; and cases in more recent volumes of Grattan's Reports.

The rule, as modified, is stated in different forms by the judges. See what is said by Judge Joynes in *Gimmi v. Cullen*, supra. In *Read's case*, upon a review of the previous decisions, Judge Moncure, after stating that regularly the facts should be certified, proceeds to say that where the facts are not certified "the appellate court cannot revise the judgment unless the evidence be certified, and then only on certain conditions; that is, the court will not in that case reverse the judgment unless, after rejecting all the parol evidence for the exceptor, and giving full faith and credit to that of the adverse party, the decision of the court still appears to be wrong." The rule thus stated I understand to be now the established rule. It is stated in the same terms in some more recent cases. See *Scott & Boyd v. Shelor*, 28 Gratt. 891, 900.

476 *Applying this rule, the judgment of the circuit court refusing to set aside the verdict of the jury, because, as alleged, it was contrary to the evidence, if not plainly right, does not, at least, appear to be wrong. Rejecting all the parol evidence of the plaintiff and taking, as the rule requires, all the evidence of the defendant to be true, the defence set up, to-wit: that the defendant had been robbed of the money, for the recovery of which the action was brought, was made out. It is only necessary to refer to the testimony, without repeating it, of the defendant's testator, proved as given on the former trial, and to the testimony of others, who profess to have been eye-witnesses of the robbery. If these witnesses told the truth, (and on this branch of the case it must be assumed that they did,) the alleged robbery was established by the proof.

The second bill of exceptions is to the refusal of the court to set aside the verdict for an alleged misdirection of the jury by the court.

It does not appear by this bill that when the instruction was given to the jury the plaintiff's counsel objected to it. On the contrary, the inference is, that if he had any objections, he waived them; for, after the instruction had been given, the court, at the request of the plaintiff's counsel, followed it with an explanation asked for by that counsel, and so far as appears, the instruction, accompanied by the desired explanation, went to the jury, if not with the approbation of the counsel, at least without objection. Certainly there was no exception then taken or reserved. The plaintiff's counsel took all the chances with the jury, and after an adverse verdict, sought to have it set aside on account of an alleged misdirection, the explanatory part of which was given at his own instance, and the whole, as explained, not objected to. Can he be heard, under these circumstances, to complain of error in the instruction?

477 *In jury trials, I have always understood the rule to be, that if a party objects to a ruling of the presiding judge during the progress of the trial, either in ad-

mitting or excluding evidence, or giving or refusing instructions, or otherwise, and intends to except to such ruling, he must make known such intention at the time of the ruling, or at least before verdict, and if the bill of exceptions cannot be drawn up at once, liberty should be reserved to do so during the term, and if he neglect to prefer exceptions until after the verdict, he will not then be allowed to do so.

One of the reasons for the rule requiring this promptness in taking the exception and giving notice thereof, is that an exception taken and made known for the first time at a subsequent period in the trial might affect very injuriously the rights of the opposing party; for, if he have reasonable notice of the exception, he may, perhaps, have it in his power at the time or during the trial to obviate or counteract it, and it would be unjust to allow his adversary to insist on the exception, and have the benefit of it, after, by his own negligence, or it may be by his contrivance, he has made it impossible to meet it.

Such I understand to be the principles deducible from the cases of *Wash. & New Orleans Tel. Co. v. Hobson*, 15 Gratt. 122, 138; *Martz's ex'or v. Martz's heirs*, 25 Gratt. 361; *Peery's adm'r v. Peery*, 26 Gratt. 320, 324; *Winston v. Giles*, 27 Gratt. 530; and *Page v. Clopton*, 30 Gratt. 415. The rule was not strictly applied in the last-named case, because it was not a proceeding inter partes, and for other reasons stated in the opinion delivered in the case.

The rule is stated quite broadly by Judge Moncure in *Winston v. Giles*. "Formerly and regularly," says he, "a bill of exceptions purports to be tendered and signed when or immediately after the opinion excepted to is given; and certainly, if convenient, the facts

could then be set out more accurately
478 and with less difficulty than *at any other time. It is admitted in all cases, everywhere, that at least the exception must be taken at the time, so as to give notice of it to the adverse party; and some of the cases require that the substance of the exception should be stated in writing at the time."

I am aware that the president of this court, in the opinion in *Bull's case*, 14 Gratt. 613, 625, 626, speaking of the rule referred to, said: "That if no objection be made at the time the instruction is given, nor an exception be then taken, or the point saved, but objection be made for the first time after verdict, and in the form of a motion to set it aside, the court will consider whether, under all the circumstances, the party has been prejudiced by the instruction; and if of opinion that a just verdict has been rendered, according to the law and the evidence, will not set it aside on account of that objection." And the decision in *Stevenson v. Wallace*, 27 Gratt. 77, 93, 94, accords with what has just been cited from *Bull's case*. See also what is said in *Johnson v. Macon*, 1 Wash. 4, 5; *Guerrant v. Tinder*, Va. R. (Gilmer) 36, 41.

Whether the general rule which seems to be established by the decisions first before

referred to is to be regarded as modified by the cases last named, in its application to instructions to which objection is made for the first time by way of motion to set aside the verdict of the jury, it is not necessary, in my judgment, to determine in the present case; for if the instruction given was liable to exception at all, I think that the plaintiff was precluded by the circumstances already adverted to from making objection after verdict.

But if the bill be regarded as well taken and as properly presenting to this court for decision the question whether the instruction complained of was erroneous or not, I have no difficulty in reaching a satisfactory conclusion.

479 *The plaintiff's counsel, in his argument before the jury, relied on the fact that the defendant had offered no proof of the character of his testator, Pleasant Waddill, the former defendant, and after the argument of the counsel on both sides had been concluded, the court, of its own motion, instructed the jury before they retired that the character of the said Pleasant Waddill, as a party to the suit, was not involved in the issue to be tried; that the defendant had no right to introduce proof of the general character of said Pleasant Waddill as a party to the suit (originally); and that the jury should disregard all argument made before them by the plaintiff's counsel, based on the failure of the defendant to introduce testimony as to the general character of said Waddill as such party; and at the instance of the plaintiff's counsel, the court added the following: "That as the said P. Waddill had testified as a witness at a former trial, and as this testimony at said former trial was proved before the jury at the present trial by a witness who had heard it given, the plaintiff had a right at the present trial to introduce evidence before the jury to impeach the said Waddill as a witness by proving his general character."

The argument of the counsel, which the jury were directed to disregard, was evidently based on the assumption that the character of the defendant's testator for honesty and integrity was in issue, as an original party to the cause, and he deduced an inference unfavorable to the defence from the failure of the defendant to offer evidence in support of that character.

This was an erroneous assumption. In civil cases, the rule is, that evidence of general character is never admissible unless the nature of the action involves the general character of the party, or goes directly to affect it, such as an action by the husband or father for seduction, and generally actions of tort wherever the defendant is

480 *charged with fraud from mere circumstances. This kind of evidence is rejected wherever the general character is involved by the plea only, and not by the nature of the action. It is not received in an action of assumpsit, although the plea avers fraud by way of defence. To this effect are all the standard elementary treatises on evidence. 1 Greenleaf on Ev. §§ 54, 55; 1

Wharton on Ev. § 47; 1 Best on Ev. §§ 257, 258; 2 Starkie on Ev. (Metcalf's ed.), 367 (side p.), et seq.; 1 Phillip's Ev. 757, and notes. The authorities, English and American, seem to be uniformly the same way. I content myself with a notice of a few only of the adjudged cases.

Humphrey v. Humphrey, 7 Conn. R. 116, was a case of petition by the husband for divorce from his wife for alleged adultery. After testimony had been given on behalf of the petitioner tending to raise the presumption of adultery on the part of the wife, she offered, by way of rebuttal, evidence of her fair character. Dogget, J., in delivering the opinion of the court, which is often cited, said that in no instance within his knowledge had such evidence been received in any civil proceeding unless character was thereby put in issue. "Causes charging cruelty, gross fraud, and even forgery," he said, "are often agitated in suits by individuals; and the result not unfrequently deeply affects the property and reputation of the party; yet no individual has been permitted to attempt to repel the proof by showing a good reputation. * * * The present is a civil suit. Character is not put in issue by the proceedings; and if it can be given in evidence, it may be given in evidence in all inquiries into facts affecting the reputation in other civil cases. This principle would lead to great uncertainty, and be productive of no benefit in the administration of justice."

In *Anderson's ex'rs v. Long & others*, 10 Serg. & R. 55, the action was debt on bond. Fraud of plaintiff's testator, 481 *James Anderson, was one of the defences. Evidence of the character of Anderson for honesty and integrity was offered. Chief Justice Tilghman, in the opinion of the court delivered by him, said: "The plaintiff's counsel say that the character of James Anderson was put in issue here because the defendants accused him of fraud; but this is not putting his character in issue. By the same mode of reasoning the defendant's character is put in issue in every action of assumpsit, because the declaration charges him with an intent to deceive and defraud the plaintiff. Indeed, in most of the controversies in courts of justice it may be said, with some degree of truth, that character is in question, because an honest man would not act with injustice. But putting character in issue is a technical expression and confined to certain actions, from the nature of which the character of the parties, of some of them, is of particular importance. Such is the action brought by one man against another for seducing his wife and having criminal conversation with her. * * * So in an action of slander the plaintiff in his declaration asserts his own good character, and avers the intent of the defendant to rob him of it. He puts his character in issue, therefore, and the defendant is at liberty to impeach it. But it has never been supposed that the character is put in issue merely by the charge of fraud made by one party against the other."

In *Nash & others v. Gilkeson & others*, 5

Serg. & R. 352, the action, as in the present case, was assumpsit; and the plaintiffs having given evidence which, the defendants supposed, tended to impeach the honesty of Gilkeson, their testator, they offered evidence in support of his character, which was admitted. Gibson, J., speaking for the court, said: "There cannot be the least doubt but the evidence was improperly received. Gilkeson's general character was not put in

482 issue by the nature of the action; *and it never was pretended that where a party is incidentally charged by the evidence with the commission of a particular fraud, that the charge can be rebutted by evidence of general good character. To this rule I know of no exception."

If the argument of the counsel was, to any extent, based on the supposition that it was competent for the defendant to adduce evidence in support of the character of his testator for truth, the testimony of the testator on the former trial being before the jury, the argument was equally objectionable. The testator's character for truth had not been impeached by direct evidence, or in any of the modes specified in *George & others v. Pilcher & others*, 28 Gratt. 300, or in any way known to the law; and until it was so impeached, no evidence in support of it was admissible.

It has been held that if a person on trial for a criminal offence offer no evidence of his good character, although he may do so if he will, no legal inference can arise from such omission that he is guilty of the offence charged, or that his character is bad; nor will such omission authorize an argument to the jury against his general good character. *State v. Upham*, 38 Maine R. 261.

It seems very clear to me, therefore, that no error was committed in giving the instruction complained of. While great latitude should be accorded to counsel in arguments to the jury, and their just privileges be in no way abridged, the presiding judge would be wanting in duty if he should remain passive and allow the jury to be misled by an argument addressed to them entirely foreign to the issue—wholly unwarranted by the law and the facts of the case.

After the motion for a new trial for the cause stated in the second bill of exceptions had been overruled, the motion was renewed, founded on the affidavit of two of the jurors to the effect, substantially, that they 483 had mistaken *the law of the case in one respect and had been misled by the instruction before referred to. The motion was again overruled and the third bill of exceptions taken.

The general rule is, and the exceptions to it are rare, that the testimony of jurors ought not to be received to impeach their own verdict. *Bull's case*, 14 Gratt. 613; *Read's case*, 22 Gratt. 924; *Steptoe v. Flood's adm'r*, supra p. 323 (decided during the present term).

In *Bull's case* the authorities are reviewed, and in *Steptoe v. Flood's adm'r* the reasons given by Judge Moncure why the affidavits of jurors to impeach their own verdict should be rejected are: 1st, Because they would tend

to defeat their own solemn acts; 2d, Because their admission would open the door to tamper with jurymen after they have given their verdict; 3d, Because they would be the means, in the hands of a dissatisfied juror, to destroy a verdict at any time after he had assented to it. These are sound reasons; and while there are exceptions to this general rule, I am of opinion that the present case does not fall within any of the excepted classes. Indeed, the decision in *Harshbarger's adm'r v. Kinney*, 6 Gratt. 287, 300, would seem to be an authority for the rejection of the affidavit in this case.

The fourth bill of exceptions is the basis of the last assignment of error to be noticed. In the course of the trial the plaintiff offered in evidence the deposition of P. A. Hay. On objection raised by defendant's counsel the court excluded from the jury certain portions of the deposition, and this action of the court is assigned as error.

The excluded portions of the deposition were declarations, as represented by the witness, made to him by John M. Waddill, a son of the defendant's testator, Pleasant Waddill. Under the general rule excluding

484 hearsay evidence it is admitted that these declarations *would not be competent evidence in the suit against Pleasant Waddill's representative; but it is claimed by the plaintiff in error that the alleged loss, by robbery, of the gold entrusted to the defendant's testator for safe-keeping was a mere pretence; that there never was in fact any such robbery; that the gold was fraudulently converted by Pleasant Waddill to his own use with the active assistance of his son; that there was a conspiracy or concerted scheme between the two to that end; and that, therefore, the excluded declarations, which related to the gold, were admissible in evidence as the declarations of a conspirator.

The rule regulating the admission of the acts and declarations of one conspirator as evidence against another is stated by a modern English author with his usual accuracy and conciseness as follows: When two or more persons conspire together to commit any offence or actionable wrong, everything said, done or written by any one of them in the execution or furtherance of their common purpose, is deemed to be so said, done or written by every one, and is a relevant fact as against each of them; but relations of measures taken in the execution or furtherance of any such common purpose are not relevant as such against any conspirators, except those who make them, or are present when they are made. Evidence of acts relevant under this article may not be given until the judge is satisfied that, apart from them, there are prima facie grounds for believing in the existence of the conspiracy. *Steven's Digest of the Law of Evidence* (2d ed.), art. 4, p. 6.

This clear statement of the rule is sustained by the best elementary works on evidence and by the adjudged cases, to some of which I here refer, without comment. 1 Phil. on Ev. (Cowen & Hill's notes), 5 Amer. ed. 168;

2 Russell on Crimes (8th Amer. ed.), 696, et seq.; 2 Best on Ev. § 508; 2 Arch. Prac. 485 and Plead. 119 (side p.); 1 *Greenleaf's Ev. § 111; 1 Wharton's Ev. §§ 1205, 1206; *King v. Hardy*, 24 How. St. Trials, 451-3; Chief Justice Marshall in *Burr's case*, 2 Burr's Trials, 539; *Queen v. Blake*, 6 Ad. & El. N. S. (51 E. C. L.) 126; *Sands' case*, 21 Gratt. 871; *Clawson v. State*, 14 Ohio St. R. 234; *Clinton v. Estes*, 20 Ark. R. 216, 224, 225; *Ormsby v. People*, 53 New York R. 472.

Further, it is well settled, both on principles and authority, that after the conspiracy has been consummated, the common purpose carried fully into effect, no subsequent declarations of any of the conspirators not made in the presence of others, are admissible as evidence against the latter.

Under the rules and principles which have been stated, the first enquiry is, does the evidence admitted establish the alleged conspiracy? Does it furnish prima facie grounds for believing in the existence of the conspiracy, so as to make it proper to admit as evidence the declarations which were excluded?

A belief in the existence of the conspiracy involves, of necessity, the assumption that the alleged robbery was never committed, that Pleasant Waddill swore falsely, and that the witnesses who sustained him in his statement either perjured themselves or were deceived by the management and artifice on his part.

This is a strong assumption, upon the evidence in the case, and one which the jury and the court below must have considered not justified, or the verdict and judgment would have been different. As a concession, however, for the purposes of the argument, let it be that Pleasant Waddill, instead of being robbed of the gold, fraudulently retained it for his own use; how is the alleged conspiracy made to appear?

The following circumstances are relied upon to show it:

At the time the robbery is said to have occurred (May, 1865) John M. Waddill 486 resided in the town of Danville, *his father resided on his farm, a little way off, it seems. In the fall of 1865 John M. Waddill removed with his family to Madison, North Carolina, where he opened a store and commenced merchandising. According to a statement of his wife, while on a visit with her to his father in the fall of 1866, his father gave him \$200 in gold coin, and on another visit, in the fall of the next year (1867), he received \$1,500 in like coin. These are the only sums of money directly proved to have been received by him traceable to his father. The witness Hay says that he always noticed that when John M. Waddill went to Danville he seemed to have more gold on his return than when he left. He speaks of having seen him on one occasion with a bag of gold, which he dropped in the streets of Madison while drunk, and although he did not count it, he supposed it amounted to some four hundred, or five hundred, or six hundred dollars. He could not tell the

shown by the commissioner's reports, a considerable amount of judgment liens on that part of the tract which lies in the county of Fauquier, besides a large debt due John Carr, which was secured by deed of trust, the amount of which was uncertain

454 *and disputed until settled by this decree. The commissioner in his last report, which seems to be the basis of the decree, states that a part of the tract lies in Warren county, and that there are a number of judgments unsatisfied, obtained in the courts of said county, some of which are upon the lien docket, and some not, and that the deed of trust from Hall to Hall has never been recorded in that county, nor the deed from Hall to Hoffman; and that a suit in chancery is depending in the circuit court of Warren to subject that portion of the land which lies in that county to the satisfaction of said judgments. The number and amount of said judgments are not ascertained and determined by this suit, though they are evidently a lien upon a part of the land which Hoffman sold to Kenny. But we are of opinion, if all the impediments had been removed at the hearing of this cause to the conveyance of a good title by Hoffman to Kenny that, under the circumstances of this case as hereinbefore detailed, both upon principle and authority, it would be inequitable to enforce the specific execution of the contract against the appellant. We are of opinion, therefore, to reverse the decree of the circuit court with costs.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the appellee, C. W. Hoffman, is not entitled to a specific performance of the contract in question, upon the case made by the record; and that the court below erred in decreeing against the appellant the specific performance of said contract instead of its rescission. It is therefore ordered and decreed that the said decree of the circuit court of Fauquier county be reversed and annulled, and that the appellee, Charles W. Hoffman, do pay to the appellant his costs expended

455 *in the prosecution of his appeal here. And this court proceeding to render such decree as ought to have been rendered by the court below, it is adjudged, ordered and decreed that the appellee, Charles W. Hoffman, do pay to the appellant, P. G. Kenny, the sum of \$600, the money he had advanced him on the purchase of the land in controversy, with interest thereon from the 10th day of August, 1868, at the rate of six per centum per annum until payment, and his costs expended in the defence of this suit in the said circuit court; and if the said sum of \$600, with interest as aforesaid, be not paid within ninety days from this date, that the said Kenny have liberty to apply to the said court, by petition in this cause, for such order as may be necessary and proper to subject the said land or the rents and profits to the payment thereof.

Decree reversed.

456 *Boynton & als. v. McNeal & als.

January Term, 1879, Richmond.

Homestead Exemption—Right to Claim against Creditors.*—B conveys a house and lot to H in trust for the separate use of B's wife. M, a creditor of B, files a bill to set the deed aside as fraudulent and void as to creditors of B, and so the court decrees. B then executes a deed of homestead of the house and lot, and files his petition in the cause to be allowed his homestead. B is entitled to his homestead in the house and lot as against M, the creditor.

This was a suit in equity in the corporation court of the city of Alexandria, brought in April, 1871, by McNeal & Beacham, partners, and James H. Stevenson, to set aside a deed made by E. S. Boynton, dated the 25th of January, 1871, by which said Boynton conveyed to George Hewes a house and lot in the city of Alexandria in trust for the separate use of Caroline E. Boynton, the wife of said Boynton. The bill charged that the firm of E. S. Boynton & Co. was indebted to the plaintiffs McNeal & Beacham \$210.74, and to Stevenson & Co. \$222.04, for goods sold to Boynton & Co. in December, 1870, and that the deed was made to hinder, delay and defraud the plaintiffs, and without any consideration deemed valuable in law.

On the 14th of December, 1871, the court held that the deed was null and void so far as it concerned the several amounts therein decreed to the plaintiffs, and decreed that E. S. Boynton should pay to the plaintiffs McNeal & Beacham \$210.74, with interest, and to Stevenson \$222.04. And unless this was done in thirty days a commissioner named should sell the house and lot on terms stated in the decree. This decree, so far as it directed a sale of the property, was afterwards set aside.

457 *In February, 1872, E. S. Boynton executed his deed of homestead, and filed his petition for appraisers under the homestead law. He also filed his answer to the bill, in which he averred that when the deed was made he was solvent, and denied that it was intended to hinder, delay and defraud the plaintiffs. But if the deed should be held to be void, then he claims his homestead in the house and lot aforesaid, and asked the court to protect him in his rights.

On the 21st of January, 1874, the cause came on to be heard, when the court decreed that E. S. Boynton was not entitled to claim a homestead in the house and lot, and his application therefor be overruled. That as to the debts due to the plaintiffs the deed to Hewes

***Homestead Exemption—Right to Claim against Creditors.**—Where there is a fraudulent conveyance of property, which is subsequently annulled at the suit of the creditor, the grantor is not estopped as against the creditor to assert his right of homestead in the premises. *Wray v. Davenport*, 79 Va. 19; *Marshall v. Sears' ex'or*, 79 Va. 49; *Hatcher v. Crews' adm'r*, 83 Va. 371; *Wilkinson v. Merrill*, 87 Va. 513; 1 Min. Inst. (4th Ed.) 910, 911. See also *Mahoney v. James*, 94 Va. 180; *Shipe v. Repass*, 28 Gratt. 716.

was fraudulent and void; and a commissioner was directed to report whether the rents and profits would pay these debts within five years.

The commissioner reported that the rents would not pay the debts in five years. And the cause came on again to be heard on the 14th of March, 1874, when the court made a decree appointing commissioners to make a sale of the house and lot on terms stated in the decree. And thereupon E. S. Boynton, Mrs. Boynton and the trustee Hewes applied to this court for an appeal; which was allowed.

F. L. Smith, Jr., for the appellants.

D. L. Smoot, for the appellees.

STAPLES, J. One of the appellants, E. S. Boynton, on the 25th January, 1871, executed a deed conveying a house and lot in the city of Alexandria to a trustee for the sole benefit of his wife, Caroline E. Boynton. At that

time the appellant, as a member of the
458 firm of E. *S. Boynton & Co., was indebted to certain creditors to the amount of five hundred dollars. In August, 1871, these creditors, the appellees here, filed a bill in the corporation court of Alexandria to set aside this deed, upon the ground it was intended to hinder and delay creditors, and was not upon consideration deemed valuable in law. The case coming on to be heard at the December term, 1871, that court entered a decree declaring the deed null and void, and setting it aside so far as it affected the claims of the appellees. Thereupon the appellant, E. S. Boynton, filed his application asserting a claim of homestead in the property; but the application was rejected by the court, and the claim to the homestead denied. From that decree an appeal was allowed by one of the judges of this court.

The question is substantially the same as that which arose in *Shipe, Cloude & Co. v. Repass et als.*, decided at Wytheville, and reported in 28 Gratt. 716, 729. It was there held by a majority in a court of three judges that when a conveyance is set aside for fraud at the suit of the grantor's creditors he is not estopped as against them to assert his claim of homestead in the property embraced in the deed. At the time that decision was made, the court had access to but few of the authorities bearing upon the question. A reference to the opinion will show the grounds upon which it was based, and it is not proposed to repeat them here.

Since the present case has been under consideration, I have taken occasion to re-examine the whole subject, and to look more fully into the authorities, and I find no reason to doubt the correctness of the former decision. In *Thompson on Homestead and Exemptions*, the most recent work on the subject, the cases are collected, and the question carefully considered on reason and authority. I propose

to quote somewhat extensively what he
459 has *said as my own argument in the present case. After stating the rule in question, he proceeds as follows:

"The reasons for this rule may be deduced

from the cases: first, that the homestead privilege is created for the benefit of the wife and children, as well as that of the husband and father; therefore it is not right that the former should be prejudiced by the wrongful act of the latter; second, that the conveyance being void as to creditors, it stands as to them as though it had never been made. If it had not been made, the debtor (or his wife) could have asserted the right of homestead in the premises against them, and they, the creditors, cannot assume the inconsistent positions of asserting the nullity of the conveyance, and claiming a right under it. In other words, a fraudulent conveyance does not enlarge the rights of creditors, but leaves them to enforce the rights they would have had if no such conveyance had been made. Expressed in still another way—the interest which the creditor has in the property by virtue of his lien is a derivative interest, proceeding from the debtor and dependent upon his title. Hence the creditor cannot acquire a right under the debtor's title, and at the same time impeach that title. He cannot sell under his execution the debtor's title, and at the same time deny the debtor's right of homestead on the ground that the latter has no title. By attempting the sale the creditor affirms that the debtor has a salable interest, and the law means that interest should not be taken away and the debtor disturbed in his possession by judicial process. When the law declares that a debtor's disposal of his property with intent to defraud his creditors shall be voidable at the instance of his creditor, and at the same time declares that specific property of the debtor shall be exempt against his creditor's adverse claims, the provisions are in *pari materia*, and must be construed together, and the latter pro-

460 vision must be held to except *this exempt property from the operation of the former provision. Certainly it would be very inconsistent to say that a debtor's disposal of his property, and which property, in so far as the creditor and his claims are concerned, may be said to have no existence at all, is a fraud upon the creditor. No creditor can be, in legal contemplation, defrauded by a mere conveyance made by his debtor of any of his property which such creditor has no right by law to appropriate, or even to touch by any civil process. A conveyance of the homestead by the husband to the wife cannot be held fraudulent as to creditors, for the reason that being exempt it was no more beyond their reach than before."

To my mind this reasoning is not only just and sound, but is absolutely unanswerable. There is much more on the same subject in the same work, but the limits of this opinion will not justify further citation. It will be seen, however, that one of the reasons given by the author for the rule stated is, that the creditor cannot be said to be hindered, or delayed, or prejudiced by a fraudulent conveyance embracing property subject to the homestead, because the debtor is entitled to hold it exempt from the payment of his debts. A striking illustration of this principle is furnished by the cases respecting property

1869; and the said Lucy A. about fifteen years of age at the time of her death, and both having died in the lifetime of their mother, the said Julia A. Their father, the said Albert, is still living. Their mother had no other children than as aforesaid, except the first two, who were twins, and died in less than twelve months after their birth. The children of Julia A. Quesenberry had no other property known to the affiant than their interest in the said tract of land.

A. S. Fant."

"April 7th, 1875."

The plaintiffs then introduced as evidence the survey and plat of the land in controversy, made under an order of the court in the cause.

They next introduced as evidence the deed from John P. Fant to Albert Quesenberry, dated 15th November, 1847, which is set out in the record. It is "between John P. Fant of the first part, Albert Quesenberry of the second part, and Julia A. Quesenberry of the third part." It "witnesseth that the 494 said John P. Fant, as well for *and in consideration of the natural love and affection he has and bears for his daughter Julia A. Quesenberry as of one dollar to him in hand paid by the said Albert Quesenberry," &c., "hath given, granted, sold and confirmed, and by these presents doth give, grant, sell and confirm into the said Albert Quesenberry, his heirs and assigns forever, a certain tract or parcel of land," &c. (describing it, and being the same land in controversy, "to have and to hold," &c. Then follows a covenant of general warranty by the said grantor with the said grantee; and then follows a declaration of trust in these words: "In trust, nevertheless, for the sole, separate and exclusive use, benefit and support of the said Julia A. Quesenberry during her life, and after her death to the children of the said Julia A. Quesenberry, and no other person or persons whatsoever."

This deed was signed and sealed by the said grantor and trustee, was attested by three witnesses, and was afterwards, to-wit: on the 17th of January, 1848, acknowledged, proved and duly admitted to record.

The plaintiffs next introduced as evidence a copy of a record of a chancery suit instituted in the circuit court of Culpeper, in April, 1872, wherein John S. Quesenberry and J. M. Quesenberry were plaintiffs, and Albert Quesenberry was defendant, which copy is set out in the record in this cause. The object of the suit was to obtain the legal title to the land in controversy, the plaintiffs claiming to be already the owners of the equitable title thereof. No allusion whatever is therein made to a sale which had been made of the land by the said trustee under a decree of the county court of Culpeper, as herein-after mentioned. The bill in said suit was taken for confessed as to the defendant therein, the said Albert Quesenberry; and in the same year, to-wit: on the 6th of June, 1872, a decree was made in said suit for the conveyance of the legal title to said 495 land to the said plaintiffs *by a commissioner of the court appointed for the pur-

pose; which conveyance was accordingly thereafter made.

"The defendant, to maintain the issue joined on his part, proved by himself that he purchased the said tract of land from Col. W. S. Coons, in the year 1856, for the sum of \$3,000, and obtained possession of said land about that time, and had had possession until the time of giving his said testimony; that he paid the whole of the purchase-money between 1856 and 1859, but did not get a deed for the land until 1868, when it was conveyed to him by deed from said Coons and wife, in the following words and figures, to-wit." (Here follows a copy of the deed in the record, but it need not be inserted here, nor further notice, than to say that it recites that "the war and other causes intervened to prevent a deed being executed;" that it was duly executed, certified and recorded.)

The defendant then called another witness, the said W. S. Coons, who proved that he purchased the said tract of land of Albert Quesenberry, commissioner, for the price of about \$2,600; that he paid all the purchase-money to said commissioner, and obtained possession of said land, and thereafter a deed therefor from the said commissioner.

The defendant then offered and read as evidence in the case a copy of the said deed, which was duly acknowledged by the said commissioner, and admitted to record September 19th, 1853. It is copied in the record in this case, but need not be further noticed than to say, that it is a full and formal deed, dated the 19th day of September, 1852, between the said parties, reciting the said decree, the appointment of said commissioner, the sale made by him under the same in June, 1852, the purchase of said land by said Coons at said sale at the price of \$8 per acre, and the full payment by him of the purchase-money; in consideration whereof the said 496 commissioner *thereby conveyed the said tract of land to said Coons, his heirs and assigns forever, with special warranty, "according to the act of assembly."

"And then offered in evidence the record of a suit instituted in the county court of Culpeper in June, 1850, by Julia A. Quesenberry, wife of Albert Quesenberry, and her infant children, John S., Jos. N., Frances Ann, and Lucy Alberta Quesenberry, who sued by Geo. S. M. Payne, their next friend, against Albert Quesenberry, defendant, in the words and figures, to-wit." Here follows a copy of the said record, which is inserted in the record of this case, but need not be further noticed here than as follows:

The bill and answer were filed and the decree for the sale rendered on the same day, to-wit: June 18th, 1850. The plaintiffs, after setting out in this bill the aforesaid trusts in regard to the said tract of land, aver that the "property is in such a condition at present that they cannot enjoy it as beneficially as they could if the investment were changed. There are no sufficient buildings for the comfortable residence of your orators and oratresses, and they have no means to put such buildings upon it. If annually let to ten-

ants, while they reside elsewhere, the land must necessarily depreciate in value. A sale of the property and the investment of the proceeds in some safe security, bearing interest, would be much more beneficial to your orators and oratresses than its annual rents would be. They therefore ask a decree authorizing such sale and investment;" and to that end pray that said Albert Quesenberry be made a party to said bill, and be required to answer the same, and be directed to sell the said land, &c.

By a certificate annexed to the bill, it appears that on the same day the next friend therein named, George S. M. Payne, made oath before a justice of the peace **497** that *the statements therein contained were true to the best of his knowledge and belief.

Exhibit A, filed with the said bill, is a copy of the deed of the 15th of November, 1847, before referred to. "between John P. Fant of the first part, Albert Quesenberry of the second part, and Julia A. Quesenberry of the third part."

In the answer of the said defendant he admits the truth of the allegations in the bill, and submits the subject to the discretion of the court; and by an affidavit annexed to said answer it appears that respondent made oath that the statements therein contained were true to the best of his knowledge and belief.

In the only deposition taken in the case, to-wit: that of Richard T. Nalle, which was "taken in the presence of James Barbour, counsel for Julia A. Quesenberry and her infant children, George S. M. Payne, next friend to the said parties, and Albert Quesenberry, to be read as evidence in" the said case; the said deponent being first duly sworn, deposed and said as follows, to-wit: "That he well knows the land conveyed by the late John P. Fant to Albert Quesenberry in trust for his wife and children, and he knows that the buildings are insufficient for the comfortable residence of the family."

In the decree made in the case on the same day, to-wit: the 18th of June, 1850, it was decreed "that Albert Quesenberry, after first advertising the time and place of sale for at least six weeks, do proceed to sell the tract of land in the bill mentioned at public sale to the highest bidder, upon such terms of credit as he may deem most expedient for the cestui que trust in the bill mentioned, and that he report his proceedings under this decree to this court whenever he shall effect a sale."

On the 21st of March, 1853, the said commissioner reported to the said court **498** that in pursuance of the said *decree of the 18th of June, 1850, "he did, after having advertised the same for six weeks, expose to sale at public auction, on the premises, the land aforesaid, on the 28th day of June, 1852, when and where Winfield S. Coons became the purchaser at \$8 per acre, upon the following terms, to-wit: one-third for cash, the balance in five equal annual payments, with interest from the day of sale, as follows, viz:" Then follows a statement

showing the gross amount of the sale, the expenses deducted therefrom, and the net proceeds. And the report thus concludes: "Leaving in the hands of your commissioner the above amount of \$2,491.11, for which amount the said Coons has executed his bonds as follows: The first bond for the sum of \$816.89 $\frac{2}{3}$, payable on demand, it being for the cash payment, and five other bonds for \$334.84 1-5 each, bearing date with the first, to-wit: the 28th day of June, 1852, payable annually for five years from the date aforesaid, with the interest from their dates respectively."

On the same day, to-wit: the 21st of March, 1853, the cause coming on again to be heard on the papers formerly read and the said report of the commissioner, was argued by counsel, on consideration whereof it was decreed that the said report be confirmed, and that the said commissioner do execute a deed with special warranty to said Coons for the land in the bill mentioned on payment of the last instalment of the purchase-money.

To the introduction of which record the plaintiffs objected, and moved the court to exclude the same; but the court, stating that it would only give to said record the weight to which it was entitled, overruled the said motion; to which opinion of the court the plaintiffs excepted; and this being all the evidence in the case the court rendered a judgment for the defendant; to which opinion and judgment the plaintiffs excepted.

499 *The plaintiffs applied to a judge of this court for a writ of error to the said judgment; which was accordingly awarded.

The only assignment of error made in the petition for a writ of error in this case is in these words:

"Your petitioners are advised that the said judgment was erroneous because they have never been divested of their interest in said tract of land. The proceedings in the county court of Culpeper in the name of Julia A. Quesenberry, &c., by George S. M. Payne, their next friend, against Albert Quesenberry, in which said land was decreed to be sold, was not binding upon your petitioners because they were not properly before the court. This proceeding was evidently intended to be under the act passed January 20th, 1832, entitled 'an act authorizing the sale of trust estates in certain cases.' See supplement to the Revised Code, p. 208, ch. 150. But your petitioners are advised that said proceedings were not in conformity with the requirements of said act, so as to bind these petitioners by the decree of said court."

The court is of opinion that the said proceedings were in substantial, if not literal, conformity with the requirements of the said act, and were binding on the parties thereto, and the sale made under the decree rendered therein was a valid sale, and conferred a good title on the purchaser.

The subject was undoubtedly within the jurisdiction of the court which rendered the decree. It was the sale of a trust estate;

and one, too, in which infants were interested; in each of which cases the statute law existing at the time of the rendition of the decree authorized the court to make the same. The judgment or decree of a court of competent jurisdiction over the subject matter thereof is conclusive against the parties

thereto until it is set aside or reversed 500 by some proceeding in *the case in the same or an appellate court. It cannot be set aside or annulled in any collateral proceeding.

The authorities on this subject are very numerous, and many of them are cited in the pointed argument of the learned counsel for the defendant in error in this case. The following are cited from the decisions of this court: *Fisher v. Bassett*, 9 Leigh, 119; *Ballard & als. v. Thomas & Ammon*, 19 Gratt. 14; *Devaughan v. Devaughan*, Id. 556; and *Durrett v. Davis*, 24 Id. 302. And the following are cited from the decisions of the supreme court of the United States, some of which, he truly says, "are extremely opposite": *Kempe's lessee v. Kennedy*, 5 Cranch. 173; *Thompson v. Tolmie & als.*, 2 Pet. R. 157; *Ex parte Watkins*, 3 Id. 193; *Vorhees v. Bank of U. S.*, 10 Id. 449; *Grigon's lessee v. Astor*, 2 How. U. S. R. 319; *Florentine v. Barton*, 2 Wall. U. S. R. 210; *Harvey v. Tyler*, Id. 328; and *McGoon v. Scales*, 9 Id. 23.

In *Faulkner v. Davis & als.*, 18 Gratt. 651, decided by this court in 1868, the subject of such sales was very fully considered in an opinion in which all the judges concurred.

Two other cases were cited by the same counsel from the decisions of this court to show that even if the decree for the sale of the land in controversy were reversed or set aside, the title of the purchaser would not be affected thereby; according to the statute which declares that "if a sale of property be made under a decree or order of a court after six months from the date thereof, and such sale be confirmed, though such decree or order be afterwards reversed or set aside, the title of the purchaser at such sale shall not be affected thereby." The cases here referred to are *Cooper v. Hepburn, &c.*, 15 Gratt. 551; and *Dixon, &c., v. McCue's adm'r, &c.*, 21 Id. 373. The sale in this case was made more than six months after the

date of the decree of sale, and more 501 than six *months after the Code of 1849 went into effect, in which Code the above statutory provision was made.

But there was really no ground for reversing or setting aside the said decree, even by a regular proceeding for that purpose in the same or an appellate court. The learned counsel for the plaintiff in error seem to suppose that it was error to make the infant parties plaintiffs instead of defendants, and that therefore the decree was not binding upon them, they in effect, as said counsel contend, not being parties to the suit. There is nothing in the statute which requires them to be made defendants instead of plaintiffs. If they had been defendants they would not have been required to answer in person, none of them being as much as fourteen years of age. They would have answered, like any

other infant defendants, by a guardian ad litem. They appeared in this case and filed their bill by their next friend, who was, no doubt, a very fit person for the purpose, and made oath to the facts stated in the bill, which were also fully proved by a witness who was examined in the mode prescribed by law in such cases, and whose veracity is unimpeached, and no doubt unimpeachable. And their mother was a co-plaintiff with them, and their father, who was the only defendant in the case, also made oath to the truth of the facts stated in the bill. That father was selected by the donor of the estate as the only trustee to hold it for the benefit of his wife during her life and of her children after her death; and there is no reason for believing that he was unworthy of the trust reposed in him.

The court is therefore of opinion that there is no error in the judgment, and that it ought to be affirmed.

Judgment affirmed.

502 *Brown v. Brown's Adm'r & als.

January Term, 1879, Richmond.

In 1807 B and A entered into a marriage contract wherein it is recited that with a view to secure to A her separate property and to provide for the issue of the marriage, &c., B covenants with trustees named, that after his just debts are paid, there shall be raised out of his estate the sum of ten thousand pounds current money, to be paid in preference to any voluntary disposition of his property, whether by will or otherwise, and placed in the hands of said trustees for the purpose aforesaid, and the further purpose of making a provision for the said A, the said money to be raised as soon as may be after the death of said B, and to be held by them in trust for the issue of said marriage, if there be any, to be held by them, if there be more than one, as tenants in common, with benefit of survivorship; the said A to share the profits of said fund during her life, she taking a child's part. B died in 1841 and A in 1843, leaving seven children of the marriage. B by his will made in 1841, referred to and confirmed the marriage contract, and left the whole of his estate to be equally divided among his seven children: Five of the children died before the estate of B was ready for distribution—Held:

1. **Wills—Construction of Terms.**—Looking to the deed and the will that the intention of B was an equal distribution among his children; and this intention is not defeated by the use of the words "with benefit of survivorship."
2. **Same—Same—Vested Interest.**—On the death of A the interest vested in the children, and the fund is to be divided among them and the children of those of them who have since died.

This is the sequel of the case of *Burton v. Brown's ex'ors & als.*, 22 Gratt. 1. When the case went back the accounts were referred to a commissioner, and all the debts of James Brown the elder having been paid, the

Approved in *Stone v. Lewis*, 84 Va. 474. See 2 Min. Inst. (4th Ed.) 1066, 1067.

accounts reported were the administration accounts *of Alexander S. and Patrick W. Brown, executors of Jas. Brown the elder, and of the distribution of the estate among the parties claiming the same. The only question brought up to this court by this appeal is upon the construction of the deed of marriage settlement executed in 1807 by said James Brown and Anna Pitfield Burton previous to their marriage. As this deed had never been recorded, it was of no avail as against the creditors of Brown, but his debts having been paid, the question of its true construction and the rights of the children of the marriage under it became important. Of these children there were seven, all of whom were alive at the death of James Brown in 1841, and of Anna Pitfield Brown, his widow, in 1843, but five of whom had died before the decrees in this case were made. The court below held that the seven children took vested interests either at the death of James Brown or of his widow. And from this decree A. Spiers Brown, one of the surviving children, applied to a judge of this court for an appeal; which was allowed. The case is fully stated in the opinion of JUDGE CHRISTIAN.

Royall, for the appellant.

H. H. Marshall and Johnson, Williams & Boulware, for the appellees.

CHRISTIAN, J. This case is before this court for the third time. Nearly forty years have elapsed since the litigation commenced, and the children surviving, who were unborn at the date of the marriage contract (executed in the year 1807), which we are now called upon to construe, are now aged men. It is to be hoped that this appeal will put and end to this *protracted litigation, and settle the rights of all the parties finally and forever.

When the case was here in 1872 it involved a number of difficult questions concerning the settlement of the partnership transactions of Brown, Rives & Co., in which Robert Burton the elder was a partner, also the accounts of James Brown as executor of Robert Burton the elder, together with the judicial construction of the will of Robert Burton, Jr., and other papers, deeds, and contracts, forming a fruitful source of uncertainty and strife in the courts. The record in that case was composed of two large printed volumes of many hundred pages each. But as numerous as were the questions then brought up and decided by this court, the question now to be determined was not presented in that record, and was raised for the first time when the case was sent back to the chancery court for further proper accounts, ordered by the decree of this court to be taken before its commissioner.

The only question we have now to determine is, what is the true construction to be given to certain provisions of the deed of marriage settlement entered into on the 9th day of October, 1807, between James Brown and Anna P. Burton, his intended wife. These provisions are as follows:

"And further, in order more effectually to provide for the children of the said marriage, the said James hereby covenants and agrees with the said John P. Braddick, Charles Johnson, Charles J. Macmurdo, that after his just debts there shall be raised out of his estate the sum of ten thousand pounds current money, to be paid in preference to any voluntary disposition of his property, whether by will or otherwise, and placed in the hands of the said trustees, for the purpose aforesaid, and the further purpose of making *a provision for the said Anna P., the said money to be raised as soon as may be done after the decease of the said James Brown, and to be held by them in trust for the issue of said marriage, if there be any, to be held by them, if there be more than one, as tenants in common, with benefit of survivorship, and if but one child, then the estate to belong to such child; and in either case the said Anna P. shall be entitled to share the profits of the said ten thousand pounds during her life in the following proportions: that is to say, if there be only one child, she is to receive for life, after the decease of the said Brown, one-third of the said profits for life, and no more; and if there be more than one child, she is in no event to have more than the profits of a child's part; and if the children of the said marriage should all of them die before attaining the age of twenty-one, then so much of the said sum of ten thousand pounds as shall remain after providing as is herein above set forth for said Anna P., to be disposed of as part of the estate of the said James Brown, in like manner as if provision had not been made for the issue aforesaid; and if there shall be no issue of the said marriage living at the death of the said James Brown, then the said trustee shall pay unto the said Anna P., out of the said profits, the sum of five hundred pounds current money, annually during her life, and no longer, and the surplus of the said sum of ten thousand pounds, as well profits as principal, to be and remain a part of the estate of the said James Brown; the said annuity of five hundred pounds to be paid in half-yearly payments."

None of the contingencies mentioned in the foregoing provision ever happened. There was issue of the marriage—seven in number. None of them died before attaining the age of twenty-one years, and all *were living at the death of James Brown and of his wife, Anna Pitfield Brown.

James Brown departed this life in March, 1841, having first made and published his last will and testament, which bears date January 1st, 1841, and was duly admitted to probate and record. His will contains the following provision:

"Whereas by virtue of a deed of marriage settlement entered into between myself and my wife, Anna Pitfield Brown, on the 9th day of October, 1807, in which I ordered to be raised out of my estate the sum of ten thousand pounds currency, in preference to any voluntary disposition of my property, whether by will or otherwise, and held for her

use, &c., &c., which deed not having been recorded may be held as annulled agreeable to the laws of this commonwealth; now, in pursuance of said deed, be it here distinctly understood, I will and devise the same by this writing to be put in full power and force, and now fully confirm the same."

Looking to these provisions of the deed of marriage settlement and the will of James Brown, which "confirms and puts in full power and force" said deed in all respects, we have now to declare what is the true construction to be given to the words found in said deed "to be held by them, if more than one, as tenants in common, with benefit of survivorship." In solving this question the controlling, if not only legitimate enquiry is, what was the intention of the grantor and testator, James Brown, in the use of these words? In ascertaining that intention, we cannot rely upon any fixed course of construction founded upon arbitrary rules and technical principles; but that intention is best deduced from the terms and provisions of both the deed of marriage settlement and

the will of James Brown, viewed in the
507 light of the circumstances which *at-

tended the execution of these two instruments. In this case we may look not only to the deed of marriage settlement, but to the will of James Brown; indeed, we must look to both, to aid us in the interpretation of the true intention of the grantor and testator, because the deed of settlement being recognized and reaffirmed in the will, is as much a part of the will itself, so far as the provisions we are considering are concerned, as if it was literally and entirely incorporated therein.

In seeking for the true interpretation of the language used, we are not tied down to the literal words, however technical and of whatever established legal signification they may be, when read abstractly in a single phrase; but must read them and interpret them in their relation to other terms and provisions of the instrument in which they occur. The subject matter of the contract, the general purpose and object of the contracting parties, or of the testator, shown by the instrument itself, has always been considered a just foundation for giving the words of an instrument an interpretation, when considered relatively, different from that which they would receive in the abstract. The provisions of the whole writing taken together, and showing the general design and purpose to be accomplished, is a just medium of interpretation of the language and meaning of the parties in relation to it. 1 Greenl. Ev. §§ 286, 287, and cases there cited.

The great object being to discover the intention, the court may put itself in the place of the parties, and then see how the terms of the instrument affect the property or subject matter.

Applying these rules of interpretation to the case before us, and looking first to the deed of marriage settlement, we discover that it is the declared purpose of that instrument—first, to secure to Mrs. Burton,

508 whom *he was about to marry, her sep-

arate estate, and second, to provide for the issue of the marriage. This purpose is plainly declared in the first clause of the deed in distinct and unequivocal terms, as follows: "Whereas a marriage is shortly intended to be solemnized between the said James Brown and Anna P. Burton, now this indenture witnesseth, that for and in consideration of the premises, and for and in consideration of the sum of one dollar by the said John P. Braddick, Charles Johnston, and Charles J. Macmurdo, to the said James Brown in hand paid, the receipt whereof is hereby acknowledged, and with a view to secure to the said Anna P. Burton her separate property and to provide for the issue of said marriage," &c., &c. After securing to Mrs. Burton her separate estate, the deed provides: "And further, in order more effectually to provide for the children of the marriage * * * there shall be raised out of his estate the sum of ten thousand pounds, current money, to be paid in preference to any voluntary disposition of his property, by will or otherwise, and placed in the hands of said trustees for the purpose aforesaid,

* * * to be held by them in trust for the issue of said marriage." Now, up to this time there cannot be a doubt, nor is there a word that can raise a doubt, that the plain intention of James Brown was to provide for the issue of the marriage, for all and not a part; to provide for all his children alike, and not alone for that child which might happen to be the last survivor of them all. Such intention is plain from the very terms of the deed up to the point where it uses the words "to be held by them, if there be more than one, as tenants in common, with benefit of survivorship." How for the use of these words upon the true interpretation to be given them will control and affect the plainly declared purpose and object of the deed will be considered presently.

509 *Now, leaving for a moment the deed of marriage settlement, and looking to the will of James Brown, we find that after the payment of debts and legacies he devised the whole of his estate, real and personal, to his seven children, to be equally divided between them. It will thus be seen that both in the deed of settlement in the provisions above quoted, and by the will of the testator, equality of distribution among his children, and not inequality, was fully declared as the purpose and object of both instruments. It is true that the rights of the children were fixed by the marriage settlement, and could not be affected by the will of James Brown; but we refer to the will as well as to the deed to show that on the part of James Brown, at least, (the grantor and testator,) equality of distribution among his children, and not inequality, was his declared intention and fixed purpose.

But it is insisted by the learned counsel for the appellant that the words "to be held by them as tenants in common, with benefit of survivorship," are the all-controlling words in this contract; that these words are of plain legal signification and fixed

meaning by judicial construction, and that they determine the rights of James Brown's children, and the nature and extent of the estate they take under the marriage contract. He insists that by the use of these words James Brown intended that his children should enjoy in equal shares the profits of the fund (ten thousand pounds) to be raised for them, and as each died the profits were to be divided among those remaining, until finally the sole survivor would succeed to the whole fund.

This construction, so at variance with the declared purpose of the grantor to provide for his issue, and which would at some indefinite period give the whole fund to the last survivor of unborn children, without any

provision for the families of those who
510 had died, can only be *given in a case so plain as to compel the court to adopt it, by some rigid and arbitrary rule of law, from which there is no escape or evasion.

To maintain his position the learned counsel for the appellant relies upon certain English cases, and affirms that at the date of the deed of settlement (1807) the words used by the grantor, "tenants in common with benefit of survivorship," had a fixed legal signification, established by the decisions of the English courts, and are capable of but one construction, and that is, that when such words are used the period of distribution, that is, the period at which the fund absolutely vests, is the death of all the donees except the last survivor, and cannot be referred to the death of the testator or grantor, or to any other particular event. In other words, his construction of his provision is, that upon the death of James Brown his children took under the marriage settlement a vested interest in the fund liable to be divested by dying, not being the longest liver of all. According to his contention, all the children had a vested equal interest in the profits of the fund, and each a contingent interest in the whole fund dependent upon his or her being the longest liver of them all.

An examination of the English cases will show that certainly as far back as 1807, when this deed of marriage settlement was executed, there was no such uniform and unvarying rule of construction of the words "with benefit of survivorship," or words of like import, established by the English courts. On the contrary, the cases on the subject were conflicting and seemingly irreconcilable.

This conflict of opinion has been noticed and commented upon in two cases in this court. See *Hansford v. Elliott*, 9 Leigh, 79; and *Martin, adm'r, v. Kirby, adm'r*, 11 Gratt. 69.

In the former case, Judge Parker delivering the opinion of the court, after reference to many of the English *cases,
511 was of opinion that the weight of authority in the English courts was in favor of the doctrine that the period of survivorship, where a different intent was not plainly manifested, should be referred to the death of the testator. He was of opinion that the cases which affirmed a contrary doctrine were easy to be reconciled upon the special cir-

cumstances of those cases. This case was decided in 1837. In *Martin, adm'r, v. Kirby, adm'r*, 11 Gratt. p. 67, Judge Lee, in referring to Judge Parker's opinion, says he does not concur with Judge Parker that the preponderance of the English authorities are in favor of the rule making the words of the survivorship relate to the period of the testator's death. He says the cases are directly conflicting and irreconcilable, and remarks that "in the earlier cases, almost without an exception, it will be found that the words of survivorship have been held to refer to the period of the testator's death" (and he cites a number of cases). On the other hand, numerous cases are to be found affirming a different rule, and referring the words of survivorship to the death of the tenant for life, or other prior particular estate; and he cites a number of cases affirming this view. Vide cases cited, p. 68, many of which are the same cited in argument here. He then observes that whatever might be the safest and soundest rule of construction, and that best adapted to promote the intention of the testator, the preponderance of the English authorities is now in favor of the rule making the words of survivorship relate to the expiration of the previous particular estate, to the period of the distribution of the subject of the gift, rather than to the death of the testator. But Judge Lee, after expressing this opinion, differing from Judge Parker, as to the preponderance of the English cases, immediately adds: "But it may admit of very grave questions whether this is a subject upon which anything like a fixed rule of construction can be established. The
512 question, and the *only legitimate enquiry, is, what is the intention of the testator."

A careful examination of the English cases has convinced me that the English courts have established no such fixed and invariable rule of construction as that insisted upon by the learned counsel for the appellant.

Even in the English cases which hold that the period of survivorship relates to the period of distribution, and not to the death of the testator, the general rule is always controlled by the special intent shown by the whole instrument.

It is impossible in the limits of an opinion to pass in review all the English cases on this subject, and it is sufficient to say, after careful examination, that they do not establish any such fixed and uniform rule as that contended for.

But there is a case decided by Lord Alvanley, just a few years before the deed of marriage settlement we are considering was executed, and reported in 3 Ves. R. 450, which gives to the words "with benefit of survivorship" a very different construction from that contended for by the appellant's counsel. It is the case of *Maberly v. Strode*, and was decided just fifty years after the case of *Haws v. Haws*, and thirty years after the case of *Rose v. Hill*, so much relied on by the appellants' counsel as establishing the rule contended for. In that case the clause for construction in the testator's will was as

follows: "But in case my son shall die unmarried and without issue, * * * then and in such case in trust to assign and transfer the principal of such funds and securities unto my nephews, William and James Strode, in equal proportions, share and share alike, (his, her, and their issue, or the issue of either of them, to take their parents' share,) with benefit of survivorship to my said nephews and niece." Upon the construction of these words (the same words used in the deed of settlement

513 *before us) it was held that "words of survivorship added to a tenancy in common, in a will, are to be applied to the death of the testator unless an intention to postpone the vesting is apparent." It is instructive to read Lord Alvauly's opinion in this case, as showing the conflict of views on this question at that time, only a few years before the execution of the marriage contract before us, and as settling, by his opinion, that there was no arbitrary rule of construction which gave to these words, "with benefit of survivorship," a fixed legal signification. At the expense of protracting this opinion beyond a reasonable length, I cannot refrain from giving an extract from his opinion, as it is a case exactly in point.

He says (p. 455): "The other question (i. e. the question to what period the words of survivorship relate) admits of more doubt; but in the opinion I have formed upon the words of survivorship I found myself upon what I thought myself warranted to do in *Perry v. Woods* (ante 204), when I had occasion to look into all the authorities, and I relied upon *Stringer v. Phillips*, followed by *Roebuck v. Dean*, which is almost exactly the present case; and there the lord chancellor thought himself warranted to follow *Stringer v. Phillips*. All the cases were considered in *Perry v. Woods*; and *Brograve v. Winder*, 2 Ves. R. 634, was urged as an authority that the lord chancellor had changed his opinion. I have looked into these cases, rather wishing to found my opinion upon them. *Roebuck v. Dean* is as near this case as can be. Lord Bindon v. Lord Suffolk seems, as the lord chancellor said, to have had a very odd fate in the house of lords. Considering *Stringer v. Phillips*, recognized by Lord Hardwick, his lordship thought it safer to adhere to that. It is very true in *Brograve v. Winder*, he was of opinion the words were such as plainly proved the vesting was postponed;

he gives his reasons, but does not re-

514 tract what *he said in *Roebuck v. Dean*, but founds himself upon the words—from which it plainly appeared that the time of distribution was the time to which the words were meant to apply. I followed that (*Roebuck v. Dean*) and *Stringer v. Phillips* in *Perry v. Woods*. This case is very nearly the same as these, perhaps stronger." After this reference to the authorities, Lord Alvanley concludes as follows (and we may adopt his language in this case): "Upon these authorities, I am of the opinion that upon these blind words ('with benefit of survivorship,' the same used in the case before us)—

upon these blind words, the safest and soundest construction, best warranted by the authorities, most beneficial to the parties, most likely to be that intended, is that the meaning is, such as shall survive the testator, and that it is not meant that it should remain in contingency, and vest only in such as should happen to survive the son, with the chance of the whole being lost and a total intestacy occasioned."

This case was decided in 1797, just ten years before the marriage contract was executed, and is the last English case I can find before 1807. This case is in utter repugnance to the doctrine contended for here by the appellant's counsel. See also *Stringer v. Phillips*, 1 Eq. Ca. Ab. 293; and specially *Roebuck v. Dean*, 2 Ves. R. 265. In that case testatrix gave stock to trustees in trust to pay dividends to her niece for life, and after her decease that the stock should be equally divided among the brother and four sisters of the testatrix, and in like manner to the survivors or survivor of them. This was declared to be a tenancy in common between those alive at the death of the niece and the representatives of such as died in her lifetime.

It is proper to remark before passing from the English authorities, that in the case of *Haws v. Haws*, so much relied on as establishing the rule contended for, the lord chancellor said this case stands on its 515 own circumstances, *divested of all authorities, yet consistent with all.

I have thus considered at length the English cases because they were relied on as establishing the rule of construction of the words used: "with benefit of survivorship." While there is no case in this court in which this precise question has arisen, or these words have been construed, yet the doctrine of this court on the general subject of the survivorship has been clearly affirmed in several decisions, which are opposed to any rule which refers the period of survivorship to an indefinite period, when the last survivor only shall be living, as the period for the enjoyment of the fund. See *Hansford v. Elliott*, 9 Leigh, 79; *Martin, adm'r, v. Kirby*, 11 Gratt. 67; *Stone's ex'or v. Nicholson*, 27 Gratt. 1, and cases cited in the opinions of Judges Parker and Lee.

Both upon principle and authority I am of opinion that the words in the marriage settlement before us do not limit the enjoyment of the fund to the last survivors of the children of James Brown, but that they refer to the death of Mrs. Brown. Those who succeeded her took an equal interest in the fund. Upon a fair and legal construction of the words of survivorship, the period of distribution relates to the death of Mrs. Brown, and not to the death of all the donees save the last survivor.

I would fix that period at the death of Mrs. Brown rather than to the death of the grantor, James Brown, because the fund was not to be created until after the death of Brown, and after the payment of all his debts and legacies; and for the further reason that

during the life of Mrs. Brown she is entitled to a certain portion of the profits of said fund contingent upon the number of children that might be the fruit of the marriage. I would, therefore, fix the period to which the words of survivorship relate at the death of Mrs. Brown, and not the death of the testator. Practically, it can make no
 516 *difference in the decree of the court below, inasmuch as the children all survived both James Brown and his widow. The effect will be the same whether the period of distribution be referred to the death of James Brown or to that of Mrs. Brown.

The construction which we have given to the marriage settlement is that which is fully warranted by the authorities, and which carries into effect the plain meaning and intention of the parties, without resorting to the unusual and unnatural interpretation which presupposes an intention to give the whole fund at an indefinite period, it may be nearly a century afterwards, to the longest liver of the unborn children of a prospective marriage. Upon the whole case, I am of opinion that there is no error in the decree of the chancery court, and that the same be affirmed.

The other judges concurred in the opinion of CHRISTIAN, J.

Decree affirmed.

517 *Piedmont & Arlington Life Ins. Co. v. McLean.

January Term, 1879, Richmond.

Fire Insurance—Forfeiture of Policy—Waiver by Agent.*—The assistant secretary of a life insurance company held to have authority to waive the forfeiture of a policy for the failure to pay the premium on the day it was due, and to reinstate the policy.

This is the sequel of the case of *McLean v. Piedmont & Arlington Life Ins. Co.*, 29 Gratt. 361. The judgment was then reversed because the court below had excluded parol evidence tending to prove a waiver of the forfeiture of the policy in which the action was founded. After the cause went back to the circuit court it came on for trial again on the 6th of February, 1877, when there was a verdict and judgment for the plaintiff. And the company obtained a writ of error and supersedeas from a judge of this court.

Two exceptions were taken by the defendant. When the evidence had been introduced, the plaintiff moved the court for an instruction, which was given; and then the defendant moved the court to give an instruction, which the court gave with an addition thereto; to which addition, and the refusal to give the instruction asked by the defendant without said addition, the defendant excepted. These instructions are as follows:

***Fire Insurance—Forfeiture of Policy—Waiver by Agent.**—See *Goe. Home Ins. Co. v. Kinnier's adm'x*, 28 Gratt. 88 and *note*; *Morotock Ins. Co. v. Pankey*, 91 Va. 259.

"If the jury believed from the evidence that Darrow failed to pay the quarterly premiums that fell due on the 22d of October, 1874, and the 22d January, 1875, on the days when they became due, and if they believe that by reason thereof he had forfeited his right
 518 *to the policy; but if they further believe from the evidence that the defendant, by its officers, waived or agreed to waive any claim which it might have that said policy had become forfeited for non-payment of the premiums due on those days, and agreed to receive the said back premiums from Darrow or the assured, and that the said back premiums were paid on the faith of this agreement, then they must find for the plaintiff."

Which instructions the court gave; and thereupon the defendant moved the court to instruct the jury as follows:

"If the jury believe from the evidence that Darrow neither paid nor tendered payment of the premiums due on the policy in suit October 22, 1874, and January 22d, 1875, until January 30th, 1875, then the jury must find for the defendant, unless they find that the forfeiture thereby occasioned had been waived by the company, or by some officer authorized to make such waiver; and if such waiver was conditional, then that said conditions, the same being lawful, have been fulfilled.

"The jury are further instructed that the burden of proof is upon the plaintiff to show that the failure to pay any premium on the day it fell due was excusable under the conditions of the policy, or was subsequently waived by the defendant.

"If the jury believe that the reinstatement of the policy on the receipt of lapsed premiums was upon the condition that the insured was in good health at the time of such reinstatement, they must find for the defendant, if there is evidence tending to show that Higgins was not in such health, and no evidence to the contrary."

Which the court modified by adding the following words:

519 *"If the jury believe from the evidence that Darrow neither paid nor tendered payment of the premiums due on the policy in suit October 22d, 1874, and January 22d, 1875, until January 30th, 1875, then the jury must find for the defendant, unless they find that the forfeiture thereby occasioned had been waived by the company, or by some officer authorized to make such waiver, the assistant secretary, J. J. Hopkins, in this case, being so authorized; and if such waiver was conditional, then that said conditions, the same being lawful, have been fulfilled.

"The jury are further instructed that the burden of proof is upon the plaintiff, to show that the failure to pay any premium on the day it fell due was excusable under the conditions of the policy, or was subsequently waived by the defendant.

"If the jury believe that the reinstatement of the policy, on the receipt of lapsed premiums, was upon the condition that the insured was in good health at the time of such reinstatement, they must find for the de-

fendant, if there is evidence tending to show that Higgins was not in such health, and no evidence to the contrary."

After the verdict had been rendered the defendant moved the court to set it aside and grant a new trial of the cause on the ground that the verdict was contrary to the evidence; and the bill of exception sets out all the evidence. It is impossible to state the evidence, nor is it necessary. It is directly conflicting on the question of waiver.

A. M. Keiley, for the appellant.

Wm. L. Royal, for the appellee.

ANDERSON, J. In the petition for the writ of error the plaintiff in error says:
520 "This cause has already *been before the supreme court, and the facts are in no respect different from those presented at the former hearing." It is also said that the only questions presented on the record are—first, whether the secretary had the power to waive an admitted forfeiture? and, second, whether in point of fact he did so waive the forfeiture?

I cannot find from the record that the forfeiture is anywhere admitted. The policy had been cancelled by the company for the supposed non-payment of the July, 1874, quarterly premium. But when the assistant secretary was satisfied that the premium was paid to the company's agent, who had failed to account for it, he admitted that the cancellation was wrong, and that the assured had not incurred a forfeiture. At the former hearing (only four judges sitting) the court was equally divided upon the question of forfeiture. I beg to refer to my opinion (29 Gratt. 364) for the grounds upon which I held that the plaintiff below had not incurred a forfeiture.

Whether he had or not, turned mainly on the question, whether, if the company revoked the authority of its agent at Newbern, North Carolina, to whom the quarterly payments had been regularly made, in compliance with the requirement of the company, and with its approval during the existence of the policy, embracing the quarterly payment of five annual premiums, it was not the duty of the company to notify Mr. Darrow, who resided in the city of New York, at a great distance from Newbern, where the premiums had always theretofore been paid, who was the known and acknowledged assignee and holder of the policy, and by whom the premiums had been paid, and were payable, as was known to the company, and to have informed him to whom and where payment of his premiums should thereafter
521 be made, I held the affirmative *of this proposition, and now hold that inasmuch as it plainly appears from the record that Darrow was ready and desirous to pay the premiums as they were severally due and payable, and that he was only prevented by the fault and gross negligence of the company in failing to give him the aforesaid notice and information, the non-payment was not in default, and he is not liable to a forfeiture of the policy therefor. In support of

this position I only propose now to cite two recent decisions of courts which are entitled to the most respectful consideration, and to which we had no access at the former hearing of this cause. One is the decision of the supreme court of North Carolina in *Braswell v. The American Life Ins. Co.*, 75 North Car. R. p. 8. It was held in that case that the obligation was on the company to notify the assured of the revocation of the authority of its agent to whom he had theretofore paid the premiums with the approval of the company. CHIEF JUSTICE PEARSON, in delivering the opinion of the whole court, said: "The fact that the defendant had revoked the agency of Dearing and refused to furnish him with receipts * * * was a matter peculiarly within its own knowledge. We hold that the defendant was guilty of gross negligence, if not fraud, by failing to communicate to such of its assured as the books showed were in connection with Dearing, and who had been in the habit of sending him the money and getting a receipt in return." The plea that the defendant, the plaintiff in error, was not informed of the residence of Darrow is not sustained. The assignment of the policy to him, which they acknowledged and approved by an endorsement thereon, was notice to them of his residence, and their agent had thereafter constant correspondence with him at
522 his residence in the city of *New York, and the premiums were regularly remitted to him by Darrow from the city of New York, except one which was remitted to the home office, in the city of Richmond, and forwarded to their agent, Carraway, at Newbern, who receipted for it.

The other case supporting the doctrine is *Insurance Co. v. Eggleston*, decided by the supreme court of the United States as late as 1877, 96 United States R. p. 572. In that case the agent to whom payments of premiums had been made was removed without notice to the assured, who was not informed what agent held the receipt, to whom payment could be made, until after the day had passed. He then tendered payment to the agent; who refused to accept it unless a certificate of the insured's health was furnished. The court held that the insured, in view of the company's dealings with him, had reasonable cause to expect and rely on receiving notice where and to whom to pay the premium, and that the company was estopped from setting up that the policy was forfeited by the non-payment.

But if there was a forfeiture, was it waived? The doctrine seems to be well settled that the company may waive the forfeiture; and that can only be done through its agent. *Insurance Co. v. Norton*, 96 U. S. R. p. 234; *Geo. Home Ins. Co. v. Kinnier's adm'r*, 28 Gratt. p. 88. In this case we think it is clear that J. J. Hopkins, assistant secretary, was a general agent of the company, and had power to make such an adjustment as is alleged by Darrow he made with his agent, D. M. Van Cott, and thereby in effect released Darrow from any forfeiture, if it had been incurred. The fact of such an ad-

justment was a question for the jury under the instructions of the court. The court instructed the jury as to the law, to which instruction the defendant excepted, but we think that the instruction, being in harmony with the letter and spirit of the prior decisions of this court, was right.

523 *The jury found a verdict for the plaintiff, and the court overruled the defendant's motion to set it aside and grant it a new trial, and gave judgment for the plaintiff, to which ruling of the court the defendant excepted, and the court certified the evidence; and the remaining question for our decision is, upon that certificate of evidence, did the court err in refusing a new trial? The question as to the legality of the evidence is *res adjudicata*. It was decided by this court when the cause was here before, that the evidence was admissible and legal, and the cause was remanded to the court below with instructions to grant the plaintiff a new trial, and if the evidence was offered again to admit it; and this court could hardly be asked to reverse the judgment of the court below for obeying its instructions in admitting the evidence.

The only question, then, for the appellate tribunal, is, did the court of trial err in refusing to set aside the verdict upon the ground that it is contrary to evidence? I do not propose to review the testimony. As by the well-established rule of this court, in deciding this question we have to exclude from consideration the exceptant's parol testimony and decide the case alone upon the testimony of the prevailing party, there is no room for debate as to what should be the decision of the court. And I am of opinion to affirm the judgment of the circuit court.

BURKS, J., concurred in the opinion of ANDERSON, J.

CHRISTIAN, J., when the case was formerly before this court, was of opinion, and is so now, that there had been a forfeiture of the policy. On the record, as it is now before the court, he must concur in affirming the judgment.

STAPLES, J., was of the same opinion.

On the first trial there had been error **524** in excluding evidence, and for *that reason he concurred in reversing that judgment. But on this record it is a case of conflicting testimony, and he therefore concurs in affirming the judgment.

MONCURE, P., concurred in affirming the judgment.

Judgment affirmed.

525 *Trevillian's Ex'ors v. Guerrant's Ex'ors & als.

January Term, 1879, Richmond.

Execution of Fl. Fa.—Effect of Debtor's Death on Lien.*—The lien of an execution of

*Execution of Fl. Fa.—Effect of Debtor's Death on Lien.—See Frayser's adm'r v. R. & A. R. Co., 81 Va. 388; Allan v. Hoffman, 83 Va. 129; 4 Min.

feri facias upon the debtor's chose in action, though not enforced in his lifetime, continues after his death as against the other creditors of the debtor. Code of 1849, ch. 188, §§ 3, 4; Code of 1873, ch. 184, §§ 3, 4, p. 1179.

This was a creditor's bill, filed in 1872 in the circuit court of Goochland county by Peter Guerrant's executors and others against the executors of John M. Trevillian and his widow, devisees and legatees, to subject the estate left by Trevillian to the payment of his debts. The bill was taken for confessed as to all the defendants, and a decree was made directing a commissioner to settle the accounts of the executors, and to take an account of the debts and their priorities, and also of the real and personal estate. The only question involved in this appeal is as to a debt claimed by the executor of William Holland. In June, 1870, William Holland recovered a judgment against John M. Trevillian, in the county court of Goochland, for \$2,143.60, with interest from the first day of July, 1860, subject to certain credits; and in June, 1871, an execution of *feri facias* was issued on this judgment, which went into the hands of the sheriff, who returned it "no effects." Holland died in October, 1871, and Trevillian died in May, 1872. At the time the execution issued, and at the time of his death, Trevillian had effects to his credit in the Union Bank of Richmond, and a bond of the city of Richmond for \$1,000.

The cause came on to be heard at the November term, 1876, when the court held **526** that the lien of the *feri facias* *continued after the death of Trevillian, and made a decree in favor of Holland's executor for the sale of the city of Richmond bond, and for the money in the bank. And thereupon Trevillian's executors applied to a judge of this court for an appeal; which was allowed.

Guy & Gilliam and Hudnall, for the appellants.

William B. Pettit, for the appellee, Holland.

STAPLES, J., delivered the opinion of the court.

This is an appeal from a decree of the circuit court of Goochland county. There is but a single point in the case, and that will be better understood by a brief statement of the facts. William Holland recovered judgment for money against John M. Trevillian in the county court of Goochland; an execution on this judgment was sued out on the 22d of June, 1871, and made returnable to the following September rules. The execution was returned by the sheriff unsatisfied. At the time of its delivery to the sheriff, Trevillian, the debtor, had funds to his credit in the Union Bank of Richmond, and he was also the owner of a Richmond city bond, amounting to about \$1,000. Holland, the judgment creditor, died in September or

Inst. (2nd Ed.) 924. See also 3 Min. Inst. (2nd Ed.) 413, 414; cited in Hicks v. Roanoke Brick Co., 94 Va. 750; Werdenbough v. Reid, 20 W. Va. 599.

October, 1871, and Trevillian died about the 1st of May, 1872, no effort having been made in the lifetime of either to enforce the lien of the execution against these choses in action. The controversy here is between the representatives of Holland on the one hand, maintaining the execution lien upon the funds in bank and the proceeds of the Richmond city bond, and the other creditors of Trevillian controverting the lien and claiming the funds as assets in the hands of the personal representatives, to be applied ratably to all the debts of Trevillian.

527 *The sole question, therefore, to be decided, and the only one intended to be, is, whether the lien of an execution upon the debtor's choses in action, not enforced in his lifetime, continues after his death as against the other creditors of the debtor.

This question must be solved by the provisions of sections 3 and 4, chapter 188, Code of 1849; Code of 1873, ch. 184, p. 1179.

The first of these sections declares that a writ of fieri facias, in addition to the effect it has under chapter 187, shall be a lien from the time it is delivered to the sheriff to be executed upon all the personal estate of the debtor, although not levied on, nor capable of being levied on under that chapter, except that as against an assignee of any such estate for valuable consideration, or a person making payment to the judgment debtor, the lien, by virtue of this section, shall be valid only from the time he has notice thereof.

The fourth section provides that the lien acquired under the preceding section shall cease whenever the right of the judgment creditor to levy the fieri facias under which the lien arises, or to levy a new execution on his judgment, ceases or is suspended by a forthcoming bond given and forfeited, or by a supersedeas or other legal process. It is conceded that under the third section the lien of an execution upon the debtor's choses in action is a legal lien, and continuing in its nature; that it does not cease with the return day, and that it is good against all persons except an assignee for valuable consideration without notice. This is settled by the decisions of this court in *Puryear v. Taylor*, 12 Gratt. 401; *Evans' trustee v. Greenhow et als.*, 15 Gratt. 153; *Charron & Co. v. Boswell*, 18 Gratt. 216.

It is insisted, however, that under the fourth section, whenever the right to levy an execution, under which the lien arises,

or the right to levy a new execution **528** upon *the judgment ceases from any cause, whether in payment of the debt, the statutes of limitation, or otherwise, the lien given by the third section also ceases; and inasmuch as the right to levy a new execution terminates with the death of the debtor, the lien acquired under the original execution necessarily terminates with it, if not enforced in the lifetime of the debtor.

The argument of the learned counsel proves too much; for if the lien acquired under the third section ceases whenever the right to levy ceases from any cause, then the lien is lost whenever the return day of the execution passes without a levy; for there can

be no levy after the return day. It is manifest it was not the design of the fourth section to provide for every case in which the lien of an execution might be at an end. It was unnecessary to do so. It was unnecessary to declare that the lien should cease upon the payment of the debt, or upon its discharge or extinguishment by any of the causes which under the general law would have that effect. In such cases the lien would, of course, cease without any special enactment so declaring. The real purpose of the section was to provide that certain causes should have the effect of putting an end to the lien, which perhaps of themselves, without some such provision, would not have accomplished that object. In other words, whenever the right to levy ceased or was even suspended by the forthcoming bond, given and forfeited, a supersedeas, or other legal process, the lien acquired by suing out the execution also ceased. A forthcoming bond sometimes operates as a satisfaction of the debt and judgment thereon, and sometimes a mere suspension of the right to sue out other executions. When forfeited it is a bar to any other proceedings on the original judgment until quashed, even though defective; so that if it is never quashed, the right to levy a new execution upon the original judgment ceases—is gone forever. The creditor

529 *must rely upon the security afforded by the bond and the judgment thereon. On the other hand, if the forthcoming bond be quashed as faulty, the creditor has his remedy against the officer if he is in default, or he may resort to his original judgment and sue out executions thereon, precisely as if no bond had been taken. But in either event, by the express terms of the fourth section, the lien of the original execution upon the choses in action is gone; so that the word "ceases," upon which counsel lays so much stress, has its appropriate place and signification in connection with the operation of the forthcoming bond; and the same thing is true with respect to the supersedeas and other legal process.

The legislature, in taking away the creditor's lien in this class of cases, must have supposed it was giving him a security equally, if not more, efficient in many respects. It is easy to understand, therefore, why provision was made for the termination of the lien after a forthcoming bond taken and forfeited, supersedeas bond and process of a like character. But it is difficult to understand upon what principle the creditor is allowed to acquire a lien only to be defeated without affording him any other security. It can scarcely be supposed it was the purpose of the legislature that the death of the debtor should deprive one creditor of the results of his superior diligence for the benefit of other creditors who have been less diligent. At common law, when an execution is delivered to the sheriff, he may proceed to levy and sell, notwithstanding the death of the debtor, and it may fairly be presumed it was intended to make the lien of the execution equally effective with respect to the choses in action.

It is true that the statutes relating to the administration of estates prescribe that the assets shall be applied to the payment of certain debts in the order of priority, and after that ratably to all other debts.

530 But it has never *been supposed that these statutes were designed to interfere with bona fide liens obtained in the lifetime of the debtor. The personal representative holding the assets for the benefit of the creditors or legatees, does so in subordination to all valid incumbrances thereon, whether voluntarily given by the debtor or obtained against him by process of law.

It has been argued that while the provisions of chapters 187 and 188 (Code 1849) were doubtless designed as a substitute for the old ca. sa., the lien of an execution under the section already cited is not in its effects coextensive with the remedy by ca. sa. unless and until the creditor has proceeded to enforce the lien in the lifetime of the debtor by process of garnishment or interrogatories to the debtor. Now, it may be conceded that the lien of the ca. sa. was merely inchoate, and could not be enforced so long as the debtor chose to remain in prison. But when he was once discharged by taking the oath of insolvency, the lien became perfect and complete, and all his goods and chattels, rights and credits, became vested in the sheriff for the benefit of the creditor, and neither the death of the debtor nor any other event could defeat his lien without the consent of the creditor. The revisors, in their report, say that chapter 188 was intended to provide for the creditor as efficient remedies as he had when the debtor was discharged by taking the oath of insolvency. 2 Rev. R. 926.

In *Puryear v. Taylor*, 12 Gratt. 401, 408, Judge Samuels, after quoting the language thus given, says: "The revisors accordingly reported a section of the statute giving the creditor the remedy indicated by them, and the general assembly, in substance, adopted the suggestion which is found embodied in section 3d, chapter 188." And in *Charron & Co. v. Boswell*, 18 Gratt. 216, 225, the president, speaking for the whole court,

531 said of the lien acquired under this third section: "In its nature, it is *more like the lien for which, in part, it was intended as a substitute, and which a creditor formerly acquired when his debtor took the oath of insolvency."

These authorities settle it, beyond question, that the lien acquired under sections 3d and 4th of chapter 188 (Code 1849), upon the debtor's choses in action, is, in its nature, substantially the same as the lien of the ca. sa. after the debtor had taken the oath of insolvency—a lien complete and unconditional, and in no manner impaired by the death of the debtor. The remedies afforded by the other sections of the same chapter (188) were designed simply to enforce this lien of the execution. The lien itself is as complete and perfect without them as with them. It continues in full force, although the creditor should never resort to those remedies. This is fully settled by the case of *Charron & Co. v.*

Boswell, already cited. Speaking of the interrogatories to the debtor and the process of garnishment, the court says: "These proceedings do not give a lien, general or specific. They are merely a means provided by law for the enforcement of a legal lien which already exists." It may, therefore, be safely assumed that the lien of a writ of fieri facias upon the debtor's choses in action, although not asserted in the lifetime of the debtor or creditor, is not defeated or impaired by the death of either or both, and this lien may be enforced in a suit for the administration of the assets, or by the remedies provided in the same chapter, asserted in the proper court. The inconveniences which the learned council suppose will result to the personal representative from the existence of this lien are, in a great degree, imaginary. An examination of the records will generally show the executions in force against the decedent estate. Besides, the personal representative is not compellable to pay any debt in the absence of a specific lien until after the lapse of twelve months from the date of

his qualification; and if after that period he makes *such payment, he cannot thereby be held personally responsible for any debt or demand against the decedent of equal or superior dignity, whether it be of record or not, unless before such payment he shall have notice of such debt or demand. Code of 1873, ch. 126, § 26. The various provisions authorizing the accounts to be laid before a commissioner for settlement, and creditors and others interested to be summoned to prove their claims, will generally secure the presentation of all demands against the estate. However this may be, the argument, *ab inconvenienti*, is one properly addressed to the legislature, and not to the courts. For these reasons, we are of opinion there is no error in the decree of the circuit court, and the same must be affirmed.

Decree affirmed.

532 *Beckwith & Wife v. Avery's Adm'r & als.

March Term, 1879, Richmond.

In a suit by A's administrator with the will annexed, brought in 1849, he is authorized to pay to M and N, legatees, for life, money in his hands upon their giving security for its return at their death; and this is done. M dies, and by another decree, made in 1853, the money paid her is collected and paid to N upon her husband, B, and herself giving like bond; and this is done. In June, 1874, upon a suggestion that the sureties in the bonds given by N and by B and N are insolvent, a rule is made upon them to show cause why they should not be required to give a new bond with undoubted security for the return of the money on the death of N. B appeared and filed his answer on oath to the rule, insisting that there was no evidence in the record that the sureties were insolvent; but upon the affidavit of T and the statement of A's administrator the court, on the same day, on the motion of parties claiming to be entitled in remainder, made an order

that unless B and N executed a bond in the penalty of \$10,000, with condition to pay the sum of \$4,216.22, that being the sum in their hands, on the death of N, A's administrator should proceed to collect the money, &c.—**Held:**

1. Indemnity Bonds—When Excessive.—

The amount of the penalty of the bond required is excessive; one-half of it, or at most \$6,000, was sufficient.

2. Appeal—Exceptions.—B and wife having had no opportunity to except to the affidavit and statement, they may object to them as evidence in the appellate court.

3. Supplemental Bills.*—The object of the suit by A's administrator having been accomplished so far as he was concerned, and the parties entitled in remainder not having been parties in that suit, after the long lapse of time since anything had been done in the case, it was improper to proceed by a rule upon B and N; but the remainderman should file a supplemental bill in the cause.

534 *The case is fully stated in the opinion of the court, delivered by **MONCURE, P.**

J. Alfred Jones, for the appellants.

Leigh R. Page and H. L. Lee, for the appellees.

MONCURE, P., delivered the opinion of the court.

This is an appeal from two decrees of the circuit court of the county of Brunswick, made, one of them on the 17th day of June, 1874, and the other on the 12th day of November, 1874, in a suit depending in said court, in which R. D. Turnbull, administrator with the will annexed of Asa Avery, deceased, was plaintiff, and Josiah Beckwith, and Nancy E., his wife, and others were defendants.

The bill was filed in the said court on the 20th day of April, 1849, by the said plaintiff, who therein stated in substance, among other things, that he had recently qualified as administrator with the will annexed of said Asa Avery, which will was duly recorded in the county court of said county; that said testator left an estate consisting of lands, slaves, money and other property; that he also left a will, by which he gave his estate to Nancy E. and Mary J. Hawthorne during their lives, "then to the children lawfully begotten of their body; if one should have children and not the other, then my will is that the whole shall go to her children, and in case that neither do, then it is my will that it shall go to their brother's and sister's children." A copy of the will was marked A and exhibited with the will. The plaintiff further stated that he had sold the perishable estate on a credit of twelve months, and delivered to the tenants for life, Nancy E. and Mary J. Hawthorne, the lands and slaves;

535 *that the tenants for life were also desirous of receiving the money belonging to the estate, which plaintiff had not paid to them because he thought it ought not to be paid to them unless they would first give bond and security for its payment

at their death; that he had collected some of the money and paid, he believed, nearly all the debts; and that the object of the suit was to get instruction from the said court as to his duties under the will, and for the purpose of settling his account and closing the estate as soon as possible. He therefore prayed that said Nancy E. and Mary J. Hawthorne might be made defendants to the bill; that all orders and decrees might be made in the suit which might seem to be just and equitable, and that the plaintiff might have general relief.

On the same day the defendants filed their answer, admitting the facts stated in the bill to be true, and saying that they wished to receive the money without giving security, and desired to receive all their rights under the will of the said testator.

And on the same day the cause was docketed by consent of parties, and by like consent came on to be heard on the bill, answer and exhibit, and was argued by counsel; when the court on consideration thereof decreed "that R. D. Turnbull, administrator with the will annexed of Asa Avery, deceased, do pay to Nancy E. Hawthorne and Mary J. Hawthorne, the tenants for life, the interest which has accrued on all the money due to said estate since the death of the testator, in absolute property, and that the said administrator do pay the balance of said money, after the payment of debts, to the said Nancy E. and Mary J. Hawthorne upon their executing bonds with ample security, to be approved by the administrator, payable to the said administrator, for the return of the principal at their deaths; but if from any cause **536** they should fail to execute *said bonds, then the said administrator is directed to lay out said money in six per cent. Virginia state stock, the dividends to be received by the said Nancy E. and Mary J. Hawthorne for life."

And the court further directed the said administrator to settle his account as such and with the legatees of his said testator before a commissioner of the court, who was to make report.

In June, 1849, the said administrator reported to the said court that agreeably to the said decree he had paid to Nancy E. Hawthorne the sum of \$1,750, and had taken her bond with ample security to return the principal at her death, and had paid a like sum to Mary Jane Hawthorne and taken a like bond from her, which bonds were returned to court with his report.

The bond to Nancy E. Hawthorne, referred to in said report, is inserted in the copy of the record in this case. In the condition it is stated that the said administrator "has paid to Nancy E. Hawthorne the sum of \$1,750, in which she has a life estate. Now, if the above-named obligors shall pay the said sum of money at the death of the said Nancy, or at any time when ordered so to do by the said court, then the aforesaid obligation to be void, or else to remain in full force." The said bond purports to have been fully executed by the said principal obligor and seven sureties.

On the 27th day of September, 1849, a de-

***Supplemental Bills.**—See 4 Min. Inst. (2nd Ed.) 126.

cree was made in the case confirming a settlement which had been made by the said administrator of his account with his testator's estate and legatees, and directing a further settlement thereof.

On the 27th day of September, 1850, an order was made in the cause, reciting that since the last decree made therein Nancy E. Hawthorne had intermarried with Josiah Beckwith, and by consent of parties **537** ordering, *that thereafter the suit should be continued and carried on in their name.

About the same time, to-wit: in September, 1850, the said administrator reported to the said court that since his last report he had paid to Mary J. Hawthorne the sum of \$379.40, and had taken her bond with ample security to return the principal at her death, and had paid a like sum to Josiah Beckwith and Nancy E., his wife, (the said Nancy E. Hawthorne having married the said Beckwith as aforesaid,) and taken a like bond, which bonds were returned with said report.

The said bond of said Beckwith and wife, which appears to have been also executed by four sureties, is copied in the record in this case. It recites the payment of the said sum of \$379.40 to the said Beckwith and wife, and is on condition that "if the said obligors shall pay the said sum of money at the death of the said Nancy E., or at any time when ordered so to do by said court, then this obligation to be void, or else to remain in full force."

On the 21st day of September, 1853, it appearing that the defendant, Mary J. Hawthorne, was dead, her death was suggested.

On the 20th of March, 1854, by consent of parties, the said suit was revived in the name of Wm. S. Andrews, executor of Mary J. Hawthorne, whom she had married previous to her death, and the cause came on again to be heard, when the court being satisfied by the admission of the parties that said Mary J. Hawthorne departed this life on the 31st July, 1853, and being also of opinion that Nancy E. Beckwith, under the will of Asa Avery, is entitled to a life estate in the land, slaves and money held by the said Mary J. during her life, and it being admitted that the slaves held for life by said Mary J. were hired out for the year 1853, and the lands

rented for that year, the court decreed **538** that the said land and *slaves be delivered to said Josiah Beckwith and wife, to be held by them during the life of the said Nancy E., and that the net proceeds of the hires of said slaves for that year be apportioned between the executor of the said Mary J. and the said Beckwith according to their respective rights.

And the court further decreed that the said Turnbull, who was thereby appointed a commissioner for the purpose, should collect the bonds filed in the cause by Mary J. Hawthorne and her securities for the return, at her death, of the money received by her, and pay over the principal thereof, after deducting a commission of two per cent. for his services, to Josiah Beckwith and Nancy E. his wife, upon their executing a bond with ample secu-

rity, payable to the said commissioner, conditioned to refund the principal without interest at the death of the said Nancy E.; but if, from any cause, the said Beckwith and wife should fail to execute said bond, then the said commissioner was directed to invest said money in six per cent. Virginia state stock, the dividends to be received by said Beckwith and wife; and the court directed the said commissioner to report his proceedings to this court, and the said administrator to render a further account, &c.

In April, 1854, the said R. D. Turnbull made his report as commissioner under the said decree, that he had collected the said bond of Mary J. Hawthorne and her securities, and paid the net amount thereof, \$2,086.82, to Beckwith and wife, upon their executing a bond in the penalty of \$4,000, conditioned to return the principal, without interest, at the death of the said Nancy E. Beckwith, with five securities, which bond was returned with said report. It is inserted in the record in this case, and is conditioned for the payment of the sum of \$2,086.82, without interest, "at the death of the said Nancy E. Beckwith."

539 *On the 20th day of September, 1854, the cause came on again to be heard, &c., when the court, among other things, confirmed the said report of Commissioner Turnbull.

No further order was made or proceeding had in the cause after the said decree of September, 1854, until about twenty years thereafter, to-wit: on the 17th day of June, 1874, when the cause came on to be heard on the papers, &c.: "On consideration whereof, and it being suggested to the court that all the securities of the said Josiah Beckwith and Nancy E. his wife in the bonds executed by them and filed with the papers in this cause are bankrupt or insolvent, the court" decreed "that the said Josiah Beckwith and Nancy E. his wife be summoned to appear at the second day of the next term to show cause, if any they can, why they should not be required to execute a new bond or bonds with good and undoubted securities, and with the like conditions, and in default thereof to pay the moneys secured by the said bonds, in order that the same may be invested under the decree and by the direction of this court."

At the next term of the said court, to-wit: on the 12th day of November, 1874, the said Josiah Beckwith made the following answer on oath to the said rule: "That he should not be required to execute the said new bond or pay the said moneys into court for the reason that it does not appear from the record or any evidence in this cause that the securities upon the original bond, executed by Nancy E. Beckwith and the said Josiah Beckwith and Nancy E. Beckwith his wife, are either bankrupt or insolvent; nor does it appear from any evidence in the cause that the said securities are not as ample and sufficient as on the day they became jointly bound with said Josiah Beckwith and Nancy E. his wife; for which reasons he prays the court that the said rule against him be discharged."

540 *On the same day, to-wit: on the 12th day of November, 1874, the cause came on to be again heard on the papers formerly read and the return of said rule duly executed on said Beckwith and wife, and the answer of said Beckwith thereto, with general replication to said answer, and was argued by counsel. On consideration whereof, the court being of opinion, from the facts stated in the affidavit of E. R. Turnbull, and the statement of R. D. Turnbull, the commissioner in this loan, and also the administrator of the said Asa Avery, which said affidavit and statement are filed with the papers in this cause, that the said Josiah Beckwith and Nancy E., his wife, should renew their bonds for the payment of the moneys now held by them for the life of the said Nancy E., under former decrees rendered in this cause, with good and undoubted security, at the death of the said Nancy E. to the said R. D. Turnbull, commissioner, &c., "doth, on the motion this day made of H. C. Hawthorne as next friend of his infant children, Parmelia, Adeline, William, Robert, Wilkins and Esther; and of James Hazelwood, who intermarried with Lucy Hawthorne; and of the said James W. Hawthorne, as the next friend of his infant children, Dorothy and Sarah; and of Fletcher Piercy, son of T. L. Piercy and Elizabeth, his wife, who before her marriage was Elizabeth Hawthorne; and of the said T. L. Piercy, as next friend of his infant son Asa; the said children of the said H. C. Hawthorne, James W. Hawthorne, and Elizabeth Piercy, being those entitled in remainder to the said moneys on the death of the said Nancy E. Beckwith under the will of the said Asa Avery, adjudged, order and decree that the said Josiah Beckwith and Nancy E., his wife, do, within thirty days after being served with a copy of this decree, execute to the said R. D. Turnbull, commissioner, &c., bond with ample and undoubted security, to be approved by him, in the penalty of \$10,000,

541 *with condition to pay the sum of \$4,216.22, that being the sum now in their hands, at the death of the said Nancy E., wife of the said Josiah Beckwith, in which said sum she has a life interest and estate. And in default of the due execution of said bond, the said commissioner, R. D. Turnbull, in conjunction with H. L. Lee, is hereby directed and ordered to withdraw the bonds heretofore taken for the said moneys by him from the papers in this cause, and collect the same as soon as they can be collected, and deposit the proceeds of said collection in the Citizens Bank of Petersburg, taking a certificate therefor, and make report to court, &c.; but before," &c. (The said commissioners were required to give bond and security before receiving money under said decree.)

The affidavit and statement referred to in the said decree are as follows:

"The affiant, E. R. Turnbull, being duly sworn, says that he knows that N. S. Edmunds, who was a surety for J. Beckwith and Nancy E. Hawthorne (who intermarried with said Beckwith subsequent to the execution of the first bond), in the bonds filed

in the cause of Avery's adm'r v. Hawthorne, &c., in the circuit court of Brunswick, has taken the benefit of the bankrupt law. He knows that Peter Stainback, another of the said sureties, has also taken the benefit of the bankrupt law; Thomas D. Edmunds, another of the said sureties, has also taken the benefit of the same law; John F. Edmunds, another of the said sureties, is insolvent, and he believes is a bankrupt; E. H. Edmunds, another of the said sureties, has taken the benefit of the same law; R. T. Pritchett, another of the said sureties, is dead, and his estate is insolvent; Thomas L. Lambert, another of the said sureties, is dead, and his estate is a small one, and he believes much involved in debt; and William B. Price, the only other of the

542 said sureties, is dead; and *this affiant, who is the clerk of Brunswick county, says that it appears from the records of his office that a great number of judgments for large sums of money have been proved in a chancery suit in the circuit court of Brunswick against the estate of the said Price, which is involved in pecuniary embarrassment."

Sworn to before a notary public, November 12th, 1874.

"As administrator and commissioner in this case, I have no hesitation in saying to the judge of the circuit court of Brunswick that a new bond or bonds ought to be required of J. Beckwith and wife in this case. But I do not originate the motion which was made at the last term, June term, 1874, at the instance of the remaindermen.

"R. D. Turnbull.

"November 12, 1874."

The said Josiah Beckwith and Nancy E., his wife, applied to this court for an appeal from the said two decrees of the 17th day of June and 12th day of November, 1874, which was accordingly allowed.

If the proceeding by rule was regular in this case, and it was proper to require of the appellants a new bond with ample and undoubted security, with condition to pay the sum of \$4,216.22, in which said sum the appellant, Nancy E., wife of the appellant, Josiah Beckwith, has a life interest and estate at the death of the said Nancy E., as was done by the decree of the 12th day of November, 1874, it is very clear that the penalty of the bond so required to be executed, viz: \$10,000, was excessive, and a penalty of about half that amount or little over, say six thousand dollars, would have been amply sufficient. If this were

543 the only error in the said *decree, perhaps it might be amended in that respect, and as so amended affirmed.

But assuming that the proceeding by rule was regular and proper in the case, was there a sufficient foundation for the decree which was based upon it?

The appellant Josiah Beckwith, who alone responded to the rule, in his answer filed on the day on which the said decree was rendered, to-wit: the 12th day of November, 1874, says "that he should not be required to exe-

cute the said new bond, or pay the said moneys into court, for the reason that it does not appear from the record, or any evidence in this cause that the securities upon the original bond executed by Nancy E. Beckwith, and the said Josiah Beckwith and Nancy E., his wife, are either bankrupt or insolvent; nor does it appear from any evidence in the cause that the said securities are not as ample and sufficient as on the day they became jointly bound with said Josiah Beckwith and Nancy E., his wife. For which reasons the said Josiah Beckwith prays the court that the said rule against him be discharged."

The bankruptcy or insolvency suggested in the rule is not admitted in the answer thereto. On the contrary, it is affirmed in the said answer that such bankruptcy or insolvency does not appear from the record or any evidence therein. It was thus clearly incumbent on the appellees, or the parties prosecuting the rule, to prove such bankruptcy or insolvency by legal evidence.

No such evidence was offered or taken; on the contrary, the "cause came on to be again heard on the papers formerly read and the return of the summons duly executed on Josiah Beckwith and Nancy E., his wife, issued in pursuance of the decree of the June term, 1874, of this court, and the answer of the said Beckwith thereto, with general replication to the said answer, and was argued by counsel.

On consideration whereof the court being of opinion from the facts stated in the 544 affidavit of *E. R. Turnbull, and the statement of R. D. Turbull, the commissioner in this loan, and also the administrator of the said Asa Avery, which said affidavit and statement are filed with the papers in this cause, that the said Josiah Beckwith and Nancy E., his wife, should renew their bonds for the payment of the moneys now held by them for the life of the said Nancy E., under former decrees rendered in this cause, with good and undoubted security, at the death of the said Nancy E., to the said R. D. Turnbull, commissioner, &c.," proceeded to decree accordingly, on the motion of a great many persons named in the said decree, who claimed to be entitled in remainder to the said moneys on the death of the said Nancy E. Beckwith, under the will of the Asa Avery, which persons had not been before named in the proceedings in the said suit until they were so named in the said decree.

In regard to the said affidavit and statement, they were wholly ex parte proceedings, and so far as the record shows, were unknown to and unheard of by the appellants until after the said decree was pronounced; nor does it appear that until then they had any notice or information that any of the persons on whose motion the said decree was made, according to a recital contained therein, had any connection therewith. It appears from the record that the said affidavit and statement were not parts of the "papers" on which the cause was again heard, when the said decree of the 12th day of November, 1874, was rendered, though they seem to have been handed to, inspected by and acted on by the

court in making the said decree, while the case was under advisement. Under these circumstances the appellants had no opportunity to be present when the said affidavit and statement were made, nor to except to them as evidence, and, of course, are in no default for not having done so. They cannot, therefore, be considered in an appellate court as *having waived their 545 right of exception to the said papers as evidence against them in the court below.

There was no evidence whatever in regard to the bankruptcy or insolvency of John Orgain, one of the sureties in the last and largest bond which had been given by said Beckwith and wife, even if the bankruptcy or insolvency of all the other sureties in the said bonds of the said parties was sufficiently proved—which is not admitted; nor in regard to the bankruptcy or insolvency of the said Beckwith and wife or either of them. Whether the bankruptcy or insolvency of all the sureties in the said bonds would be a sufficient ground for requiring the execution of a new bond, with sufficient sureties, by the said Beckwith and wife if they be themselves perfectly solvent, and the payment of the money which may be due by them at her death be perfectly safe and certain on their own responsibility only, or without giving any new or further security, is a question which need not be now decided. Several of the said bonds, and among them the last and largest that was given, are payable absolutely "at the death of the said Nancy E. Beckwith," and not in the alternative, as is the case with some of them, "or at any time when ordered so to do by the said court." Certainly the sureties in the former could not be, even if the principal obligors therein could be, required to pay them before they will become payable by the express terms and conditions thereof.

But was the proceeding, by rule, a regular and proper proceeding in this case?

We think that it was not; and that the proceeding, if any were necessary, ought to have been by bill, in the nature of a supplemental bill.

When the said rule was entered, to-wit: on the 17th day of June, 1874, more than twenty years had elapsed since the institution of the suit, and even since the

546 execution *of the last of the original bonds of the life-tenants for the payment at their deaths of the principal of the sums of money received by them of the executor of Asa Avery; and nearly twenty years had elapsed since the last preceding order had been made in the cause, to-wit: on the 20th day of September, 1854. After that day no proceeding whatever had been taken therein. The primary, if not the only object of the suit, would seem to have been accomplished. The complainant, R. D. Turnbull, administrator with the will annexed of Asa Avery, deceased, had no further interest in the suit. He had, before the suit was brought, delivered to the tenants for life the bonds and slaves belonging to the estate of his testator. They were also desirous to receive the money belonging to the said estate, which

the complainant had not paid to them because he thought it ought not to be paid to them unless and until they would first give bond and security for its repayment at their deaths. He therefore brought the said suit to obtain instructions from the court as to his duties under the will, and for the purpose of settling his account and closing the estate as soon as possible. Soon after the suit was brought he settled his account, and paid the money remaining in his hands to the tenants for life, taking their bonds, with the most ample and satisfactory security, for the repayment of the principal at their deaths. All this was done under the direction and with the approbation of the court. He had no reason to suppose that anything remained to be done by him in the matter at any future period. The only thing which remained to be done thereafter in the matter, as he had the best reason to suppose, was the repayment of the principal of the money by the life-tenants or their personal representatives at their deaths to the remaindermen; and that would be a matter between them alone, and one about which he could not suppose there would be any difficulty.

547 *The persons claiming to be remaindermen were not parties to the suit. When it was brought it was not known who would be the remaindermen, and of course they could not be made parties thereto. When the rule was entered, more than twenty years thereafter, it was no doubt known who would probably be remaindermen, and the proceeding by rule seems to have been at their instance, though their names do not appear in the rule, but appear for the first time in the suit in the last decree which was entered therein, to-wit: the said decree of the 12th day of November, 1874.

We are of opinion that the proceeding of the remaindermen to obtain the benefit and relief sought by them to be obtained by the said rule ought to have been by a bill, in the nature of a supplemental bill, instead of by mere rule as aforesaid. In a proceeding by bill as aforesaid all matters of contention between the parties might have been put in issue. This would seem to be peculiarly proper—first, because of the long lapse of time since the original suit was brought; second, because the objects sought by the original bill seem to have been long since obtained; and third, because the remaindermen, the only persons interested in the fund except the tenants for life, were not parties to the original cause.

The court is therefore of opinion that the decrees appealed from ought to be reversed and the cause remanded to the said circuit court, with liberty to the parties claiming to be entitled as remaindermen at the death of the appellant, Nancy E. Beckwith, to the money to which she became entitled for her life under the will of the said Asa Avery, deceased, to proceed by a bill, in the nature of a supplemental bill, to have the said money secured, if necessary, and to recover it for distribution among themselves.

548 according to their *respective rights in and to the same, whenever the interest

and estate therein of the said tenants for life shall be determined.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that if the proceeding by rule was regular in this case, and it was proper to require of the appellants a new bond with ample and undoubted security, with condition to pay the sum of \$4,216.22, in which said sum the appellant, Nancy E., wife of the appellant, Josiah Beckwith, has a life interest and estate, at the death of the said Nancy E., as was done by the said decree of the 12th day of November, 1874, it is very clear that the penalty of the bond so required to be executed, viz: \$10,000, was excessive, and a penalty of about half that amount or little over, say six thousand dollars, would have been amply sufficient. The decree is therefore on that account erroneous. Though if that were the only error in the said decree, perhaps it might be amended in that respect, and as so amended affirmed.

But the court is further of opinion, for reasons as aforesaid, that the proceeding by rule was not a regular and proper proceeding in the case; but that the proceeding, if any were necessary or proper, ought to have been by bill, in the nature of a supplemental bill. The decree is therefore on that account also erroneous.

Therefore it is decreed and ordered that the same be, for the errors aforesaid, reversed and annulled, and that the appellants recover their costs by them expended in the prosecution of this appeal against the appellee, R. D. Turnbull, administrator with the will annexed of Asa Avery, deceased, to be levied on the estate of his said testator.

549 *And it is further decreed and ordered, that the cause be remanded to the said circuit court for further proceedings to be had therein to a final decree in conformity with the foregoing opinion and decree; which is ordered to be certified to the said circuit court.

Decree reversed.

550 *Stamper's Adm'r v. Garnett & als.

March Term, 1879, Richmond.

Laches—Lapse of Time.*—A case in which, from the lapse of time, the death of all the parties cog-

***Laches—Lapse of Time.**—In Nelson's adm'r v. Kownslar's ex'or, 79 Va. 468, the court said: "In view of all these circumstances, and many others disclosed by the record, there being no errors apparent as alleged, nor any pointed to as such, no exceptions taken when all the parties were before the commissioner, when Commissioner White's report was confirmed and acquiesced in for many years before this contention was raised, and when by lapse of time, loss of evidence and death of parties, it is impossible to have any new settlement based upon anything other than mere conjecture, it would be nothing less than wrong and oppression to disturb the settled rights of

nizant of the transactions, the destruction of the records of the county and loss of papers, it was held that an account of administration of an estate could not be settled without great danger of injustice to the deceased administrator, and therefore refused.

This was a suit in equity in the circuit court of New Kent county, brought in July, 1871, by Alpheus H. Garnett and others as the residuary legatees of Anderson Crump, deceased, against the administrator de bonis non and widow and heirs of James Stamper, deceased, who in his lifetime had been the administrator de bonis non with the will annexed of said Anderson Crump, for the settlement of the account of Stamper as administrator, and payment of the amount which might be found due on that account.

Anderson Crump died in 1852, leaving a will, and a considerable estate consisting of land, slaves, stock on the farm, and debts due him, and Nathaniel L. Savage qualified as his executor. Savage died in 1853, when Stamper qualified as the administrator de bonis non, &c. He died in September, 1856; when John S. Lacey qualified as administrator of Anderson Crump, and Robert Howle qualified as administrator of Stamper. Howle died in 1862, and there have since been two administrations on Stamper's estate.

In September, 1871, there was a decree for an account; and in April, 1874, the 551 commissioner returned *his report. To this report the defendants filed thirteen exceptions; but the only question was upon the possibility of settling the accounts after the lapse of time, the death of all the parties having any cognizance of the accounts, and the destruction, during the war, of all the records of the clerk's offices and courts of New Kent county.

The cause came on to be finally heard on the 27th of November, 1876, when the court overruled the defendants' exceptions and made a decree in favor of the several plaintiffs for the amounts reported to be due to them. And thereupon Stamper's administrator applied to a judge or this court for an appeal; which was allowed. The case as it

an executrix, long since dead, one against whom the record discloses nothing to her discredit, or against the fairness of all her dealings, and in whose behalf all the presumptions arise. These principles have the sanction of a long and unbroken line of decisions, among them *Crawford's ex'or v. Patterson*, 11 Gratt. 374; *Bolling v. Bolling et als.*, 5 Munf. 340; *Harrison et als., v. Gibson et als.*, 23 Gratt. 223; *Tazewell's ex'or v. Whittle's adm'r*, 13 Gratt. 352; 4 Min. Inst. 1249; *Newton v. Pool*, 12 Leigh 144; *Stamper's adm'r v. Garnett*, 31 Gratt. 550; and *Hill et als. v. Umbarger et al.*, 77 Va. 653." See *Hatcher v. Hall*, 77 Va. 573; *Perkins v. Lane*, 82 Va. 59, and cases cited; *Gibboney's ex'x v. Kent*, 82 Va. 383; *Green's adm'r v. Thompson*, 84 Va. 376; *Hodgson v. Perkins*, 84 Va. 706. See also *Cramner v. McSwards*, 24 W. Va. 595.

Personal Representatives—War Interest.—In *Brent's adm'r v. Clevenger*, 78 Va. 12, it was that an administrator residing in a county which was subject to alternate raids from both armies during the Civil War were not liable to war interest. Citing principal case; *Lacy v. Stamper*, 27 Gratt. 65.

was viewed by this court, is presented in the opinion of JUDGE ANDERSON.

John A. Meredith and B. W. Lacy, for the appellant.

J. Alfred Jones, for the appellees.

ANDERSON, J., delivered the opinion of the court.

The bill represents that Anderson Crump died in 1852; that Nathaniel L. Savage qualified as his executor, and died on the 4th of January, 1853; that on the 14th of April, 1853, James Stamper qualified as administrator de bonis non with the will annexed of the said Anderson Crump, who "owned and possessed a very large and valuable estate, consisting of lands, slaves, debts due to him, household and kitchen furniture, crops of corn, &c., and a large and valuable stock of horses and mules, cattle and hogs, &c., all of which (the bill alleges), or the proceeds of the sales of all of which, and the hires of the slaves for many years, went into the hands and possession of the said

James Stamper as administrator de 552 bonis non as aforesaid." *And the bill charges that the said James Stamper, administrator de bonis non as aforesaid, collected many large sums of money that were due to said Anderson Crump, deceased, in his lifetime, and that he collected large sums of money arising from the sales of the said perishable property and the hires of the slaves of the said Anderson Crump, deceased, and departed this life in 1857, without ever having settled any account of his transactions as the administrator de bonis non with the will annexed of Anderson Crump, deceased, largely indebted to the estate of said Crump; that the plaintiffs are the legatees of said Crump, and entitled to a distribution of whatever is due from the estate of the said Stamper; that Henry D. Vaiden is the personal representative of the said James Stamper, deceased, who, together with the widow and children and heirs of James Stamper, deceased, are made defendants to the bill, and said Vaiden required to state, render and settle up an account of the administration de bonis non of James Stamper on the estate of Anderson Crump, deceased.

The record does not show the precise date of the death of N. L. Savage; but it must have been prior to the 14th of April, 1853, at which time letters of administration de bonis non with the will annexed of the estate of Anderson Crump were granted to James Stamper; and it shows that the said Stamper died about the 20th of September, 1856, instead of in 1857, as alleged by the bill. The record shows also what does not appear on the face of the bill, that E. A. Savage, the widow of N. L. Savage, qualified as his executrix, and that James Stamper acted as her agent in the administration of the estate of the said N. L. Savage, and after her death, which occurred prior to the 14th day of April, 1853, qualified as her executor.

Nor does it show, as appears in the rec- 553 ord, that after the death of *James

Stamper Robert Howle administered on his estate, and John S. Lacy qualified as administrator de bonis non with the will annexed of Anderson Crump, and that both of them died long before the institution of this suit; that after his death Leonard C. Crump qualified as administrator de bonis non of James Stamper, deceased, and that some years after his qualification his letters of administration were revoked, and the estate of James Stamper, as the bill does allege, was committed to the administration of H. D. Viaden, sheriff of New Kent county, one of the defendants.

Nor does the bill show that the records of the courts of New Kent county, were the evidences of these various administrations, the transactions of N. L. Savage, the executor of Anderson Crump, of A. E. Savage, his executrix, through her agent, James Stamper, of James Stamper, as her executor, and as administrator de bonis non, with the will annexed of Anderson Crump, deceased, of Robert Howle, his administrator or executor, and of John S. Lacy, who succeeded him as administrator de bonis non, with the will annexed of Anderson Crump, deceased, could have been found, were all destroyed by fire by the enemy during the late war. But these facts are fully set out in the answer of Mrs. Martha Stamper, the widow of James Stamper, deceased, and two of their children, and are established by the proofs in the record.

From this simple narrative of the facts, it is manifest that after this great lapse of time, and the destruction of the records, when the voices of the actors in all these transactions are silenced in the grave, and there are no witnesses who were cognizant of the transactions and capable of throwing light upon them, living to testify, it would be extremely difficult, if not

554 *impossible, for any commissioner to state an account which would do justice to all concerned. This suit was not brought until August, 1871, nineteen years after the death of Anderson Crump, and the qualification of his executor, eighteen years after the death of N. L. Savage, and the qualification of James Stamper as administrator de bonis non of Anderson Crump, fifteen years after his death, and nearly ten years after the death of Robert Howle, his executor or administrator. The defendants demurred to the bill, and upon the facts set forth in their answer, resisted the right of the plaintiffs to an account. They say that "the papers of said Stamper have been so lost and otherwise made way with that it would be impossible at this late day to settle the transactions of said Stamper as the administrator of Anderson Crump; that said Stamper was a good accountant, being a commissioner of the court, and there is scarcely a doubt but that he regularly settled his accounts and returned them to the court, but all the papers of that office have been destroyed; and the great lapse of time since the qualification of said Stamper renders it still more impossible to settle said accounts, without doing great injustice to the estate of said Stamper; and

inasmuch as this suit was not instituted for nearly twenty years after the qualification of said Stamper, and sixteen years after the death of said Stamper, the court should dismiss said bill; for if the claim be not barred by the statute of limitations (on which they relied as one of the grounds of demurrer) it is clearly lost by their laches."

But the court directed an account, and the commissioner undertook to make it out, and reported an account charging the estate of James Stamper with a large balance, which the court sustained and decreed 555 *in favor of the plaintiffs, the legatees of Anderson Crump; from which decree this appeal was allowed.

It appears that William P. Richardson was the personal representative of Robert Howle, who was the executor of James Stamper, and that Vaiden, after the estate of Stamper was committed to him, found a parcel of loose papers which had been in the possession of Howle, as executor of Stamper, scattered over the floor of Richardson's office and desk (probably by Federal soldiers who had possession, and committed great depredations), which he afterwards turned over to Commissioner Barham, who had been directed to take an account in this case. Among this rubbish, not destroyed by the enemy, were found the papers exhibited and designated M O H, and H O M, an old memorandum book, and the paper J D C. The two first are in the handwriting of James Stamper, and purport to be settlements of his administration account for the years 1853 and 1854, showing a balance due from him to the estate on the 1st of January, 1855, of \$1,289.26. He is charged with the whole of the hires of the slaves for 1853, due in 1854, though he held the bonds of two of the legatees for hires, with which he was not credited. The paper J D C purports to be an unfinished and incomplete statement of the administration account for the following year. It begins with the debit of \$1,289.26, balance due from the administrator on the 1st of January, 1855, credits him by certain payments made during the year, and debits him with the hires of 1854, collectable in 1855. This paper is proved to be in the handwriting of J. D. Christian, but is not signed. No balance is struck, but the account is left in an unfinished state and is not closed. Why did not the commissioner go on to complete the account? The probability is that there were other matters to be stated which the administrator was not then prepared to show, 556 and that, in all probability, was the *disbursements of the negro hires. It can not be perceived for what else the account was kept open. But is it likely, is it probable, that James Stamper would have allowed it to remain long in this unfinished state? He lived until the 20th of September, 1856, and when we remember with what promptness he had his administration accounts for 1853 settled (he only qualified in the spring of that year), and his accounts for 1854 settled, and with what promptness he commenced the settlement of his accounts for 1855, and his general habits of business as exhibited in the record, we

are forced to the conclusion that he would not have suffered this settlement to continue unfinished during the remainder of his life, which gave him ample time to have had the settlement concluded and put upon record, as his previous settlements were.

No other papers have been recovered from the wreck of his papers and the destruction of the records which throw any light upon his subsequent transactions and dealings as administrator de bonis non of Anderson Crump, deceased. They are all buried in the impenetrable darkness of the dead past. I am not unmindful that there is another paper exhibited, and designated Q S, upon which the commissioner relies, and makes the basis of subsequent charges against the administrator. It purports to give the hires of the servants for the year 1855, due in 1856. The commissioner certifies that it "is a true copy of a memorandum in the handwriting of John D. Christian, taken from a book marked 'ledger.'" Whose book it was does not appear; and it does not appear even to be signed by J. D. Christian, or that there was any privity between him and Stamper, or that he had any authority to make the statement, or that Stamper ever gave his assent to it, or had any knowledge of it. And yet the commissioner holds him bound by it,

only, for aught else that appears, because 557 it is in the handwriting *of Christian—which it might be and not be an affirmation of said Christian, which would be no evidence against Stamper even if it was. True there is another exhibit, the memorandum book before mentioned. But between it and the settlements M O H and H O M, there are discrepancies which show that it is too inaccurate to be relied on as the basis of an account or the foundation of a decree.

But the paper Q S puts the hires for 1855, which is adopted by the commissioner, at \$400 more than they are charged in said memorandum book. It is true the hires of four men are charged that are not charged in the memorandum book. But non constat that those hires were ever received by the administrator, for reasons which cannot now be explained, or that they were properly chargeable to him.

To complete the account, the commissioner charges Stamper with all the hires of 1856, although they were not due until after the death of Stamper, and could not have been received by him; and if there is any evidence in the record that they were charged to his executor as assets of Stamper, I have unconsciously overlooked it. I do not think that it anywhere appears that Stamper's estate got the benefit of those hires, whatever they may have been. There is no proof as to their amount; and in the absence of all proof the commissioner had to reply on estimates and conjecture; and his estimate of the hires of 1856 are \$314.75, minus \$11.25, more than the actual hires for the previous year are stated to be by the paper Q S, and \$703.50 more than James Stamper is charged with the year 1855, next preceding, in the said memorandum book. I find nothing in the record to warrant such an ex-

traordinary advance upon the hires of the previous year.

The commissioner also puts the estimated expenses for the chargeable servants 558 for the year 1856 at much less *than the actual expenses are stated for the previous year. The actual expense sums up \$230; the estimated, for the following year, only \$182.50—a difference of \$47.50. The same is true with regard to medical attendance. The actual amount for 1855 sums up \$118.50; the estimated amount for 1856 only \$47; and for 1857, \$58—a difference for one year of \$71; for the other, of \$60.50.

The commissioner has also gone behind the settlement of 1854 to debit the administrator with the sum of \$334.34, which was due from William R. Savage to Anderson Crump. N. L. Savage was the executor of Crump, and was individually indebted to W. R. Savage in a much larger amount. James Stamper represented both estates—the latter as administrator de bonis non, and the former as agent for his executrix; and the estate of Anderson Crump may have gotten the benefit of the debt due it from W. R. Savage in the settlement which Stamper made of N. L. Savage's administration on it, which would account for his not debiting himself with that amount as administrator of Crump in his settlement of 1854. After such a lapse of time, and the obscurity thrown upon these transactions by deaths, and the destruction of records, and the loss of papers, a settlement ought not to be surcharged and falsified because some of the transactions cannot be now clearly and fully explained.

But these objections are secondary and inconsiderable, in view of the great and overwhelming objection of stating an account to charge a dead man's estate, upon only partial evidences of his transactions, and partial settlements now only extant, whilst other and important evidences of his transactions, and of further and fuller settlements, which were in all probability made and placed on record, have been lost, and cannot now be produced, because of the destruction of the records by fire, 559 *and the seizure and pillage of his private papers by a licensed soldiery.

In Foster's curator v. Rison & al., 17 Gratt. 321, JUDGE MONCURE said, p. 347: "Something may be due; I might go further and say, that probably something is due from the estate of John W. to the estate of John Foster on account of the transactions stated in the bill. But the possibility, or even the probability that something is so due, is not enough to entitle the plaintiff to an account. Independently of the bar of the statute, it would be a sufficient answer to his claim for an account that one cannot now be settled with any reasonable expectation of doing justice to the defendant, and that the plaintiff's testator is in fault for not having sooner asserted and prosecuted his claim. It may be said that John W. Foster was also in fault for not having himself rendered and settled an account. Non con-

stat that he did not render and settle an account."

These principles are eminently applicable to this case. It is easy to see that if the records of the courts of New Kent county had not been destroyed, they might have poured a flood of light upon these transactions, which would have brought the commissioner to very different conclusions; and which, too, would have been more consonant with the reasonable presumptions of the case.

It is incredible, if these large balances were due the plaintiffs by James Stamper in his lifetime, that they would not have asserted their claims long ago.

What was there to prevent them instituting their suit more than twenty years ago, in the lifetime of James Stamper, or immediately after his death, in the lifetime of his executor, to assert this claim for a large balance due them, and demanding a settlement? His transactions were then probably manifested by the records of the court, and if not fully disclosed, could have been satisfactorily explained by living witnesses.

560 If they had *this large balance in the hands of James Stamper, he had ample money to pay it, and they were not so plethoric that they could afford to lie out of it. They appear to have been in needy circumstances, and if this money way lying in the hands of Stamper, it was certainly as well known to them as now, and they would hardly have been content to let it lie there. They were under no disability to sue, and would hardly have slept on their rights for such a length of time. But we do not hear of their ever claiming such indebtedness until the bringing of this suit—after the destruction of the records, the death of the actors and of others who might have thrown light on the transactions.

Some papers have been found amongst the wreck of Robert Howle's papers, which show that they had settlements with him of various transactions, in which his testator was an actor. Settlements were made between them, and receipts executed by them to him for the several amounts which appeared to be due them from the estate of James Stamper. If Stamper was owing them these large balances now claimed, is it not likely that they would then have insisted upon the settlement and payment of them too? If there was anything due them, the presumption is that they then claimed it, and that it was then settled and paid to them, and that the evidence of it is among the rifled and lost papers or burnt records; and this conclusion is confirmed by the fact that they furnish no evidence, after the foregoing settlements and payments to them by Howle, that they set up any claim in the lifetime of Howle to other balances due them from the estate of Stamper; and by the virtual disclaimer of Mr. Howle, not long before his death, when he stated to Mrs. Frazier that he had settled up and paid all the debts due from James Stamper's estate, except two or three small debts, which he intended to pay in a short time.

561 *But as an offset to these conclusions, it is said that there was a controversy as to the title of the slaves, and that a suit was depending in the circuit court of New Kent county to decide to whom they belonged, and that the papers in that suit were lost in the general conflagration of the records of the court. It seems to be conceded that there was such a suit; but when and by whom brought, and against whom, and how decided, or whether decided or not, there is nothing to show. It is most likely that the suit was brought by the legatees of Robert Crump, the father of Anderson Crump, under whose will, which was lost in the burning, they claimed against the plaintiffs, legatees of Anderson Crump; and if brought in the lifetime of James Stamper, who had possession of the slaves, he was a defendant, and if after his death, J. S. Lacy, his successor as administrator de bonis non of Anderson Crump, would have been a defendant; and also Robert Howle, the administrator of Stamper, would have been a necessary party to account for the hires his testator had received. It is most probable that the suit was brought in the lifetime of Stamper and was probably decided against the plaintiffs, as they seem to have abandoned the claim. We hear of them making no claim to the slaves or the hires after they came to the hands of J. S. Lacy. The presumption is that not only the question of title, but the account of hires, was settled in that suit; that James Stamper, or his executor, Robert Howle, was required to render an account of the hires that were in the hands of Stamper, and paid them to a receiver, under the order of the court, or to the party who it was decided was entitled to the slaves. How else can it be accounted for, that when Howle settled up other transactions of his testator with these plaintiffs, they made *no demand for the settlement of the hires also? If it should be said that the suit was not decided, then it was the duty of the court to have ordered an account of the hires, and directed what appeared to be in the hands of James Stamper to be paid into court, and it must be presumed that what ought to have been done was done. The controversy with regard to the title to the slaves, or the pending of the suit, does not repel or weaken the presumption upon the grounds before stated, that the plaintiffs had received payment of all that was due them. But the fact that such a suit had been depending, in connection with the conduct of the plaintiffs in never requiring payment from the executor of James Stamper or of his administrator de bonis non, until after the death of the parties against whom they claim, and the death of witnesses, and the destruction of the records, gives greater force to the presumption that there was nothing due to them from the estate of James Stamper. It is so improbable that the plaintiffs would, under the circumstances disclosed and hereinbefore alluded to, have slept on their rights and never have claimed money as due them in the hands of the representatives of James Stamper during the long lapse of time from 1856 to 1871, that

it raises a strong presumption that there was nothing due them, and the inability of the defendants to produce receipts or other evidences of payment, under the circumstances of the loss of papers, and the destruction of the records of the court, whether such evidence would probably exist, is not entitled to be weighed against that presumption.

It is a rule of equity not to encourage stale demands, or to give relief to parties who sleep on their rights. No precise limit of time can be stated within which the interposition of the court must be sought.

What is a reasonable time cannot well **563** be defined so as to establish *any general rule, and must, in a great measure, depend upon the exercise of the sound discretion of the court, under all the circumstances of each case. In *Gregory v. Gregory*, Coop, 201, Sir William Grant, M. R., refused to set aside a purchase by a trustee, after a lapse of eighteen years. In *Lord Selrey v. Rhoades*, 2 Sim. & St. R. 41, when a lease was granted to a steward, and eleven years had elapsed, the court refused to set the lease aside, though there were special circumstances in the case. So in *Baker v. Reed*, 18 Beav. R. 398, a bill filed after the lapse of seventeen years to set aside the purchase of a testator's estate by his executor at an undervalue, was dismissed on the ground of delay. Kerr on Frauds, p. 303, and numerous cases cited. Parties who would have had the clearest title to relief had they come in reasonable time, may deprive themselves of their equity by a delay which falls short of the period fixed by the statutes. Ib. p. 305, and cases cited.

In *Carr's adm'r, &c., v. Chapman's legatees*, 5 Leigh, side p. 164, JUDGE CARR elaborately reviews the decisions on this subject, English and American. We beg leave to refer to his opinion with only this brief citation. He remarked: "Equity, always averse to state claims, will not be called into activity in aid of legatees after great length of time, especially if the original parties are all dead and their representatives allege their inability to furnish the accounts." The bill in that case was not filed until twenty-eight years after the death of the first testator, but from twelve to twenty years after some of the plaintiffs attained full age. In the case in hand the legatees not only delayed bringing suit until all the original parties were dead, but until all the records of the courts were destroyed, which were the repositories of the evidences upon which the defendants might have relied to show that their intestate and ancestor had faithfully discharged his fiduciary obligations. In the case cited **564** the *decree was reversed and the bill dismissed, although some of the plaintiffs had delayed only twelve years in bringing suit after their disabilities were removed.

In *Pickering v. Lord Stamford*, 2 Ves. Jr. R. 581, the master of the rolls said "that parties shall not by neglecting to bring forward their demands put others to a state of inconvenience, subjecting them to insuperable difficulties. Against such a bill, undoubtedly, the court ought to set its face." "If from

the plaintiff's lying by it is impossible for the defendants to render the accounts he calls for, or it will subject them to great inconvenience, the plaintiff must suffer, or the court will oppose what I think the best ground—public convenience." The foregoing is cited with approval in *Hayes v. Goode*, 7 Leigh, 452, 487, and by Allen, J., in *Caruthers' adm'r v. Trustees of Lexington*, 12 Leigh, 610, 618. In the latter case Allen, J., said: "No particular period is fixed by the cases as limiting the demand for an account. If from the delay which has taken place it is manifest that no correct account can be rendered, that any conclusion to which the court can arrive must be at best but conjectural, and that the original transactions have become so obscured by time and the loss of evidence and the death of parties as to render it difficult to do justice, the court will not believe." That, it seems to me, is emphatically this case. The original transactions have become so obscured by time and the loss of evidence, the total destruction of the records of the courts, the death of the actors in these transactions, and the death of witnesses, as that the account, which is the basis of the decree, is stated in great part upon conjectural estimates and upon partial and incomplete settlements, showing balances against him, in the absence of evidence of further and subsequent settlements, which were in all probability made and entered of record, which would

show the satisfaction of the balances **565** appearing to be due from *the administrator on the previous settlements, every trace of which has been destroyed in the conflagration of the records of the court—involving in the destruction the records of a suit, which is known and admitted to have been depending, which would have required the further and final settlement of the administrator's accounts involved in this controversy, and which it is reasonable to presume, under all the circumstances of this case, were settled and paid into court or to the parties entitled thereto.

The same doctrine was reiterated by this court in the recent case of *Harrison & als. v. Gibson & als.*, 23 Gratt. 212. And JUDGE STAPLES, speaking for the whole court, said: Although the time which has elapsed since the death of Mrs. Wagoner may not of itself constitute a statutory bar to the claim, still the unaccountable neglect of the parties for fourteen years thereafter to prosecute any suit, when considered in connection with the other circumstances, is very persuasive against the equity and justice of that claim. I think they fully justified the court below in dismissing the bill.

The plaintiffs below, by their delay and gross laches in asserting their claim, until by the destruction of the records of the courts, and the loss of papers, and the death of the actors in the transactions, and of important witnesses, it is not only inconvenient and difficult, but impossible for the defendants, as they aver, to state an account which would do justice to the estate of the decedent, and the court in decreeing an account upon such imperfect and defective material would incur

the hazard of doing great injustice to the estate of one who has been dead for nearly a quarter of a century, have not shown themselves entitled to the assistance of a court of equity. It is a well established principle governing a court of equity, that

nothing can call it forth into activity **566** but conscience, *good faith and reasonable diligence; where these are wanting the court is passive and does nothing. It always refuses its aid to stale demands, where the party has slept upon his rights and acquiesced for a great length of time. There is no precise limit of time prescribed, but each case must depend on its circumstances, and the destruction of records and the loss of evidence and the death of parties and witnesses to the original transactions prior to the assertion of the claim, are circumstances to be weighed in connection with the delay in determining whether a court of equity should give the plaintiffs the assistance which they invoke. These circumstances I have reviewed, and upon the whole am of opinion to reverse the decree and to dismiss the plaintiffs' bill.

BURKS, J. I do not concur in much that is said, and not at all in the conclusion reached in the opinion just delivered by JUDGE ANDERSON. Notwithstanding the lapse of time, death of parties, and loss of papers, I think the record furnishes material for an account on which a decree might be based doing substantial justice. The only matters in controversy are the hires for the years 1853, 1854, 1855, and 1856. The papers W O H and H O M purport to be accounts stated between Stamper and the estate of his intestate for the years 1853 and 1854. They are in the handwriting of Stamper, and no doubt are correct copies of the accounts duly stated by Christian, the commissioner. The hires and expenses of the negroes for the year 1853 are embraced in the last of the two accounts as shown by the paper H O M. The balance against Stamper, as shown by this last-named account, was \$1,289.26 as of the 1st day of January, 1855. There can be no doubt then as to the hires and expenses for 1853. For the hires and expenses of 1854, we

have several papers which show with **567** sufficient accuracy what *they were.

There are exhibits J D C, A B X Y, and Q S. Exhibit J D C is proved to be in the handwriting of the commissioner (Christian), who stated the accounts of the two preceding years. It purports to be the account of Stamper with the estate of his intestate for the year 1855. It is true no balance is formally struck, but it sets out the debits and credits with minuteness, showing the hires of all of the negroes in detail for the year 1854, and also the expenses for that year. A B X Y is an extract from the private account-book of Stamper, in which are set down, in Stamper's own handwriting, the hires of three of the slaves for the year 1853, and all of them for the years 1854 and 1855.

Q S is an extract from the ledger in the handwriting of the same commissioner, Christian. It is a statement of the hires for the years 1855 and 1856. Now, these hires, charged

in the papers J D C, correspond with the statements contained in A B X Y and Q S. The papers taken together show with sufficient certainty what were the hires for all four years. There is no direct evidence of the expenses for the last two years, 1855 and 1856, but a reasonable estimate of them can be made from the papers before referred to. The commissioner, in stating the accounts, was guided and controlled chiefly by those papers, and the results reached by him cannot be far out of the way, if at all. Certainly Stamper owed a balance of \$1,289 as of the 1st day of January, 1855. The undisputed, settled account, H O M, shows that fact. The balance shown by the settlement by the commissioner in the court below as of that date is some \$300 in excess of the balance stated in the account H O M. Perhaps this last named balance should have been adopted by the commissioner and court as the true balance, and the accounts reported corrected in that particular, and it may be in some other matters of minor detail. The accounts stated any way on

568 just principles would show *a large balance due the appellees. There is no evidence showing or, as I think, tending with any force to show, that these hires have ever been paid. While so much stress is laid upon the loss of papers, it is remarkable that the papers produced in the cause, while they show settlements between Stamper and the appellees, and between Stamper's representative and the latter, they show no accounting for hires.

These settlements, as the papers abundantly show, I think, related exclusively to the payment to the appellees of what was coming to them on account of the sales of the perishable property of Crump's estate and the sale of land. Out of the moneys arising from these sources were deducted the bonds of the appellees given for the hires of the slaves, showing, inferentially, at least, that the hires were not paid. It is very strange that while the papers relating to these settlements are found and show very satisfactorily the disposition of the funds arising from the sales of the perishable property and of the land, no receipts or other papers showing or tending to show the payment of the hires were ever found or produced, if such payment was made. The dispute about the title to the slaves would sufficiently account for the non-payment of the hires. A suit involving the title was pending when Stamper died. It is not to be presumed that Stamper would hazard a payment of the hires to the litigants on either side until this dispute was settled. It was not settled in Stamper's lifetime nor in the lifetime of his first representative, Howle, who died in 1862, and the question of title is now made in this very case. The possibility that Stamper might have accounted for these hires in the suit brought by Robert Crump's legatees, the papers in which suit have been burned, does not, I think, raise a presumption on which a decree can be safely based. At most, **569** it is a *mere conjecture. If Stamper had, as suggested, paid the money into court in the case referred to, the probability

is there would have been some trace of the payment, some receipt or other paper or papers giving at least some clue. There are none such.

I do not think this is a case of such laches as to prevent the equitable relief sought. Stamper died in September, 1856. About four years or four and a half years intervened before the commencement of the war. The war lasted four years. Stay-laws were in force for four years longer. Laches cannot be imputed during these periods; at least, the existence of war and the partial suspension of remedies for about eight years were circumstances to be considered in determining the question of laches. We have so held in several cases. This suit was instituted about two years after these obstructions were removed, and in 1868 the complainants had filed a petition touching the title to the slaves in the suit of *Samper v. Lacy*, which petition was rejected without passing on the merits. If laches can be predicated of any period, it is of the four and half years that elapsed before the war. I do not think the failure for four years to call a fiduciary to account is such laches as to protect his estate from accountability, although by reason of war, death, destruction and loss of papers, there may be some difficulty in the settlement of his accounts.

Such are my views, in part, in this case, hastily sketched this morning and imperfectly stated. If the case be reported, I reserve the liberty of writing out my opinion more fully and carefully.

STAPLES, J., concurred in the opinion of BURKS, J.

570 *The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the decree of the circuit court of New Kent county is erroneous. It is therefore ordered and decreed that the decree aforesaid be reversed and annulled, and that the appellees pay to the appellants their costs expended in the prosecution of their appeal here. And the court proceeding to render such decree as ought to have been rendered by the court below, it is adjudged, ordered and decreed that the plaintiffs' bill be dismissed with costs.

Decree reversed.

571 *Sands, Receiver, v. City of Richmond.

[31 Am. Rep. 742.]

March Term, 1879, Richmond.

1. **Local Assessments.**—The city council of Richmond has authority under its charter and the

***Local Assessments.**—*City of Norfolk v. Ellis*, 26 Gratt. 224; *Richmond & A. R. Co. v. City of Lynchburg*, 81 Va. 473; *Davis v. City of Lynchburg*, 84 Va. 861; 1 Min. Inst. (4th Ed.) 630, 631. Compare *City of Norfolk v. Chamberlain*, 89 Va. 196; *McCrowell v. City of Bristol*, 89 Va. 652. See especially 92 Va. 561, where all the cases on the subject are thoroughly reviewed; *Wilson v. Phillippi*, 39 W. Va. 80; *Parkersburg v. Tavenner*, 42 W. Va. 491.

constitution of Virginia to require the owner of a lot upon a street which has been graded, paved and guttered by the city to pave the sidewalk in front of his lot, and when it is at the corner of a street, to pave the sidewalk on the side of the lot. And if the owner does not have the work done within the time prescribed by the ordinance, the city may have it done and collect the money from him.

2. **Ordinances—Charter Requirements.**—If the charter of the city requires that an ordinance providing for the opening, grading, &c., of streets shall be passed by a vote of three-fourths of each branch of the council, if the present ordinance was not so passed, yet if it is an amendment of a prior ordinance giving substantially the same powers to the council, the act of the council will be sustained.

This was an appeal from a decree of the chancery court of the city of Richmond made in a cause depending therein in the name of *Atkinson v. Atkinson & others*, directing Alexander H. Sands, as the receiver of the court in that case, to pay to the City of Richmond \$53.82, expended by the city in paving the sidewalk in front and on the side of a lot at the northwest corner of Leigh and Tenth streets, owned by the parties in that cause. It appears that the city having in pursuance of the ordinance of the city graded, guttered and curbed the streets and sidewalk along the front and side of said lot, gave a notice to Sands, as receiver in said cause, to pave the sidewalk; and he failing to have the work done within thirty days, the engineer of the city, as directed by the ordinance, had the work done, the cost of which 572 was \$53.82. This *bill was presented to Sands for payment, and payment was refused for the reason that, being an officer of the court in the case, he desired the order of the court in the premises.

The petition was thereupon filed by the city, and Sands filed his answer, in which he insisted—

1st. That the ordinance was invalid as being in violation of the constitution of the state.

2d. Because the ordinance under which this demand upon him was made was not passed by three-fourths of the members of each branch of the city government, as required by the 25th section of the charter of the city.

It was agreed by the parties that the ordinance was not passed by either branch of the city government by the vote of either two-thirds or three-fourths of all the members of each body respectively; but it appeared that the ordinance of which this was an amendment contained substantially the same provision.

The case came on to be heard upon the petition on the 9th of May, 1878, when the court held the ordinance was valid, and that the claim made by the city was a valid charge against the property in question, and decreed that Sands, receiver of the court in the cause, do forthwith, or as soon as funds come into his hands, pay to the City of Richmond, the sum of \$53.82, with interest thereupon until paid, in full of the claim set forth in the bill accompanying the petition, and also the

costs of this proceeding. And thereupon Sands applied to a judge of this court for an appeal; which was allowed.

Johnson, Williams & Boulware and Sands, for the appellant.

Keiley, for the appellee.

573 *STAPLES, J., delivered the opinion of the court.

The charter of the city of Richmond provides that whenever a new street shall be laid out, a street graded or paved, or any other improvement whatever made, the city council may determine what portion of any of the expenses thereof ought to be paid from the public treasury of the city, and what portion by the owners of real estate benefited, or may order and direct that the whole expense be assessed upon the owners of real estate benefited thereby. Under an ordinance adopted by the city council, whenever a street is opened, graded, guttered and curbed, in whole or in part, including the walkways, it is made the duty of the owner or owners of property along said street to pave the walkway the full width across their fronts with bricks, or such other material as the committee on streets may approve. Where the property corners on two streets, the property-owner shall pave the said walkway along his depth one-half the distance at his own cost, and the city shall pave the other half at its cost. If, upon notice by the city engineer, the owner fails to make such pavement, the engineer is authorized to have the work done by the city contractor, and the costs are to be collected from the owner.

There are other provisions of the ordinance bearing upon the subject, but they are not necessary to be cited here.

The appellant, acting as receiver by appointment of the chancery court of Richmond, in the case of *Atkinson v. Atkinson et als.*, was notified by the city engineer to pave the sidewalks fronting the property under his control as such receiver. The appellant having failed to comply with this order, the city engineer caused the work to be done by the city contractor; and the question of the receiver's liability was referred to the chancery court, from which the receiver derived his authority. That

574 court *sustained the claim of the city, and from that decision an appeal was taken by the latter to this court.

In the petition for an appeal and in the argument here, the ordinance already cited has been assailed on various grounds.

It is insisted that the assessments authorized by the ordinance—if they are to be regarded as an exercise of the taxing power—violate the rule of uniformity and equality required by the constitution; and if they are not to be so regarded, they are mere appropriations of private property for public purposes without just compensation. This question was fully considered in the case of *Ellis v. City of Norfolk*, 26 Gratt. 224. It was there held that special or local assessments are a peculiar species of taxation, governed by principles that do not apply to

the general burdens imposed for state and municipal purposes. They proceed upon the assumption of peculiar benefits conferred upon the persons liable to the tax in the enhancement of the value of their property by the contemplated improvement. It is not necessary now to go into the argument in support of these propositions.

The validity and constitutionality of these assessments are sustained by an array of authority and force of reasoning which ought to be decisive of the question. Most of the cases on the subject may be found in 2 Dillon on Municipal Corporations, sec. 596 to 600; Cooley's Constitutional Limitations, sec. 619 to 636. In Cooley on Taxation, ch. 20, p. 416 to 473, the whole subject is exhaustively discussed, and all the objections to this species of taxation fully answered. It is not denied that a local assessment may so far exceed the limits of equality and reason, that instead of being a tax or contribution, it would practically amount to confiscation of the property benefited. In such cases it would be the duty of the courts to interpose for the protection of the citizen. *Alley v. Drew*, 44 Verm. R. 174.

575 *The real difficulty in this class of cases is not with respect to the power to assess the expense of local improvements upon the property specially benefited thereby, but with respect to the method or basis of apportioning the expense among the property-holders adjacent to the improvement. It has been held in a number of cases not allowable to impose upon each owner of a lot upon a street the entire cost of grading and paving the street along its front without reference to any contribution to be made by any other property; but that the true mode is to make the street a taxing district, and to apportion the expense of the improvement among the various lots in proportion to their frontage. An opinion was incidentally expressed in accordance with this view in *Ellis v. City of Norfolk*, but the case did not call for a decision of that question. Nor is it necessary to decide it in the present case, for here the assessment is not for the purpose of grading and paving the streets, but for paving the sidewalk after the street is graded, guttered and curbed, including the sidewalk. The city at its own expense grades and paves its streets, but requires the owner to pave the sidewalk in front of his lot.

The owner is supposed to be peculiarly interested in and benefited by the sidewalk in front of his lot, but in the street he is generally interested along with other citizens. Whether this distinction be sound in principle or not it is needless to enquire. It is sustained by very respectable authorities.

In *Goddard*, petitioner, 16 Pick. R. 504, a leading case recognized as authority, the court say: "Although the sidewalk is part of the public street, and the public have an easement in it, yet the adjacent occupant often is the owner of the fee, and generally has some peculiar interest in it and benefit from it distinct from that which he enjoys in common with the rest of the community.

He has this interest and benefit often
 576 in accommodating his *cellar-door and steps, a passage for fuel, and the passage to and from his own house to the street. To some purpose, therefore, it is denominated his sidewalk."

In *Woodbridge v. The City of Detroit*, 9 Mich. R. 274, 310, Judge Christiancy, while maintaining with great ability the invalidity of an assessment upon the owner to defray the expense of grading and paving the street adjacent to his property, partly upon the ground that such an improvement is for the public benefit, and the owner is entitled to no peculiar use of the street not common to the public, concedes that the same rule does not apply to an assessment for the purpose of paving the sidewalk, in which the adjoining owner is recognized as having a peculiar interest and benefit distinct from that which he enjoys in common with the rest of the community.

In his work on Taxation, Judge Cooley strongly controverts the justice as also the legality of assessing each individual lot with the cost of improvements along its front. The reason he assigns is, that if every owner is compelled to construct the street in front of his lot, his tax is neither increased nor diminished by the assessment upon his neighbors. Nothing is apportioned or divided between him and them, and each particular lot is in fact arbitrarily made a taxing district and charged with the whole expenditure thereon. From accidental circumstances the major part of the cost of an important public work may be expended in front of a single lot, these circumstances not at all contributing to make the improvements to the lot thus specially burdened more valuable, perhaps even having the opposite consequence.

The learned author nevertheless concedes that a different rule applies to assessments for the construction and repair of the sidewalks. He declares that the cases of assessments for the construction of walks by the side of streets in cities and other popu-
 577 lous places are more distinctly *referable to the power of police. The duty imposed upon the owners is enjoined as a regulation of police, made because of the peculiar interest such owners have in the walks, and because their situation gives them peculiar fitness and ability for performing with promptness and convenience the duty of putting them in a proper state, and of afterwards keeping them in a condition suitable for use. Upon these grounds the authority to establish such regulations has frequently been supported. Cooley on Taxation, 398, 453; see also *Mayor & Alderman v. Maberry*, 6 Hun. 368; Cooley on Constitutional Limitations, 734.

Whether the learned author is correct in referring the improvement of the sidewalk by the owner to the police power, or whether it belongs to the taxing power, it is not material to discuss. It is a power exercised by the municipal authorities of, perhaps, three-fourths of the cities of the United States under their respective charters; it is just and reasonable in itself; and, with a

few exceptions, is approved by the whole current of decisions.

The ordinance of the city of Richmond would seem to be peculiarly favorable to the owners of the lots, in merely requiring them to pave the sidewalks after they have been graded at the expense of the corporation; and in the case before us the assessment does not appear to be extravagant or in excess of the benefits which the owners of the property will probably derive from the improvement. We are therefore of opinion that the ordinance is not obnoxious to any of the objections based upon the ground of its alleged illegality or unconstitutionality.

It has been argued, however, that the ordinance upon which these assessments are based was not adopted by a three-fourths vote of all the members of each branch of the city council, as required by the
 578 charter. The counsel *for the City of Richmond concedes this; but he maintains that a three-fourths vote was not necessary; that the charter confers upon the city council two distinct powers: one, for the general management of all the streets (found in the nineteenth section of the charter); the other, for the improvement of particular localities; and for these latter exceptional cases the charter confers a special power (contained in the twenty-sixth section), only to be exercised with the concurrence of three-fourths of the council. We are not prepared to give our assent to this construction of the provisions of the charter referred to. And if the assessment in this case depended exclusively upon the amended ordinance, approved 18th May, 1875, we think there might be some difficulty in sustaining it. Without expressing any opinion on this point, it is sufficient to say that if that ordinance be void for the want of the requisite vote, it leaves in full force the preceding ordinance, which is substantially the same, and under authority of which this assessment might have been made. It is difficult, therefore, to see what advantage the appellant expects to gain when he succeeds in establishing the nullity of the amended ordinance.

Another objection to the ordinance is that it attempts to delegate to the city engineer and to the committee on streets the exercise of functions which properly belong to the city council. We are unable to perceive the force of this objection. The city council determines when a new street is to be opened or an old one to be graded; and the work is of course to be done under the supervision of the city engineer. The ordinance requires that the owner shall pave the sidewalk after the street is graded, and the city engineer merely gives notice to the owner to do the work as prescribed by the ordinance. The city engineer is the mere agent of the council to carry into execution its orders, and cannot be said in any sense to exercise powers properly belonging
 579 to the city council. The *same is true with respect to the street committee, as it is termed.

With respect to the alleged insufficiency of the notice in failing to describe the prop-

erty to be paved and the precise duty to be performed, it is sufficient to say that a copy of the ordinance was appended to the notice, which fully informed the appellant of all that was required to be done by him. If the location of the property was not described with entire accuracy the appellant was not in the least misled by it. He well knew the lot or lots under his control as receiver were referred to. This failure to perform the work did not proceed from any misapprehension on this point, but because he considered it his duty to resist the assessments as illegal, and to submit the whole matter to the determination of the courts. The objection does not appear to have been made in the court below, but is for the first time suggested in this court.

This disposes of all the material points raised by the appellant. For the reasons stated, we are of opinion that none of them are valid, and the decree of the chancery court must be sustained.

ANDERSON, J., dissented.

Decree affirmed.

580 *Brockenbrough's Ex'x & al. v. Brockenbrough's Adm'r & als.

March Term, 1879, Richmond.

I. A deed of trust is given in 1870 to secure a *bona fide* debt of \$10,000, evidenced by four notes payable in one, two, three and four years, and conveys a tract of land with the crops then upon or thereafter grown upon the land until said notes are fully paid, all stock of horses, mules, cattle, sheep and hogs with the increase of the same then on the said land and thereafter placed on the same, and all farming implements used in the cultivation of the said land—HELD:

1. The deed is not *per se* fraudulent on its face.
2. **Liens—After-Acquired Property.***—*Quære*: If the crops thereafter grown upon the land, or the increase of the stock, or other stock or implements afterwards put upon the land, pass by the deed, and will be protected against subsequent execution creditors.

II. **Deed of Quit-Claim—Release of Securities.**—Pending a suit by judgment creditors to set aside the deed as fraudulent, the grantor makes a deed of quit-claim to his creditor of all the property conveyed in the deed; but the notes are not given

***Liens on After-Acquired Property.**—The principal case was cited in *First Nat. Bank v. Turnbull & Co.*, 32 Gratt. 695. See also 3 Min. Inst. (2nd Ed.) 268; Code of 1887, ch. 110, §§ 2493-6; Acts 1891-92, p. 782.

Merger of Estates.—In *Garland v. Pamplin*, 32 Gratt. at p. 315, the principal case was cited to support the proposition that while the rule at law may be inflexible, in equity it depends upon circumstances, and is governed by the intention, either expressed or implied (if it be a fair and just intention), of the person on whom the estates unite, and the purposes of justice, whether the equitable estate shall merge or be kept in existence. 4 Kent's Comm. 102 (mar. p.). See also *Rhea v. Preston*, 75 Va. 757, 776, citing principal case.

up, nor is the deed of trust released—HELD: That whether the trust is released depends upon the intention of the creditor; and in this case it was held upon the evidence there was no such intention.

III. Deed of Trust—Reservation—Legality.*

—A deed of trust to secure certain debts conveys certain real estate, and the grantor reserves in it, to himself and his family, all exemptions and property allowed by the constitution of Virginia and all laws passed in pursuance thereof, and in addition thereto all exemptions allowed under the bankrupt laws—HELD: The reservation is legal and valid.

IV. L brings an action on a bond against B, which is on the office judgment of the court at its March term, which commences on the third of the month, and the office judgment is confirmed on 581 *the fifth, which is the last day of the term of the court. On the first day of the same term of the court B goes into court and confesses a judgment in favor of S, no suit having been instituted against B by S—HELD:

1. **Confession of Judgment—Validity.†**—The judgment in favor of S is valid, though no suit had been instituted by him against B.
2. **Same—Time of Taking Effect.**—That the judgment of L relates back to the first day of the term, and the law not regarding a fraction of a day, both judgments stand as of the same date.

This was a suit in equity in the circuit court of Richmond county, brought in March, 1874, by Lucy C. Brockenbrough, executrix of Littleton Brockenbrough, deceased, and Ferdinand Shackelford, administrator of Thomas R. Shackelford, deceased, judgment creditors of John M. Brockenbrough, to set aside as fraudulent three deeds of trust made by the said John M. Brockenbrough. The creditors secured, as well as John M. Brockenbrough, answered denying the fraud.

The first of these deeds bears date the 26th of October, 1870, and by it John M.

***Deeds of Trust—Reservation of Exemptions—Presumption of Fraud.**—The provisions of a mortgage or deed of trust may be of such a character as of themselves to furnish conclusive evidence of a fraudulent intent; but the presumption of law is in favor of honesty, and the court cannot presume fraud unless the terms of the instrument preclude any other inference, and the fact that the grantor reserves his exemption rights is no evidence of fraud. *Williams v. Lord & Robinson*, 75 Va. 390, citing principal case; *Young v. Willis*, 82 Va. 291; *Hickman's ex'or v. Trout*, 83 Va. 478, 495, dissenting opinion of FAUNTLEROY, J.; *Keagy v. Trout*, 85 Va. 390; *Paul v. Baugh*, 85 Va. 955; *Hughes v. Epling*, 93 Va. 424; *Shattuck v. Knight*, 25 W. Va. 595.

†**Confession of Judgment—Validity.**—The principal case was cited in *Shadrack's adm'r v. Woolfolk*, 32 Gratt. 707, to support the proposition that a judgment confessed without writ of previous process is not therefore void.

Judgments—Commencement of Lien.—See 2 Min. Inst. (4th Ed.) 312, 313; *Yates & Ayres v. Robertson & Berkley*, 80 Va. 475; Code of 1887, § 3567; Acts of 1897-98, p. 507; *Nat. Bank v. Distilling Co.*, 41 W. Va. 531; *Hockman v. Hockman*, 93 Va. 456.

Same—Collateral Attack.—As to collateral attack on judgment not void, see *Alexander et al. v. Alexander*, 85 Va. 353.

Brockenbrough and Austina, his wife, for the purpose of securing the payment of four notes therein described, due to I. M. Parr, of Baltimore, conveyed to Thomas Croxton a tract of land called The Island, and personal property, &c. This deed and its provisions are fully set out in the opinion of Burks, J. It appeared very clearly from the evidence that Parr lent to Brockenbrough \$10,000 at twelve per cent. interest, and the notes mentioned in the deed were given for that loan; and certainly as to him and the trustee, Croxton, there was no fraudulent intent; and as to Brockenbrough, there was no evidence of fraud unless it was to be inferred from the provisions of this and subsequent deeds.

The second deed bore date the 28th of February, 1873, and by it John M. Brockenbrough conveyed to T. R. B. Wright a farm
582 called The Cottage, containing *two hundred and eighty-four acres, in trust to secure to Lucy C. Brockenbrough, executrix of Littleton Brockenbrough, deceased, \$3,400, due by bond, and to F. Settle, superintendent of the poor, and his successors in office, \$1,327.50, with interest from the 1st of February, 1872, due by bond. And the said Brockenbrough reserved to himself the right to and use of said property until the 1st of January, 1877, unless he, the said Brockenbrough, shall consent to a sale at an earlier day; and upon the further trust that the said Wright, with the consent of the said Brockenbrough, shall sell at any time; but after the 1st of January, 1877, if payment is demanded by said creditors, upon the terms and in the manner prescribed by § 6, ch. 117, Code of Virginia, in all respects, except that it shall not be for cash, but upon such terms as are provided for in the act of the general assembly entitled an act to regulate judicial sales and prevent a sacrifice of property, approved July 11th, 1870. And upon the further trust that the said Wright, with the consent and under the direction of said Brockenbrough, shall at any time sell the said tract of land in part or in whole, as said Brockenbrough might deem most expedient, and also cut and sell any wood and timber, and appropriate the proceeds of the same, as well as the rents and profits, to the payment of the debts secured. And it is expressly covenanted and agreed by the said Brockenbrough that he reserves to himself and family all exemptions and property allowed by the constitution of Virginia and all laws passed in pursuance thereof, and in addition thereto all exemptions allowed under the bankrupt law. This deed was admitted to record on the 6th of March, 1873.

By deed of the same date as the last named, the said John M. Brockenbrough,
583 reciting that his wife, Austina, *had united with him to convey all her right and interest in certain lands mentioned, devised to her by her father, and also in conveying her contingent right of dower in The Island, and that it was agreed between them that in lieu thereof he should settle upon her for her benefit certain other property of adequate value and amount; and whereas her brother, Austin Brockenbrough, did by his will give

to said Austina personal property to the amount of \$6,000, which, with interest, now amounts to \$8,000, to be made over to her by her husband by deed, which said sum has been received by the said John M. Brockenbrough; he, in consideration of the premises, and the further consideration of the natural love and affection which the said John M. Brockenbrough has for his wife, conveys to T. R. B. Wright his farm called The Cottage, after the payment of the debts due Lucy C. Brockenbrough and F. Settle; also his interest in The Island, subject to the payment of the debt of Parr, with all crops, horses, &c., &c., in trust for the use and benefit of himself and wife, and in no way subject to his debts, during their joint lives and the life of the survivor, and then to their children.

It appears that the plaintiff, Lucy C. Brockenbrough, had brought a suit on the bond held by her against John M. Brockenbrough, and that at the March term of the county court, which commenced on the third day of the month, she recovered a judgment against him. And she refused to accept the deed executed for her security.

It appears further that Settle had not instituted an action on the bond due to him, but on the first day of the March term of the court Brockenbrough went into court and confessed a judgment for the amount of the bond without any process having been issued against him. And upon this ground the plaintiffs in their bill contested the validity of his judgment.

584 *It appears further that the tract called The Island was devised by Moore F. Brockenbrough to his five sons; that under a decree for partition of the land, in 1853, the commissioners allotted the whole tract to B. W. Brockenbrough, who agreed to take the same at the valuation put upon it, and he conveyed it to Richard H. Harwood and others in trust to secure the several parties interested in the property their proportions of the purchase-money. One of those parties was Jno. M. Brockenbrough, and another was Littleton Brockenbrough, the testator, of the plaintiff, Lucy C. Their shares were each \$5,595.18¾. Another share of the same amount was due to Edward Brockenbrough, who seems to have died previous to the year 1870.

By deed dated the 30th of August, 1870, B. W. Brockenbrough, in consideration of the payment of all debts due by him to Edward Brockenbrough, deceased, as well as the payment by J. M. Brockenbrough of the liabilities incurred by the said B. W. Brockenbrough on account of The Island property, the release of all demands held by the said J. M. against the said B. W. Brockenbrough in any way, and of the further consideration of \$3,250 paid to the said B. W. by the said J. M. Brockenbrough, conveyed to the said J. M. Brockenbrough the tract of land called The Island, with all the personal property thereon, and his, the said B. W. Brockenbrough's, interest in the estate of Edward Brockenbrough, deceased.

In the progress of the cause the court directed a commissioner to ascertain and re-

port what moneys are still unpaid and due by B. W. Brockenbrough as purchaser of the farm called The Island, and to whom the said moneys are due, and also what liens, whether by deeds of trust or otherwise, there are upon the realty and personalty mentioned in the complainant's bill, and any other matter deemed pertinent by him, or that he may be requested to report specially by any party in interest.

585 *In pursuance of this decree the commissioner made a report of the debts of J. M. Brockenbrough which were liens, and their priorities. The first is a judgment recovered by Thomas Shackelford on the 8th of April, 1867, for \$300 of principal, interest and costs \$154.15. The second is the four notes due I. M. Parr, secured by deed to Croxton, amounting to \$13,240. He states the judgment of Settle as of March 3d, 1873, the first day of the court, and that of Mrs. Lucy C. Brockenbrough as of the 5th of March, the last day of the term, when the office judgment was confirmed.

The amount due by B. W. Brockenbrough on the purchase of The Island farm, and secured by deed of trust to Harwood and others, principal and interest \$11,860.88 to Edward Brockenbrough, and to Wm. F. Brockenbrough a balance of \$286.17. John M. Brockenbrough was the administrator of Edward Brockenbrough, and the estate was debtor to him on his administration account \$1,048.03, and the other outstanding debts of Edward, not paid, were \$475.76. The commissioner also makes what he calls an approximate estimate of division of the estate of Edward Brockenbrough, and after deducting the outstanding debts, including the amount due the administrator and the expenses of collecting the fund, he makes the amount for division \$10,030.88, one-sixth of which, \$1,671.81, was due to B. W. Brockenbrough, W. W. Brockenbrough, John H. Brockenbrough, Robert Knox and wife, and W. R. Aylett and wife, and one-sixth was due to the three children of Littleton Brockenbrough, each the sum of \$557.27.

While the cause was pending in the court, and after the commissioner had settled the accounts as before stated, the plaintiffs filed a supplemental bill, in which, after referring to these accounts, they charge that since the filing of their bill the debt to Parr, se-

586 cured by the *deed to Croxton, had been paid off and satisfied by John M. Brockenbrough, and that he has been discharged of the same by the said Parr, and the notes specified in said deed of trust have been surrendered to said Brockenbrough, but that Croxton has not executed to Brockenbrough a deed of release, but still holds the legal title to the property specified in said deed. And making John M. Brockenbrough, Parr, and Croxton parties defendants to the bill, they pray that the property may be sold for the payment of their debts, and for general relief.

Croxton and Parr answered the supplemental bill. Croxton denied the allegations of the bill that the notes due to I. M. Parr and secured by the deed of trust had been

satisfied by J. M. Brockenbrough. Respondent had advertised for sale The Island and other property to satisfy said notes, and the sale was enjoined. In this state of matters Brockenbrough made and executed a deed of quit-claim to The Island and certain personal property mentioned in said deed of quit-claim, and put said Parr in possession of the same until the court shall have settled the question of the validity of various claims sought to be enforced against said property, some of which existed by virtue of a deed of trust made by B. W. Brockenbrough many years before the deed to respondent was made. The sole interest of J. M. Brockenbrough was his equity of redemption and possession, the value of the first to him being nothing; no sale could be made on account of the interdict of the court, and when that should be removed this respondent, as well as Parr, knew that liens to the amount of from five to six thousand dollars at least existed ahead of his claim for the notes due said Parr; the possession of the land was valueless to Brockenbrough because of his inability to cultivate it, and hence he was anxious for a sale; but as he could not sell he made the deed and quit-claim to his largest creditor. He avers that no sale of

587 The Island *and other property has ever been made, nor has respondent ever heard of any arrangement to make a deed of release or surrender of the notes secured in the trust to him; certain it is that nothing of the sort has been done.

Parr denied that Brockenbrough had paid the notes given him by Brockenbrough and secured by the deed of trust. Up to October 13, 1874, Brockenbrough had paid him \$792.38, arising from sales made from The Island, as he understood, and that was all.

The deed from J. M. Brockenbrough to Parr bears date the 16th of November, 1874, and in consideration of the sum of five dollars Brockenbrough doth grant, sell, convey and forever quit claim unto the said Parr all his right, title and interest in the farm called The Island, with the following personal property, specifying it.

Several witnesses were examined as to what had been said by Brockenbrough and Croxton in relation to this transaction. It is sufficiently referred to by Judge Burks in his opinion.

The cause came on to be heard on the 25th of November, 1875, when the court held that the deed of trust made by J. M. Brockenbrough and wife to T. Croxton for the benefit of I. M. Parr was good against all creditors seeking to establish liens upon the farm called The Island, except those named in the commissioner's report secured in the deed of trust made by B. W. Brockenbrough to Harwood and others; and it appearing from receipts filed that W. F. Brockenbrough, W. R. Aylett and wife, the heirs of Littleton Brockenbrough, and Knox and wife have been paid the sums reported due them in said report, and it being the opinion of the court that the claims reported as due J. M. and B. W. Brockenbrough passed under the deed to Croxton; and it further appearing that J.

M. Brockenbrough has since the death of his wife made to I. M. Parr a deed granting
588 all *his interest in said Island farm, the injunction awarded in the case of *Shackleford v. Croxton, &c.*, is dissolved.

The court was further of opinion that the personal property of J. M. Brockenbrough, not in existence on The Island farm at the date of the deed to Croxton, embraced in the deed to I. M. Parr of November, 1874, except such as was substituted or exchanged for that then on said farm, is liable to the existing lien of B. W. Brockenbrough; and it was ordered that one of the commissioners of the court should ascertain and report what personal property passed under the deed from J. M. Brockenbrough to Parr, of November, 1874, not embraced in said deed to Croxton, or substituted or exchanged therefor.

The deed to T. R. B. Wright having created interests in The Island farm which could not and did not pass under the deed from J. M. Brockenbrough to I. M. Parr, it is ordered that said Croxton, trustee, proceed, as directed by the deed from Brockenbrough and wife to him, to sell said land and report his proceedings to the court. And the court further orders that I. M. Parr surrender to J. M. Brockenbrough the notes taken and secured in the deed to Croxton, trustee. And the trustee, Wright, was directed to proceed to sell The Cottage farm, embraced in the deed of trust to him, and report to the court. The plaintiffs thereupon applied to a judge of this court for an appeal; which was allowed.

George Walker and Jones & Son, for the appellants.

Jones & Bouldin, for the appellees.

BURKS, J. Of the various questions to be determined in this case, the one deemed of most importance is, whether the deed of trust to Thomas Croxton, trustee, was made
589 with intent to hinder, delay and defraud the appellants *and other creditors of the grantor, John M. Brockenbrough.

The deed bears date the 26th day of October, 1870, and after reciting that the grantor is indebted to I. M. Parr, of Baltimore, Maryland, by four promissory notes, all of the same date with the deed, for the following sums, and payable as follows, to-wit: one note for \$3,200, due November the 1st, 1871; another for \$2,960, due November the 1st, 1872; another for \$3,720, due November the 1st, 1873; and the last for \$3,360, due November the 1st, 1874, purports to convey to the trustee a tract of land called "The Island," lying on the Rappahannock river with all the buildings, improvements, crops then upon or thereafter grown upon the said land, until the said notes are fully paid, all stock of horses, mules, cattle, sheep and hogs, with the increase of the same then on the said land, or thereafter placed on the same, and all farming implements used in the cultivation of the land, in trust to secure the payment of the notes aforesaid to the said Parr, as they respectively become due and payable. In default of the payment of any one of the said notes at maturity,

the trustee, on request by the said Parr, is empowered and required, after advertising, to proceed to sell the property conveyed, for cash, to an extent sufficient to pay all the costs and charges attending the execution of the trust, including the usual commissions, and whatever sum may be then due to the said Parr on any or all of said notes that may have matured, and upon such credit for the residue as will raise the sum or sums necessary to satisfy any of said notes which may not have matured at the time of the sale; and after fully satisfying the said notes with all interest and the costs, &c., aforesaid, the trustee is required to pay the balance arising from the sale to the grantor. No schedule or inventory of the property conveyed was annexed to the deed.

590 *It is contended, in the first place, by the learned counsel for the appellants, that this deed is fraudulent on its face. There is no doubt that the provisions of a mortgage or deed of trust may be of such a character as of themselves to furnish evidence sufficient to justify the inference of a fraudulent intent. Such is the case where the grantor reserves a power over the property conveyed incompatible with the avowed purposes of the trust and adequate to the defeat thereof. This principle was enunciated in *Lang v. Lee & others*, 3 Rand. 410, and has been repeatedly recognized by this court in subsequent decisions. *Sheppards v. Turpin*, 3 Gratt. 357, 373, 397, 398, et seq.; *Spence v. Bagwell*, 6 Gratt. 444; *Addington v. Etheridge*, 12 Gratt. 436; *Quarles & others v. Kerr*, 14 Gratt. 48; *Perry & Co. v. Shenandoah Nat. Bank & others*, 27 Gratt. 755.

While, however, the principle referred to is established by these decisions, it is equally well settled, in this state at least, that no irresistible inference of intent to defraud is deducible from a provision in a deed of trust postponing a sale of the property conveyed for a reasonable length of time and reserving the use of the property to the grantor until sale, even although a portion of the property conveyed may be perishable in its nature and consumable in the use; nor is such inference a necessary deduction from the omission to annex a schedule or inventory of the property to the deed; nor is the inference a necessary one where all these circumstances exist in the same case. *Lewis & others v. Caperton's ex'or & others*, 8 Gratt. 148; *Cochran v. Paris*, 11 Gratt. 348; *Dance & others v. Seaman & others*, Id. 778; *Sipe v. Earman & others*, 26 Gratt. 563.

I do not mean to say that these circumstances, apparent by the deed, when taken in connection with extrinsic evidence, are not entitled to weight in determining the question of intent. I think they are
591 so entitled; but *alone they are not sufficient to establish fraud. They are consistent with an honest purpose. The presumption of law is in favor of honesty, and "the court cannot presume fraud unless the terms of the instrument preclude any other inference." *Allen, J., in Dance & others v. Seaman & others*, supra.

Recurring to the deed in question, I find nothing in it particularly distinguishing it from other deeds held by this court to be valid, except the provision conveying or purporting to convey the crops to be grown on the land until the secured notes are fully paid, and the further provision purporting to convey horses, mules, cattle, &c., which might be thereafter placed on the land.

It is contended that these provisions are indicative of fraud; that while the professed object was to secure the debt to Parr, the real design was, while securing Parr, to shield the property from other creditors and secure the control and use of it to the grantor; and thus that the whole deed was vitiated and rendered void as to such creditors.

This would seem to be a harsh inference. If, as was thought by the judge below, the deed was inoperative to bind the future crops and the stock which might thereafter be placed on the land, a futile effort to convey under a mistaken view of the grantor's right would not be a sufficient ground for the charge of fraud. A man may well mistake the law in such a case and be innocent. Nor, in this view, would the creditors be injured. They might, by legal proceedings, subject the crops and the after-acquired stock to their debts if they chose to do so. If, on the other hand, these provisions were effectual to pass the title at law to the crops and stock, or to bind the same in equity, I do not perceive how fraud can be justly predicated of them. It would seem that the scheme of the deed was, that until default

in the payment of the sums secured, **592** the crops made on the farm, *as well as any stock of the description mentioned which might be placed thereon, should constitute a part of the trust subject. No benefit is reserved to the grantor. Why should such an arrangement be regarded as fraudulent? To my mind, it is rather indicative of an honest purpose in the grantor to dedicate not only what he had, but also what he might make or acquire, to the payment of his debts.

It is a maxim of the common law that a man cannot grant a thing which he has not—*nemo dat quod non habet*. To constitute a valid sale at law the vendor must have a present property, either actual or potential, in the thing sold. *Smithhurst v. Edmunds*, 1 *McCarter* (14 N. J. Chy. Rep.) 409. It is said "that things have a potential existence which are the natural product or the expected increase of something already belonging to the vendor." 9 *Bush*. (Ky.) 319. Hence, trees, grass, and corn growing and standing on the ground, fruit upon the trees, and wool upon the sheep's back may be mortgaged. The legal title passes. *Idem*. There is conflict in the authorities as to whether unplanted or future crops—*fructus industriales*—can be conveyed so as to pass the title at law. It was held in a recent case in the supreme court of New York that while at law a mortgage or sale of future-acquired personal property, the mortgagor neither having acquired the thing nor the agent of its production at the time of mak-

ing the contract, creates no valid subsisting property, yet if the future-acquired property be the product of present property in the mortgagor, as the wool growing on a flock of sheep; or the produce of a dairy, or of a farm, or anything of that character, the mortgage will take effect upon the property as soon as it comes into existence, and will be perfectly binding at law. *Corderman v. Smith*, 41 *Barb.* 404.

In *Beale v. White*, 94 U. S. R. (4 Otto) 382, it is said that the law will permit the **593** grant or conveyance to take *effect upon the property when it is brought into existence and belongs to the grantor, in fulfilment of an express agreement, if founded on a good consideration, and it appears that no rule of law is infringed and the rights of third parties are not prejudiced; but it is there admitted that decided cases may be found (and some of them are cited) in which the rule, as stated, is greatly qualified, and others where it is expressly denied if applied in the ordinary business transactions.

There are cases to the effect that while a mortgage of unplanted crops does not operate to pass the legal title, yet in equity a lien attaches as soon as they are produced, which will be enforced. See *Butt v. Ellet*, 19 *Wall.* 544; *Sillers & wife v. Lester & others*, 48 *Miss.* 513; *Cayce, trustee, v. Stovall*, 50 *Miss. R.* 396; *White v. Thomas*, 52 *Miss.* 49; *Evarman & Co. v. Robb*, 52 *Miss.* 653.

Upon the general doctrine in equity as to liens or charges upon after-acquired property, Mr. Justice Story in *Mitchell v. Winslow*, 2 *Story*, 630, after an examination of the authorities says: "It seems to me a clear result of all the authorities that wherever the parties, by their contract, intend to create a positive lien or charge, either upon real or upon personal property, whether then owned by the assignor or contractor or not, or if personal property, whether it is then in esse or not, it attaches in equity as a lien or charge upon the particular property as soon as the assignor or contractor acquires a title thereto against the latter, and all persons asserting a claim thereto under him, either voluntarily, or with notice, or in bankruptcy." And this would seem to be the doctrine on which *Holroyd v. Marshall*, 9 *Jur. M. S.* 213, was decided by the House of Lords in 1863.

Numerous cases upon the general subject are referred to in 2 *Wait's Actions and Defences*, 170, et seq.

594 *I have referred to these decisions to show the somewhat uncertain state of the law on the subject of the transfer of titles to and the creation of charges upon future crops and after-acquired property generally; and as I do not deem it absolutely essential in this case to determine what is the rule on the subject, I desire to be understood as expressing no opinion upon it. The crops raised on the land after the deed was made have all been consumed, except a portion conveyed to Parr by the deed of November the 16th, 1874. The judge below decided that these crops remaining are subject to the lien of the execution of B. W.

Brockenbrough. This decision is adverse to the appellees, and they are not complaining. And so as to the property, if any remains, which may have been acquired by substitution or exchange for property specifically conveyed in the deed. The decree appealed from seems to determine the right to this property in favor of Parr's trustee. The only party who could complain of this is the execution creditor, and he has not appealed and is making no objection.

Looking to the evidence in the case, I find nothing indicating a fraudulent purpose on the part of any concerned in the transaction which is the subject of investigation. The debt secured was for money lent in good faith. No one can doubt that. It is admitted by the counsel for the appellants. The grantor in the deed was more or less embarrassed with debt when he made the deed, but was the owner of a large and valuable estate, and there is no reason to doubt the truth of what he alleges, that he supposed by borrowing the money and getting indulgence on the payment he would be able to discharge all his liabilities. The Island farm was estimated to be worth at least \$20,000. The Cottage farm \$8,000 or more, and he had other property besides. I have not made the calculation, but from the report of the commissioner it would seem that his liabilities 595 did *not exceed the then estimated value of his property. There seems to have been, at the date of the deed, only one judgment against him, the principal of which was \$300. Although The Island was incumbered by the deed of trust made by B. W. Brockenbrough in 1853, The Cottage farm and other property were not incumbered, except by the comparatively small judgment before mentioned. He was left in the possession of the property conveyed to the trustee, Croxton, as contemplated by the deed, and as is usual in mortgages and deeds of trust. The evidence shows that he managed the property badly, that the seasons were unfavorable, that his crops were inferior, and that no profit was realized from the farm. It does not appear that his creditors, at the time the deed was executed, complained of any unfairness in the transaction. Certainly, no suits were brought against him until more than two years had elapsed. I find nothing in the circumstances of the case which cannot be reconciled with good faith in the making of the deed.

It is convenient, in this connection, to notice the charge made in argument by the counsel for the appellants, that the debt to Parr is usurious. It might be a sufficient answer to say that the question of usury is not presented by the pleadings. Usury is nowhere charged or insinuated in any of the bills. If the appellants, as creditors, would have been allowed to make such a defence at all for the debtor, which he did not choose to make for himself, the extent of the relief, if usury had been proved, would have been the abatement of the usurious premium. *Martin v. Hall*, 9 Gratt. 8. But it does not appear that the transaction was in fact usurious. The sum borrowed was \$10,000. The

rate of interest then allowed by law was twelve per centum per annum. Interest was computed at that rate, averaged for the four years, and included in the notes, the instalments of principal *money, it would seem, being \$2,000 for each of the first two years and \$3,000 for each of the last two. This is apparent from a calculation furnished by the counsel for the appellees.*

The reservations in the deed which was made to Wright (trustee) to secure the debts due to Mrs. Brockenbrough and Settle do not vitiate the deed. The grantor had the right to convey his property subject to the exemptions allowed by law, and such is the effect of the deed. The other objections to this deed need not be noticed, after what has been said in passing upon the validity of the deed to Croxton.

The other deed to Wright, settling the property therein mentioned upon the grantor's wife and children, is, of course, 597 void as to existing creditors, unless *supported by a valuable consideration. If any consideration therefor moved from the wife, the deed would be upheld to that extent. Such consideration is recited by the deed, but the recitals are not evidence against the creditors. *Blow v. Maynard*, 2

*NOTE.—Statement furnished by Appellee's Counsel:

Transaction—\$10,000 was loaned at 12 per cent. interest, the interest being payable yearly, and the principal being payable in annual instalments—\$2,000 at one year, \$2,000 at two years, \$3,000 at three years, and \$3,000 at four years.

In accordance with said agreement, notes were taken as follows, viz:

1st. Instalment of principal due	
1st Nov., 1871.....	\$2,000
One year's interest on	
\$10,000 at 12 per cent.	1,200
	————\$3,200 1st note.
2nd. Instalment of principal due	
1st Nov., 1872.....	\$2,000
One year's interest on \$8,000.	960
	————\$2,960 2nd note.
3d. Instalment of principal due	
1st. Nov., 1873.....	\$3,000
One year's interest on \$6,000.	720
	————\$3,720 3d note.
4th. Instalment of principal due	
1st Nov., 1874.....	\$3,000
One year's interest on \$3,000.	360
	————\$3,360 4th note.
Total amount of notes....	
	\$13,240

Had the agreement provided for the payment of the principal in four equal instalments (\$2,500 each), the interest would have amounted to \$3,000. Say \$10,000 at one, two, three and four years—average time, two and a half years—at 12 per cent.—30 per cent., or \$3,000. But the payments were to be \$2,000 at one year, \$2,000 at two years, \$3,000 at three years, and \$3,000 at four years—making the average time two and seven-tenths years, at 12 per cent., and the whole interest \$3,240. From which it will appear that the notes were given for the exact and proper amounts according to the agreement for 12 per cent. simple interest.

Leigh, 29; William and Mary College v. Powell and others, 12 Gratt. 372, 384; Price v. Thrash, 30 Gratt. 515. No answer to the bill was filed for the wife. In his answer, the husband says that he had gotten by his marriage quite a large amount of money and property, and he felt that no law would be violated or any injustice done in an effort to secure a bare subsistence to his wife and children out of the remnants of quite a large estate, and that this is all he attempted to accomplish. He does not allege any such agreement for the settlement as is set out in the deed, and there is no proof of any such, nor, indeed, of any valuable consideration for the conveyance. As, however, the decree appealed from does not pass definitely upon the validity of this deed, the rights of the parties under it may be enquired into and adjudicated by the circuit court in the further proceedings to be had in the cause after it shall have been remanded.

It is further insisted that even if the deed to Cloxton (trustee) were valid, the rights of Parr, the cestui que trust, were extinguished by the deed of the 16th of November, 1874. Such would be the ordinary effect at law, on the principle of merger. But, in equity, it is a question of intention. The general rule is, that the mortgagee's acquisition of the equity of redemption does not merge the legal estate as mortgagee so as to prevent his setting up his mortgage to defeat an intermediate title, if such appears to have been the intention of the parties and justice requires it.

1 Jones on Mortgages, § 380, and authorities cited in *note (1). In the case of Forbes v. Moffat, 18 Ves. R. 384, 390, the master of the rolls, Sir William Grant, says: "It is very clear that a person becoming entitled to an estate, subject to a charge for his own benefit, may, if he chooses, at once take the estate and keep up the charge. Upon this subject a court of equity is not guided by the rules of law. It will sometimes hold a charge extinguished where it would subsist at law; and sometimes preserve it where at law it would be merged. The question is upon the intention, actual or presumed, of the person in whom the interests are united." And it is said that even where the parties have undertaken to discharge the mortgage upon the uniting of the estates of the mortgagor and mortgagee in the latter, it will still be upheld as a source of title wherever it is for his interest, by reason of some intervening title or other cause, that it should not be regarded as merged. "This is based upon the presumption as matter of law," says Chief Justice Bellows in the recent case of Stantons v. Thompson, 49 New Hamp. R. 272 (cited in 1 Jones on Mortgages, § 873), "that the party must have intended to keep on foot his mortgage title, when it was essential to his security against an intervening title, or for other purposes of security; and it is no matter whether the parties through ignorance of such intervening title, or through inadvertence, actually discharged the mortgage and cancelled the notes and really intended to extinguish them; still on its be-

ing made to appear that such intervening title existed, the law would presume conclusively that the mortgagee could not have intended to postpone his mortgage to the subsequent title."

I think it sufficiently appears from the evidence and the circumstances of the case, that whatever might have been the object and purpose of the deed of November, 599 *1874, it could never have been intended, and was not expected, that the security of the deed of trust to Parr should be discharged. The consideration for the deed was nominal, and it is incredible that Parr, against his most obvious interest, should have been willing and have designed to surrender his security and let in the intervening claimants, thus defeating the very object he had in view in the pending litigation, to-wit: the preservation of the security which he held. The deed of trust was never actually released, nor the notes surrendered, although it seems to have been the understanding that they should be surrendered. I think the substance of the agreement was, that Parr should hold it subject to the existing incumbrances, including his own, according to their relative priorities, and that if Parr's debt should not be fully satisfied under the deed of trust held by him, he should not look to the grantor for the deficiency; and this agreement should be upheld in a court of equity.

As to the judgment of Settle:

1. It is contended that it is void, because confessed without a writ being issued. It was confessed in open court; the court had jurisdiction of the subject, and the defendant appeared and confessed judgment in proper person. Such a judgment is not void. The prime object of the writ is to notify the defendant of the plaintiff's action. It was waived by the appearance of the defendant and the confession of judgment. A judgment on confession is equal to a release of errors. Code of 1873, ch. 177, § 2. Besides, a judgment not void cannot be collaterally assailed because erroneous.

2. It is further contended that if the judgment is not void, the appellant's judgment has priority as a lien. The latter was a judgment by default in a pending suit, and has relation to the first day of the term of the court in which it was rendered.

600 The judgment of Settle was *confessed in the same court and on the first day of the same term. Both must be treated as judgments rendered on the same day, at the same time. Neither has precedence over the other in point of time. In such case the court takes no notice of the fractions of a day. Coutts v. Walker, 2 Leigh, 268; Skipwith's ex'or v. Cunningham, 8 Leigh, 271. 279, 280; Withers v. Carter, 4 Gratt. 407; Freeman on Judgments, §§ 369, 370. See the provision of the statute, Code of 1873, ch. 182, § 6.

The omission in the decree of any provision for the payment of the debts chargeable on the estate of E. C. Brockenbrough, if error at all, is not an error for which the decree should be reversed. It is not a final

decree. These debts may be provided for in the further proceedings to be had in the cause in the circuit court.

Upon the whole case, I am of opinion to affirm the decree of the court below.

The other judges concurred in the opinion of BURKS, J.

Decree affirmed.

601 *Lewis & als. v. Overby's Adm'r & als.

March Term, 1879, Richmond.

L, about a year before his death in 1866, put each of his four children into possession of a parcel of land with the personal property upon it, but did not convey it. About the same time he made his will, and by it gave to each of the children the land and property in his and her possession. By a codicil he states he was the guardian of his children, and requires that each one of them shall execute a receipt for all claims against him as guardian before they shall be entitled to receive their portion under his will. And he directs that if any one of them shall refuse so to do, his or her portion shall be sold and the proceeds held to meet the liability, and the balance paid over to those executing the receipt. These children held the lands so in their possession, each of them selling a part of that given to him or her prior to 1873. In 1873 a judgment was recovered by B's administrator against the executors of L, upon a bond on which he was surety, and in 1877 a bill was filed by said administrator against the executors and devisees of L, to have payment. The executors had been assured by L, that he owed no debts, and was under no liability, and neither they nor the other children had ever heard of this debt until the suit was brought in April, 1873—Held:

1. Construction of Statute—Gifts.—That neither under the act of L, putting them in possession of the land, nor under the devise to them, are the devisees entitled to the protection of the statute, Code of 1873, ch. 146, § 16, p. 1001, which provides that no gift, &c., which is not in consideration deemed valuable in law, shall be avoided either in whole or in part, for that cause only, unless within five years after it is made suit be brought for that purpose, &c.

2. Equitable Estoppel.—The devisees having continued to hold the land from the time they were put in possession, and having sold parts of it, they are estopped from setting up a claim to a settlement *of L's guardian accounts, and holding him liable to them as their guardian, though they did not execute a release of their claim.

3. Debts of Decedent—Liability of Executors.—The executors having been assured by L, that he owed no debts, and they knowing of none, they will not be liable for the value of the personal property that L, had in his lifetime put into the possession of his children.

4. Same—Same—Refunding Bonds.*—The executors having distributed the personal property

***Devastavit—Liability of Personal Representative.**—The rule laid down in the fourth headnote in regard to the liability of personal representatives who distribute the assets of the deceased without taking refunding bonds is sustained in *Edmunds v. Scott*, 78 Va. 720; *Cookus v. Peyton*, 1 Gratt. 442; *Morrison v. Lavell*, 81 Va. 523; *Lewis v. Mason*, 84 Va. 731. See also 11 Am. & Eng. Enc. Law (2nd Ed.) 912; *McGlaughlin v. McGlaughlin*, 43 W. Va. 226.

of L, in his possession at his death, without taking a refunding bond, they are responsible to the creditor for its value, though they knew of no debt due from L.

5. Equity—Subjecting Devisees for Debts of Decedent.*—All the parties being before the court, the executors are entitled to have the devisees to whom they paid over the proceeds of the personal property, subjected in the first place to pay the amount to the creditor.

6. Debts of Decedent—Apportionment.†—The court should subject each devisee for his proportion of the debt, according to the value of the land devised to him or her, and direct a sale of his or her land not sold in the first instance for the payment of his or her proportion of the debt. If the land still held by one of them does not discharge his or her proportion of the debt, the balance remaining unpaid should be apportioned in like manner among the others, and the land of each sold to pay his or her proportion thereof, and so on until the whole debt is paid or the whole land sold.

The bill in this case as filed in August, 1877, in the circuit court of Mecklenburg county, by John A. Coke, administrator with the will annexed of R. Y. Overby, deceased, suing for the benefit of himself and all other creditors of John Lewis, deceased, who shall come in and contribute to the costs of the suit.

The complainant charged in the said bill that the said John Lewis died in 1866, after making his will, which was admitted to probate by the county court of said county on the 19th day of November, 1866; on which day John T. Lewis and R. B. Lewis, the executors therein named, qualified as such, and executed a bond in a penalty of \$50,000, conditioned for the faithful performance
603 *of their duties under said will; that by said will the testator divided the whole of his estate, real and personal, after paying his debts, amongst his three sons, John T. Lewis, R. B. Lewis and L. L. Lewis, his daughter Fannie A., the wife of W. T. Boyd, and his granddaughter, Mary Eliza Marshall.

The complainant then set out in said bill, a description of the different tracts of land devised by the testator to his said three sons and daughter respectively, stating that he bequeathed to each of them "also certain articles of personal property;" and stated that "to his granddaughter, Mary Eliza Marshall, he gave all his interest in a

***Equity—Subjecting Devisees for Debts of Decedent.**—On the question involved in the fifth headnote in regard to subjecting the devisees in the first place for the amount due unpaid creditors, see *Watts v. Taylor*, 80 Va. 626; *Improvement Co. v. McGavock*, 96 Va. 134. Principal case distinguished in *Findlay v. Trigg*, 83 Va. 539. See also 11 Am. & Eng. Enc. Law 1180, and Virginia cases there cited.

†Debts of Decedent—Apportionment.—In *Ryan v. McLeod*, 32 Gratt. 367, the rule laid down in the sixth headnote of the principal case in regard to the manner of subjecting the devisees for their proportion of the debt due is expressly affirmed. See also *Harman v. Oberdorfer*, 33 Gratt. 497; *Pugh v. Russell*, 27 Gratt. 789; *Alexander v. Byrd*, 85 Va. 700.

certain gold mine in Granville county, North Carolina, and five shares of the Roanoke Valley Railroad stock."

The complainant then charged "that said devisees and bequests were made by the testator on the express condition that the said devisees shall release to his estate all demands or claims which they held against it by reason of having been their guardian; that each of them immediately after testator's death received, and have continued to hold and enjoy, the estate devised to them respectively by said testator, and have virtually, if not formally, released said estate from all demands by reason of the guardianship aforesaid."

The complainant then charged that the said devisees, or most of them, had, at different times, sold and conveyed to others large portions of the land devised to them respectively as aforesaid, and set out the quantities so sold and conveyed, and to what persons and at what times respectively—the times being during the years 1870, 1871, 1872, 1873, 1874, 1875 and 1876, but the greater part having been so sold and conveyed before 1873.

The complainant then charged that on the 23d of November, 1873, he obtained a judgment on the law side of said court against the said executors of John

604 Lewis, *on a bond executed by Jas. E. Haskins and said John Lewis for \$1,800, with interest thereon from 1st April, 1853, and cost of suit; which judgment was, on appeal to this court, affirmed on the 1st of May, 1877; that execution had been issued on said judgment returnable to August rules, 1877, against said executors, and returned not satisfied; that said Haskins had long since been adjudicated a bankrupt, and on the 30th of July 1874, received his discharge in bankruptcy, on the payment of all debts provable against him, and is therefore not liable to the payment of this debt; that besides the real estate of which the testator died seized, he left a large and valuable personal estate of the value of \$4,000 or more; that by virtue of the qualification of said executors they became possessed of said personal estate, and it was their duty to apply the same to the payment of testator's debts, in due course of administration; that said executors have never returned, as required by law, an inventory of the estate that came or ought to have come to their hands as such; nor any account of sales of the personal estate of their testator; nor have they ever settled any account of their transactions as such executors; nor have they applied the said personal estate to the payment of the debts of the testator, among them the judgment aforesaid; but have wasted the same.

The complainant therefore prayed that the said John T. Lewis and R. B. Lewis, in their own right and as executors of John Lewis, deceased, and the other devisees and legatees of said John Lewis, naming them, and certain other persons by name, interested in the subject of the suit, might be made defendants thereto; that certain accounts might be taken; that the testator's

personal estate might be applied in a due course of administration; and should it be insufficient for the payment of the testator's debts, that the real estate of which he died seized and possessed, and which was devised by his

605 will, might be *decreed to be sold for such payment, and for general relief.

Copies of the will of said John Lewis dated the 27th of January, 1866, his codicil dated the 20th of June, 1866, and the certificate of probate of both, dated November 19th, 1866, were filed as exhibits with the said bill. In his will, after making specific devises and bequests of all his land and most of his personal estate among his children, he directs any surplus, &c., to be sold and divided by his executors, and concludes it in these words: "but if they prefer it, they may divide all the surplus between my four children equally after paying my debts, if any can be found against me." His codicil is to the following effect:

"In addition to this my last will and testament, I add the following, to-wit:

"Whereas I have acted as guardian of my four children, John, Richard, Fannie and Len, and the property received for them from the estate of their sister, Lucy L. Hodge, deceased, being principally negroes, and they mostly in families that were a tax instead of a profit, and all the money received by me from said estate having been expended upon their education, I do now, in order that questions of the liability of my estate may be known on my decease, require that each one of my children shall execute a receipt for all claims against me as guardian before they shall be entitled to receive their portion under this will.

"In case of the refusal of either of them so to do, then his or her proportion shall be sold by my executors and the proceeds held to meet any liability of my estate, and on full settlement of the same the balance to be equally divided between those executing the required receipt.

"In addition to what has been devised to my daughter Fannie in this will, I re-

606 quire my executors to pay *her out of the sale of any surplus of my estate after my death the sum of \$1,000, in what may be at the time the circulating currency of the country.

"In witness whereof," &c.

There were also filed as exhibits with the said bill copies of the judgment in favor of said Overby's administrator against said Lewis's executors in said bill mentioned, dated June 5th, 1877, of the executions issued thereon, and return of "no effects found" endorsed on said execution.

On the 4th of October, 1877, the cause came on in vacation to be heard upon the bill taken for confessed and exhibits filed: in consideration whereof the court decreed that one of its commissioners should settle and report to the court—1st, an account of the property, real and personal, of which said John Lewis died seized and possessed, showing what disposition had been made of it, by whom and when; 2d, an account of

the transactions of the said Lewis's executors; and 3d, an account of the outstanding debts of his estate, with their priorities, if any.

On the 13th of November, 1877, the report of Commissioner Baskerville, made under the said decree, was returned and filed. It contains two statements, A and B. Statement A showing what real estate John Lewis died seized and possessed of, and what disposition had been made of the same, and by whom and at what dates. From which it appeared that the testator died seized and possessed of 3,470 acres of land, which he devised in different parcels to his four children; 1,282 acres of which had been since sold and conveyed by some of them at different times to different purchasers. Statement B showing account of outstanding debts against the estate of said testator established before the commissioner, being only the *claim asserted in the bill, amounting, with interest to 25th November, 1877, and costs, to \$4,959.47.

On the 27th day of November, 1877, several answers were filed to the said bill; among which were the following:

1st. The answer of John T. Lewis and R. B. Lewis, executors of John Lewis, deceased; in which, among other things, they say: "that while their testator died entitled to a considerable property, the amount not known by respondents, he died possessed of very little or none. Their testator being quite an old man, some several years previous to his death divided his property, real and personal, amongst his several children, and put them in possession of the same; and after the qualification of respondents, finding that the testator had already executed his own will, they did not take possession of his personal estate, but allowed the parties, legatees, to continue in possession of the same. Their testator, before his death, having frequently assured respondents that he owed no debts whatever, they did not deem it necessary to go through the regular course of administration, and taking charge of a small amount of personal property which the testator left undisposed of, they divided the same among the legatees, and did not make or keep any account, receipts or vouchers. Believing that no one was interested in the estate, they kept no account of anything. Hence, when summoned before Commissioner Baskerville, by a vacation order to render an account of their transactions, never having kept any account, voucher or paper of any character whatever, they were unable to do so from memory."

2d. The answer of the said John T. Lewis and R. B. Lewis, as co-heirs of the said John Lewis, in which they refer to and **608** adopt the answer of their co-heirs *and co-defendants, W. T. Boyd and wife and L. L. Lewis, as their defence to the said bill.

3d. The answer of W. T. Boyd and Fannie A., his wife, and L. L. Lewis, heirs of John Lewis, deceased, in which, among other things, they say they are advised "that the complainant ought not to have and maintain his said suit against these respondents, because at the time of the commencement

of his suit more than five years had elapsed since the time of the gift or transfer of said property to them by their testator, John Lewis, deceased, the statute law of Virginia providing that no gift, conveyance, transfer, assignment or charge which is not on a consideration deemed valuable in law, shall be avoided for that cause only, either in whole or in part, unless within five years after it is made suit be brought for that purpose; and that in no event and under no circumstances can the real estate which is attempted to be charged with the payment of the complainant's demand be sold or interfered with in any way until a full account of the personal estate of which said John Lewis died possessed shall have been taken and the same sold and the proceeds applied to the payment of said demand." They deny that "at any time of the said alienations made by them of the proceeds of the real estate descended to them from said John Lewis anterior to the 18th March, 1873, they had notice of the complainant's demand or of any other demand against said estate."

"But should the court by of opinion that the foregoing defences are not sufficient to bar the complainant from asserting his demand against them, respondents would state that at the time of the death of the testator, John Lewis, he was indebted to them and their co-heirs in a very large amount as their guardian for moneys and property of various kinds which descended to them from their half-sister, Lucy L. Hodge, deceased, of which mention is made in the will of the testator; and having had **609** *no notice whatever of the existence of the complainant's demand prior to March 18th, 1873, if respondents have done anything before that day to prejudice their right to assert their said claim against their late guardian, they are advised that such conduct, being in ignorance of the demand of the complainants, will not in any way bar or affect their right to demand and have satisfied the debt due to them by their late guardian out of his estate.

Wherefore they pray for a settlement of the said guardianship account and a decree for the balance due thereon, it being a fiduciary debt, having priority, &c.

4th. The answer of John R. Clack, trustee, in a deed of trust executed to him by R. B. Lewis and wife to secure a debt to R. F. Clack for \$1,000; dated 29th July, 1871, conveying 700 acres of the land devised to said R. B. Lewis by the said John Lewis; and

5th. The answer of the said R. F. Clack. The respondents in said two last named answers therein deny notice of the complainant's demand at the time of the said conveyance or afterwards, until the 18th day of March, 1873, when the writ issued on said demand bears date, as appears by a copy of said writ exhibited with one of said answers.

On the 5th of December, 1877, the cause came on to be further heard on the papers formerly read, and their answers, with replication thereto, and the report of Commissioner Baskerville, filed 13th November,

1877, on consideration whereof the court, approving said report, to which there was no exception, confirmed the same; and was of opinion that the tract of land conveyed to John R. Clack, trustee, to secure the payment of a debt to R. F. Clack, is first liable to the satisfaction of said debt, and that none of the lands conveyed by the devisees prior to 18th March, 1873, are liable to the satisfaction of plaintiff's demand; and

610 the court was further of opinion *that the statute of limitation of five years, relied upon by defendants, does not apply to legacies and devises; and also that the devisees, having accepted under the will, and held and disposed of the property devised to them, are estopped after so great a lapse of time from asserting any claim against the testator as their guardian; and the court is further of opinion that the personal estate of the testator is first to be exhausted before subjecting the real estate to the payment of debts; the court therefore decreed that the said executors of John Lewis should render an account of his personal estate before one of the commissioners of the court, and that the said commissioner enquire and report at what time the devisees of said John Lewis first had knowledge of the existence of the said debt due to the plaintiff. The court also decreed a sale of the land conveyed by deed of trust to secure a debt due by R. B. Lewis to R. F. Clack as aforesaid.

On the 15th of February, 1878, Commissioner Baskerville made his report in pursuance of the last-mentioned decree, in which is contained an account of the estate of said John Lewis with his said executors, dated January 14, 1867, in which account the estates credited as of that date: By amount received from McKinney & Dupuy, of Richmond, being about the amount of money in their hands as the commission merchants of John Lewis at the time of his death in the fall of 1866, \$1,300; amount of sale of a jack, \$75; of a lump of gold, \$37.50; value of personal property, being household and kitchen furniture divided among his legatees, \$150—\$1,562.50.

Whole amount of personal estate charged to the executors.....	\$1,562 50
Deduct for burial expenses, and doctor's bill, estimated	100 00

1867, January 1st, by amount which should have been in the hands of the executors of John Lewis, deceased, as of this date.. \$1,462 50

611 *Also statement "A," showing the amount of personal property which was on the farms turned over previous to the death of John Lewis, viz: to R. B. Lewis, \$250; John T. Lewis, \$175; Boyd and wife, \$400; L. L. Lewis, \$400—\$1,265. The commissioner states that of the said amount of \$1,462.50 with which the said executors appeared to be chargeable on the 1st day of January, 1867, on account of the personal estate, the sum of \$1,000 was paid by them to W. T. Boyd and wife, in accordance with the will of the testator, and the balance equally divided between the testator's four

children; also that he considered the executors not chargeable with the \$1,265, or any part of it, the value of the personal property which the testator in his lifetime delivered to his children; also that the devisees had knowledge of the debt due by the testator to the plaintiff about the 1st and 2d of April, 1873.

The commissioner returned with his report the depositions of the devisees, R. B. Lewis, J. T. Lewis, W. T. Boyd, and L. L. Lewis, which were taken by him in connection with his said report. It is not necessary to state here the substance of their depositions, as it seems to be embraced in the said report. It appears from them that the devisees had possession of the property, real and personal, given them by the will, from the 1st day of January, 1866, the testator having died about the month of November of that year. The executor, John T. Lewis, in answer to a question propounded to him by the commissioner, says: "The reason I made no settlement was because my father told me he did not owe anything in the world, and was not under any obligation to anybody for anything. His property, with the exception of a very small amount, which I will hereafter explain, was divided by my father to us, his children, during his lifetime, and therefore I thought there was no need of having any inventory and ap-

612 praisement. *The personal estate which came into my hands." &c.; and he then proceeds to give an account of it, which has already been given in the statement of said report hereinbefore made.

It appears that none of the devisees had any information in regard to the plaintiff's claim against the testator until an action was brought therefor in 1873 or very shortly before, and that the testator believed at the time of his death that he owed nobody anything. The debt now claimed against his estate is a securityship debt, and if he remembered it at all he no doubt believed that it could and would be certainly paid by the principal debtor, who has no doubt since become insolvent.

On the 4th of July, 1878, the cause came on again to be heard on the papers formerly read and the last report of Commissioner Baskerville, to which there was no exception; on consideration whereof the court was of opinion that the said executors of John Lewis were chargeable with the sum of \$1,462.50, with interest from the 1st of January, 1867, of the assets of their testator which came to their hands to be administered, which money is applicable to the payment of complainant's claim, and accordingly decreed the payment of the same by the said executors to the said complainant on account of his said claim. And the court was further of opinion that the sum of \$1,265, the value of the personal property mentioned in schedule "A," of said report, is not assets which should have come to the hands of said executors, and that they are not chargeable therefor as such. And it appearing to the court that said sum of money will be insufficient to discharge the complainant's judgment, which amounts as of

the 25th of November, 1877, to \$4,938.47, interest since accrued, and expenses of the suit, and that a sale of the real estate of John Lewis, deceased, is necessary to satisfy the balance of

613 said judgment, as well as what may remain uncollected *under this decree from said executors, and no objection being shown against such sale, the court accordingly decreed that the real estate of said John Lewis remaining unsold by his said devisees on the 18th day of March, 1873, (the date of the institution of the action of the complainant against the said executors,) or so much thereof as may be necessary for the payment of the balance aforesaid of the complainant's judgment and the costs and expenses of this suit, should be sold in the manner and on the terms prescribed by the decree by two commissioners thereby appointed for the purpose, either one of whom was authorized to act alone. And in making said sale the commissioners, or the acting commissioner, shall sell such part or parts of said real estate as may be selected for the purpose by said devisees; provided the parcels so selected be sufficient to realize the amount required in this decree.

And right is reserved to the complainant, should the decree against said executors prove unavailing, in whole or in part, to apply to the court for a further decree to subject to sale the lands of said John Lewis to satisfy whatever sum may remain unpaid of the amount decreed the complainant against said executors. But said commissioners, or the one who may act, is required before acting to give bond with security in the penalty of \$1,500, conditioned according to law.

And it appearing to the court that the lands held by R. B. Lewis as devisee of said John Lewis had been sold under a deed of trust executed by the former, pursuant to a decree entered in this court at the November term, 1877, and that the proceeds of sale are insufficient to pay the trust debt, said lands are excepted from the operation of the decree, and said commissioners will take no action in regard to the same.

From the two decrees aforesaid, of the 5th day of December, 1877, and the 4th 614 day of July, 1878, the said *J. T. Lewis and Lucy, his wife, R. B. Lewis and Sally M., his wife, W. T. Boyd and Fanny, his wife, L. L. Lewis and M. E. Marshall, applied to a judge of this court for an appeal; which was accordingly granted.

Jones & Bouldin, for the appellants.

John A. Coke, for the appellee.

MONCURE, P., delivered the opinion of the court. After stating the case he proceeded:

The appellants assign five errors in the decrees appealed from, which assignments will be here stated and disposed of in the order in which they are made.

1. It is contended by the appellants that the lands of John Lewis, deceased, in the hands of his children, to whom he had given them, are protected from liability for the debt

claimed in this suit against his estate by the appellee, the personal representative of R. Y. Overby, deceased, by the 16th section of chapter 146 of the Code of 1873, page 1001, which declares that "no gift, conveyance, assignment, transfer or charge, which is not on consideration deemed valuable in law, shall be avoided either in whole or in part, for that cause only, unless within five years after it is made, suit be brought for that purpose, or the subject thereof, or some part of it, be distrained or levied upon, by or at the suit of a creditor, as to whom such gift, conveyance, assignment, transfer or charge is declared to be void by the second section of the 114th chapter."

To bring this transaction between John Lewis and his children within the operation of this statute, it is insisted: first, that this was a parol gift in the lifetime of the said John Lewis; and second, if this be not

615 true, that the *devise made by John Lewis to his children of the lands is such a gift as is contemplated by this statute.

To support the first of these positions, it is alleged that John Lewis in his lifetime, and shortly before his death, divided his property, or most of it, among his children, and put each in possession of the portion intended for him; and that these children continued to hold this property during his lifetime, a period of less than one year from the date of the alleged gift; and that he died leaving a will, in which he devised to his said children the respective lands and personalty which, they say, were given to them in his lifetime, which will, they contend, is a confirmation of the parol gift.

It is not pretended that there was any gift of the said property, or any part of it, from the said father to his children by conveyance or other written instrument made and perfected in his lifetime; or that there is or ever was any other evidence of any such gift than the will itself. If such a gift can be established, it can only be by inference from the will itself, in connection with the fact that shortly before the testator's death he put his children in possession of the property, real and personal, or most of it, which he intended to give to them respectively by his will. He made no contract, and had no understanding with them on the subject, much less one founded on a valuable consideration, or such a one as a court of equity would enforce. He might, at any time during his life, after the execution of his will, have altered it at his pleasure, in any or every respect. If he had made a parol gift of his lands in his lifetime, it would have been ineffectual under our statute, which decrees that "no estate of inheritance or freehold, or for a term of more than five years, in lands, shall be conveyed unless by deed or will." Code, ch. 112, § 1, p. 887. As is truly said in the argument of the learned 616 counsel for the appellees, the authorities are uniform to the effect *that lands cannot pass in Virginia by parol gift, but only by descent, adverse possession, deed or will. *Clarke v. McClure*, 10 Gratt. 315-16. And certainly, under the circumstances which existed in this case, no such

equitable rights were acquired by the donees as entitled them to a conveyance of the legal title, on the principle of the cases cited in the said argument from 1 John. C. R. 500; 1 Cow. 733; 1 Hill Chy. 51; 1 Marsh. 87; 4 Bibb, 186. It is no uncommon thing for a father, after making his will, and thereby distributing his estate among his children, to place them in possession of the property so given, or part of it, shortly before his death, without intending thereby to part with his title to it or control over it, or power to dispose of it at his pleasure, during his life or at his death. And such seems to have been the case in this instance. That the two children who qualified as their father's executors considered the whole estate devised and bequeathed by his will to be his at his death, is shown by their giving a bond as his executors in the penalty of \$50,000.

The second position of the appellants under the first assignment of error is, that a will is embraced by the provisions of § 16, ch. 146 of the Code, p. 1001; and they insist that because the appellee did not file his bill to subject these lands within five years after the death of the testator, John Lewis, that the bar of this statute applies to the claim.

The said provisions of the Code must be construed in connection and *pari materia* with the second section of chapter 114 of the Code, page 896, which is headed "Voluntary Gifts," and is in these words:

"2. Every gift, conveyance, assignment, transfer or charge which is not upon consideration deemed valuable in law shall be void as to creditors whose debts shall have been contracted at the time it was made, but shall not, on that account merely, be void as to creditors *whose debts shall have been contracted, or as to purchasers who shall have purchased after it was made; and though it be deemed to be void as to a prior creditor, because voluntary, it shall not, for that cause, be decreed to be void as to subsequent creditors or purchasers."

The 16th section of ch. 146 of the Code must be construed, as if it immediately followed in the same chapter, section 2 of chapter 114 aforesaid, as it would have done but for its being considered as more properly belonging to chapter 146, concerning "limitation of suits." There is a close resemblance in the language of the two sections. Section 2 of ch. 114 commences thus: "Every gift, conveyance, assignment, transfer or charge which is not upon consideration deemed valuable in law shall be void." &c. Section 16 of ch. 146 commences thus: "No gift, conveyance, assignment, transfer or charge, which is not on consideration deemed valuable in law, shall be avoided," &c. The two sections were introduced into the Code at the same time, under the same circumstances, and as parts of the same purpose. They were not in the Code of our statute law before the revision of 1849, but made their appearance for the first time in the Code of that year. They were not in the Code of that year as reported by the revisors; but were amendments made thereto by the joint committee of revision, and adopted by the leg-

islature. See the report, pp. 612 and 745; and the said amendments, pp. 141 and 161. About the time of that revision, or shortly before, much controversy existed among our judges and lawyers as to when and how far a deed was void as to creditors of the grantor, merely on the ground of its being voluntary. *Hutchinson v. Kelley*, 1 Rob. 618 R. *123; *Bank of Alexandria v. Patton*, Id. 499; *Hunters v. Waite*, 3 Gratt. 25.

It was to settle this controversy and make the law on the subject plain, that these amendments were made. While they declared "every gift," &c., void, they required that a suit to avoid such a gift should be brought for that purpose within five years after it was made. They related only to gifts *inter vivos*, and not to devisees. The whole estate of a deceased debtor, real and personal, is bound for the payment of his debts, whether he die testate or intestate. In the latter case, his heirs-at-law succeed to his real estate, subject to the payment of his debts. In the former case, his devisees, to the extent to which he may have devised his real estate, can only take it subject to the payment of the claims of his creditors, to the extent to which a sale of the land devised may be necessary for such payment. A debtor cannot, by his will, impair the rightful claims of his creditors against his estate.

The court is, therefore, of opinion that the said first assignment of error cannot be sustained:

2d. The second assignment of error is, that if a decree is proper against these lands at all, it should have apportioned this debt among the several devisees, and provided that upon payment of such proportion by each devisee, the lands of such devisee so paying should be protected from further liability, unless upon a sale of the lands of the delinquent devisees there should be a deficit.

It is true that the third section of chapter 127 of the Code clearly subordinates and postpones the devise to the claims of creditors, and makes the whole of the property devised chargeable with the payment of the testator's debts. But it is equally true that unless the will direct otherwise, and it does not in this *case, the land devised is primarily liable according to its value, and the burden of the testator's debts, or such part of it as devolves on his devised lands, falls on the devisees in proportion to the value of the lands devised to them respectively. The whole of his estate is liable for the payment of his debts, and if necessary for their payment, the creditors may subject all to that purpose to the total exclusion of his devisees and legatees. But if the whole of it be not necessary for that purpose, equity will require the burden to be laid upon the estate in such a way and in such proportions as to do no injury to the devisees and legatees, provided that can be done without doing injury to the creditors or subjecting them to unreasonable delay. And that can always be done where, as in this case, all the parties interested in the subject are before a court of equity, in a suit in which the matter is involved, and the means of

making an apportionment of the burden are readily at hand and can be used without injury or material delay to the creditors. Of course the whole estate is liable for the debts, and may be resorted to until they are completely paid. Equity only regulates and controls the manner and order of making such resort so as to prevent injury to devisees and legatees by taking from them what is not necessary for the payment of debts if the burden of them be properly adjusted.

No doubt all the devised lands are liable for the payment of the debts of the testator, but surely each devisee should be allowed to save from sale, if possible, the land devised to him by paying his ratable share of the debts, as among the devisees themselves each is liable for a part of the debt proportioned to the value of the land devised him. If he pay more, or his lands are sold to pay more, he certainly has the right to call on

his co-devisees for contribution. But **620** *why sell his lands, and perhaps deprive him of a home, and then turn him around on the others to get his money, which probably would not compensate him for his loss, for the loss of a home is often irreparable? It is the constant course of equity so to administer justice as to prevent multiplicity of suits and circuity of action, save costs, and put an end to litigation. The case of *Mason's devisees v. Peter's adm'rs*, 1 Munf. 427, referred to in 2 Rob. Pr. (old ed.) 89, seems to be directly in point. Akin to it is the case of *Mayo v. Tomkies*, 6 Munf. 520, 528. Upon like principles was the decision, in part, of the case of *Horton v. Bond & others*, 28 Gratt. 815. See what is said on pp. 825, et seq., and so much of the decree on pp. 829, 830, as relates to this subject. The last-named case, in which the opinion of the court was delivered by Judge Burks, presented the question of equities among sureties, and the court respected those equities in giving relief to the creditor. The principle is the same in all the cases, to-wit: that where there is a common burden, and the parties liable are all before the court, equity will apportion the burden in the first instance according to the rights and liabilities of the parties, provided that can be done without prejudice to the creditor, who has a claim on all. It can be done and should have been done in the present case. The objection is not removed by the provision in the decree, that the commissioner "shall sell such part or parts of said real estate as may be selected for the purpose by said devisees." The devisees might not agree as to the selection or as to the value of their respective devises, and each would be in the power of the other. Besides, some have sold nearly all their lands.

The principles just laid down are strongly applicable to this case, in which there is but one debt due by the testator's estate, which was a suretyship debt that he **621** *doubtless had not the remotest idea of ever having to pay, and had doubtless forgotten when he wrote his will, and his devisees never heard of until about seven years after his death, when, for the first time, it was claimed against his estate and

an action of debt was brought therefore against his executors, long after they had in good faith fully administered his estate, without any idea of the existence of the debt now claimed against it, or any other debt for which it could possibly be liable. The creditor was no doubt aware of what they were doing, and yet asserted no claim against the estate until about the time he brought the action aforesaid; perhaps because he expected to receive payment of the principal debtor until he became a bankrupt, which may have been shortly before said action against the executors of the surety was instituted. But however that may have been, the case was a very proper one for the application of the principles aforesaid.

The court is therefore of opinion that the second assignment of error is well founded, and the decrees appealed from are erroneous on the ground relied on in that assignment.

3d. The third assignment of error by the appellants is, that they are entitled to a large sum from their father with which he was chargeable as their guardian; that they have not released said claim or waived their right "to an account to show how they stood affected in the actual state of the case, that they might make an intelligent election, whether to accept the devises under the conditions annexed to them, or to assert their claims on their guardian," &c.

The court is of opinion that whether the devises made by the testator to his children can be properly said to have created a case for an election by them between the said devises and their claims against him as their guardian, or to have been a case of **622** devises on condition that *the devisees relinquish and release all claim that they might have had against their father as their guardian, is an immaterial question in this case, and that it is perfectly clear that in the former view they elected to accept the devises as a full satisfaction of any claim they might have had against their father as their guardian, and in the latter view they accepted the devises on the condition on which they were made, and in neither view can any claim be now asserted by them against the estate of their father on account of his guardianship for them. They, in fact, accepted the devises in his lifetime, possessed them for about a year before his death, and have continued to possess them ever since, until they sold portions of them, and never pretended to set up any claim on account of said guardianship until they filed their answers in this case, on the 26th of November, 1877, although the testator died more than eleven years before, in 1866, and action was brought against his executors for the debt now in controversy on the 18th of March, 1873.

The court is therefore of opinion that there is no error in the said decrees on the ground stated in the said third assignment of error.

4th. The fourth assignment of error is as to the personal decree against the executors, John T. Lewis and R. B. Lewis, for a devastavit of the assets of their testator; in which it is insisted that there should have

been no personal decree against them until a decree was had against the legatees, to whom those executors paid money of the estate and turned over certain personal property of the testator.

There can be no doubt but that these executors were personally liable, as for a devastavit, for the amount thus decreed against them; nor can there be any but that they are entitled to have recourse over against the legatees to whom they had

623 paid the same amount. If they *had, as they might and ought to have done, required and taken refunding bonds, with good security, according to law, from the legatees on making such payment, the only recourse of the creditor of the estate for his debt would have been upon such bonds. As they did not take such bonds they remain liable to the creditors, but have their recourse over against the legatees to whom they paid the money. But as both executors and legatees are before the court at the suit of the creditor, why not settle the matter by one decree instead of two; or, to use a common but expressive phrase, "why not put the saddle directly on the right horse"? This would accord with the principles of equity before referred to. If the decree against the legatees should be unavailing in whole or in part, the executors would of course remain personally liable for the deficiency, and there would be a decree over against them therefor. All the risk the creditor would run by this operation would be that of incurring a little delay in getting his money; and he could not justly complain of that, under the circumstances. He would have incurred the same if the executors had, as they might have done, taken and returned a refunding bond with security. They acted in good faith in settling with the legatees and requiring no refunding bond; believing, and having the best cause to believe, that their testator owed no debt. On the other hand, the only creditor of the estate failed to assert or give any notice of his claim until seven years after the testator's death.

The court is therefore of opinion that the fourth assignment of error is well founded.

5th. The fifth and last assignment of error is that the plaintiff, John A. Coke, was appointed, and authorized to act alone, as a commissioner to sell the lands of the said devisees in execution of the decree; and that

the penalty of the bond required of **624** him — \$1,500 — was inadequate; *the debt for which the sales were to be made exceeding \$5,000.

The case of *Teel & als. v. Yancey & als.*, 23 Gratt. 691, is an express authority for the action of the circuit court in appointing the plaintiff, John A. Coke, and authorizing him to act alone as a commissioner, to sell the said lands in execution of the decree; and there is therefore no error in the action of the court in that respect. Nor is there any error in the said decree in regard to the penalty of the bond, which does not appear to have been inadequate. It appears that the amount necessary to be raised by said sale will probably be about \$2,500, one-third

of which was required to be paid in cash—that is little upward of \$800. The penalty of the bond was fixed in reference to that amount, and would seem to have been adequately fixed at \$1,500.

The court is therefore of opinion that so far as the decrees appealed from do not conform to the foregoing opinion they are erroneous, and ought to be reversed and annulled; and that the residue thereof ought to be affirmed, and the cause remanded for further proceedings to a final decree in conformity with the foregoing opinion.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that although the appellants, John T. Lewis and R. B. Lewis, are chargeable with the sum of \$1,462.50, with interest from the 1st day January, 1867, by the said decree of the 4th day of July, 1878, decreed to be paid by them to the appellee, John A. Coke, administrator de bonis non of R. Y. Overby, deceased, on account of his judgment against the said appellants as executors of John

Lewis, deceased; the said executors **625** having committed a devastavit *in paying and distributing the said sum of money to and among the legatees of their said testator when it was first liable to the payment of the said judgment, or the debt for which it was obtained. Yet, as the said executors made such payment and distribution in good faith, and without knowledge of the existence of the said debt, they are entitled to have their recourse over against the said legatees for the amount so paid to and distributed among them, with interest from the time of such payment and distribution; and as the said legatees as well as the said executors are all parties to the suit, the said circuit court, instead of rendering a decree first in favor of the said appellee against the said appellants, and thereafter in favor of the said appellants against the said legatees for the said sum of money and interest, ought to place the burden directly on the shoulders of those who ought ultimately to bear it, and in the proportion in which they ought so to bear it respectively. And if the decree to be so rendered against them should prove ineffectual, in whole or in part, then there may and ought to be a decree in favor of the said appellee against the said appellants for the said sum of money and interest, or so much thereof as may not have been recovered and received of the said legatees as aforesaid.

And the court is further of opinion that although the real estate which was devised by the said testator, John Lewis, to his devisees respectively, or so much thereof as has not since his death and before the institution of this suit been sold by them or any of them to bona fide purchasers for value and without notice, still remains bound and liable for the said judgment in favor of the said appellee, which amounts to \$4,938.47, including interest to the 25th day of **626** November, *1877, with interest on the principal sum thereof from that day till payment, and his costs of said suit, subject to a credit for the amount which may

be realized by the said appellee on account of the said judgment out of the personal estate of the said testator as aforesaid; yet, instead of directing a sale of said real estate, as was done in the said decree of the 4th day of July, 1878, the said circuit court ought to have the balance due upon the said judgment and costs, after applying the said credit, apportioned among the said devisees according to the value of their respective devises and bequests at the date of the death of the said testator. And if the said devisees fail to pay to the said appellee in a reasonable time, to be prescribed by the court, their respective portions of the said balance according to the said apportionment, then the real estate which may have been devised by the said testator to such of the said devisees as may be in default as aforesaid, or such part thereof as may remain unsold to a bona fide purchaser for value and without notice after the death of the said testator and before the institution of this suit, or so much of the said real estate as may be sufficient to pay the said portions of the said devisees in default as aforesaid respectively, ought to be decreed to be sold for that purpose. And if the real estate devised to any of the said devisees, and remaining unsold as aforesaid, shall be insufficient to pay their respective portions of the said balance according to the said apportionment, then there may be a personal decree to the extent of such deficiency against the said devisees respectively, not to exceed, however, the amount received by them for land devised to them, and sold after the death of the testator and before the institution of this suit as aforesaid. But should any such personal decree be unavailing, in whole

627 or *in part, the amount as to which it may be unavailing ought to be apportioned among the remaining devisees, and the real estate devised to them respectively, and not required for the payment of their respective portions of the said balance, ought to be held liable for the payment of their respective portions of the amount as to which such personal decree may be unavailing as aforesaid. And so on until the entire debt due to the said appellee, including interest and costs as aforesaid, is fully satisfied, or the real estate devised by the said testator and remaining unsold as aforesaid, is exhausted in the payment of the said debt, interest and costs. The whole of the said real estate being liable for the payment of the said debt, though it is considered just and equitable under the circumstances of this case that such liability should be in the manner aforesaid, all the parties concerned being before the court, such adjustment can be affected in a reasonable time, and whatever delay may occur thereby, being occasioned by the laches of the only creditor of the estate in the assertion of his claim against it.

The court is further of opinion that the decrees appealed from are erroneous, so far as they conflict with the foregoing opinion and decree, but are not erroneous so far as they are consistent with the same. Therefore it is decreed and ordered that so much

of the said decrees as are above declared to be erroneous be reversed and annulled, and the residue thereof affirmed, and that the appellants recover of the appellee, John A. Coke, administrator with the will annexed of R. Y. Overby, deceased, their costs by them expended in the prosecution of their appeal aforesaid here, to be levied of the estate of his said testator in his hands to be administered. And it is further decreed 628 *and ordered that this cause be remanded to the said circuit court to be further proceeded in to a final decree, in conformity with the foregoing opinion and decree; which is ordered to be certified to the said circuit court of Mecklenburg county.

Decree reversed in part.

629 *Mosby v. St. Louis Mutual Ins. Co.

March Term, 1879, Richmond.

Absent, Burks, J.*

1. **Statute—Penalty—Civil Cases.**†—The act, Code of 1849, ch. 16, § 18, Code of 1873, ch. 15, § 13, which provides that if by a new law, repealing a former law, any penalty, forfeiture or punishment be mitigated by any provision of the new law, such provision may, with the consent of the parties affected, be applied to any judgment pronounced after the new law takes effect, applies to forfeiture in civil as well as criminal cases.

2. **Same—Same—Usury.**—Though the statute of usury, at the time a contract was made, declares the contract to be null and void, if at the time of the the decree in the case the statute has been amended and only avoids the contract for the interest, the decree should be for the principal loaned, with interest from the date of the decree.

This was a suit to enjoin a sale of land under a deed of trust in the circuit court of Bedford county, brought by Thomas Y. Mosby against the St. Louis Mutual Insurance Company and others. The ground relied upon was that the debt secured by the deed was usurious. The case is stated by JUDGE CHRISTIAN in his opinion.

E. C. Burks, for the appellant.

Haymond and R. G. H. Kean, for the appellees.

CHRISTIAN, J., delivered the opinion of the court.

This case presents a single question, and must be determined by the true construction to be given to our statutes on the subject of usury.

630 *The facts disclosed by the record, so far as it is necessary to refer to them, are as follows:

The St. Louis Mutual Life Insurance

*He had been counsel in the court below.

†**Statute—Usury—Penalty.**—The rule laid down by the principal case with regard to the application of the statute referred to in the first headnote to civil cases generally and to the statute of usury particularly, is followed in *White v. Freeman*, 79 Va. 597; *Bain v. Savage*, 76 Va. 904; *Bloss v. Hull*, 27 W. Va. 509.

Company is a foreign corporation, having its chief office in the city of St. Louis, Missouri. Its principal business was that of life insurance. In connection with this insurance business it also had authority under its charter to loan money, and its agents were authorized to make loans of money to those who might take out policies of life insurance in said company. The loans were to be negotiated upon certain conditions and stipulations prescribed by the rules of the company to its agents, among which conditions it was stipulated that the loanee should take out policies of insurance from said company at its usual rates of insurance, pay the premiums on such policies promptly, pay interest on the proposed loan after the rate of ten per centum per annum semi-annually, and secure the payment of the loan by deed of trust or mortgage on unincumbered real estate double the value of the amount of the loan, and execute bonds for the loan to run one year, but renewable upon prompt payment in advance of interest for the next ensuing year, so that such loans should not continue for a period exceeding five years.

John A. Otey was the local agent for the company in the county of Bedford to solicit insurances, negotiate loans and forward applications. From this agent the appellant borrowed the sum of \$2,500, to bear interest at the rate of ten per centum per annum. At the same time he took out two policies of insurance (which it seems was one of the conditions of the loan of that amount): one on his own life for the sum of \$10,000, and the other on the life of his wife for the sum of \$5,000. Upon the former he was to pay a premium of \$318.80, and on the latter a premium of \$132.45. The interest upon this

loan was to be paid semi-annually in
 631 *advance. The premiums and the first half-year's interest were to be deducted by the company from the amount of the loan. By the terms of the agreement between the parties, the premiums on the two life-policies and the first half-year's interest being deducted from the sum loaned (\$2,500), left a balance of \$1,923.25. A draft for this amount and the two policies of insurance were forwarded to Otey, the agent, at Liberty, to be delivered to Mosby whenever he should execute a deed of trust upon his farm of six hundred acres free from other incumbrance. Upon this farm there was a pre-existing deed of trust to secure one McGhee for the sum of \$2,000, which amounted at the time of the above transaction to about \$2,200. It seems the object of the loan secured by Mosby was to lift this lien in favor of McGhee, who was pressing for the payment of his debt and threatening to sell the land under his trust deed. The amount borrowed from the company, after deducting premiums, &c., was not sufficient by some \$200 to pay off McGhee's lien, and he was unwilling to release his lien until this balance was paid. This caused some delay in the consummation of the negotiations between Mosby and Otey, the agent of the company, and it was not until the 31st August, 1872, that a release deed was executed by McGhee; and on that day the

net amount of the loan was paid over to McGhee and the policies delivered to Mosby.

Two bonds were executed by Mosby to the company: one for \$2,500, the principal amount agreed to, which was payable twelve months after date, and the other for \$125, half-year's interest, payable six months after date. Both of these bonds were secured in the deed of trust, and there was a stipulation in said deed that upon default in the payment of either, the land should be sold upon certain terms set out therein.

Mosby failed to pay at maturity the
 632 bond for \$125, which became *due on the 14th December, 1872, and on the 28th March, 1873, the trustee advertised a sale of the land to be made on the 28th April, 1873, for cash sufficient to pay the whole of the two bonds, to-wit: \$2,625, with ten per cent. interest on \$125 from 14th December, 1872, and for the residue of the purchase-money on such credit as the grantor, Mosby, might designate. The terms of sale thus advertised were in strict conformity with the provisions of the trust deed.

On the 19th April, 1873, Mosby filed his bill of injunction, in which he charged that the contract made with him by the St. Louis Insurance Company was usurious, and prayed "that an issue be directed to be tried by a jury, to try and determine whether or no the transaction aforesaid be usurious, and if found usurious, that the said debts and obligations be declared void; and that defendants be restrained and enjoined from selling said tract of land, or any part thereof, by virtue of said deed of trust," &c. The defendants, the St. Louis Insurance Company, and their agent, Otey, answered the bill of injunction, in which they deny the allegation of usury, and set out, with much detail, the whole transaction—not necessary to be further referred to, as the material facts are briefly set out in the foregoing statement.

The cause came on to be heard in the circuit court of Bedford on the bill and answers, and replications thereto, when it was ordered that the following issue be tried on the common-law side of the court, viz: "Whether or no the contract in the bill mentioned for the loan of the sum of \$2,500 to the complainant by the defendant, the St. Louis Mutual Life Insurance Company, is usurious." Upon the trial of this issue the jury returned the following verdict: "We, the jury, find
 633 that the contract for the loan of the sum of *\$2,500 in the bill mentioned to the complainant, the St. Louis Mutual Life Insurance Company, was usurious."

A motion was submitted by the defendant (the insurance company) to set aside the verdict and grant a new trial, which motion was overruled, and it was ordered to be certified to the chancery side of the court, that the court was satisfied with and approved the said verdict. And thereupon it was decreed and ordered by the said circuit court on the chancery side thereof, that unless the plaintiff, Thomas Y. Mosby, do pay to the St. Louis Mutual Life Insurance Company the sum of \$1,923.25 within sixty days from the date of

said decree, with six per cent. interest thereon, then that certain commissioners therein named should sell at public auction the tract of land in the bill and proceedings mentioned, for so much cash as shall be sufficient to pay the expenses of said sale, and for the residue, on a credit of one, two and three years, in equal instalments, bearing six per cent. interest from the day of sale.

From this decree the complainant, Mosby, applied for and obtained an appeal and writ of supersedeas from one of the judges of this court.

The court is of opinion that there is no error in the said decree to the prejudice of the appellant. Admitting that the transaction was usurious, as was found by the verdict of the jury and approved by the judgment of the court, the question is, what is the penalty or forfeiture incurred by the appellee? Is it the forfeiture of the whole amount, principal and interest, or is it the forfeiture of the interest only? It is true at the date of the contract (June 14th, 1872,) the statute, as it then stood, declared that "all con-

634 tracts and assurances made, directly or indirectly, for the *loan or forbearance of money or other thing at a greater rate of interest than is allowed by law, shall be void." But at the time the decree was rendered this statute was so amended as to declare that such contracts "shall be deemed to be for an illegal consideration as to the excess beyond the principal amount so loaned or forborne." Is the case to be governed by the statute existing at the date of the contract, or by that which was in force at the date of the decree? It is insisted by the learned counsel for the appellant that the last named statute is prospective, and not retroactive, and that it applies only to contracts made after its enactment.

It is a sufficient answer to this position to refer to the provisions of our Code upon the construction of statutes, which declares that "if any penalty, forfeiture or punishment be mitigated by any provision of the new law, such provision may, with the consent of the party affected, be applied to any judgment pronounced after the new law takes effect." Now, the penalty or forfeiture under the old law was a forfeiture of the whole debt. This was certainly "mitigated" by the new law, which declares that there shall be a forfeiture of the interest only. It cannot be said that this has reference only to criminal cases, because the language used is general enough to embrace both civil and criminal cases. If it had been the intention of the legislature to confine the provision to criminal cases alone, it would not have used the words "the party affected" thereby, but the word "accused," or some similar word indicating a criminal offence. Indeed, it has been held by this court that these precise words used in another statute (Code 1860, ch. 216, § 2) apply to proceedings whether criminal or civil. See *Jeter Phillips' case*, 19 Gratt. 485, 526. Certainly the language of the statute and the mischief to be remedied are equally predicable of civil 635 as well as criminal proceedings *and

judgments. It is further insisted, however, by the learned counsel for the appellant, that the relief to which he was entitled under the plea of usury under the law as it stood at the date of the contract was a release of the payment of the whole debt; or, in other words, that it was his right to compel a forfeiture by the appellee of the whole sum which he had borrowed from him, and that this right was a vested right which could not be taken from him by any law enacted after the date of his contract. It may here be remarked that while the statute fixing the penalty for usury as a forfeiture of the whole debt had not been amended at the date of the contract, yet the statute of construction above referred to was then in existence, and enters into the contract in the same degree as the first named statute. Upon this question, however, it is sufficient to refer to the able and elaborate opinion of Judge Staples in the case of the *Town of Danville v. Pace*, 25 Gratt. 1, and the cases there cited; and also the leading case of *Curtis v. Leavitt*, 15 New York Reports, quoted approvingly by Judge Staples. Mr. Justice Paige said in that case, page 229: "The defence of usury is in the nature of a penalty or forfeiture, and may at any time be taken away by the legislature in respect to previous as well as subsequent contracts, without trenching upon any vested right. A proposition that a party can have a vested right in enforcing a penalty or forfeiture, against which it is the office of a court of equity to relieve, is a legal solecism. Statutes of usury are highly penal in their character, and the defence of usury has always been regarded as an unconscientious defence, and has never received the favor either of courts of law or equity. No penalty can be enforced after the repeal of the law imposing it, unless saved by express words in the repealing act. * * * The repealing statute obliterates the statute repealed as completely as if it had not been passed, 636 and it must be considered as *a law that never existed, except for the purpose of those actions which were commenced, prosecuted and concluded while it was an existing law." In the same case Judge Selden said: "Usury being a mere statutory defence, not founded upon any common-law right, either legal or equitable, it was clearly within the power of the legislature to take it away."

Applying these principles to the case before us, we are of opinion that there is no error in the decree of the circuit court and that the same be affirmed.

Decree affirmed.

637 *Edmunds' Assignee v. Harper.

March Term, 1879, Richmond.

Statute—Set-Off.—S as principal, and H as his surety, executed their bond to E. E owes S and

Instructions—Presumptions—Reversal.—In *Kimball v. Borden*, 95 Va. 205, the court lays down the rule that if a misdirection or other mistake

N, partners, an account, and N assigns it to S. E becomes bankrupt and S proves the account before the register in bankruptcy, and he afterwards became bankrupt. The assignee in bankruptcy of E sues H on the bond, and H pleads the account as a set-off—**Held:** Under the Virginia statute of set-off, Code of 1873, ch. 168, § 4, the account is a valid set-off for H in the action against him on the bond.

This was an action of debt in the circuit court of Brunswick county, brought by the assignee in bankruptcy of Thomas D. Edmunds, a bankrupt, against J. W. Harper, co-obligor with Peter Stainback, also a bankrupt, to recover the amount due upon a bond for \$933.32, executed by said Stainback and Harper to Thomas D. Edmunds, dated 24th of July, 1860.

The defendant pleaded payment and offsets, and the only question was whether the offset pleaded was available to the defendant. It was an account due from Thomas D. Edmunds to the firm of Edmunds & Stainback, the partners being Peter Stainback and N. S. Edmunds. In March, 1862, N. S. Edmunds transferred all his right and interest in this account to Peter Stainback. And it appeared that Stainback proved the account as a debt due to him from Thomas D. Edmunds before the register in bankruptcy; but no further proceeding seems to have been had in Edmunds' case, except a direction to his assignee to bring suit upon the bond.

It appeared further that in September, 638 1866, Thomas *D. Edmunds conveyed all his property, including the bond sued upon in this case, describing it as the bond of Peter Stainback and Joseph W. Harper, subject to certain credits, which he estimated would reduce it to about \$600, to a trustee, for the payment of certain debts therein mentioned; that prior to this conveyance he applied to Peter Stainback to know if he had any objection to his conveying the said bond; that Peter Stainback stated that he had no objection if he would allow a credit upon the said bond for the account due Edmunds & Stainback; that T. D. Edmunds did not consent to the accounts being allowed as a set-off to the bond, and gave as a reason for not so doing that N. S. Edmunds owed him. The firm of Edmunds & Stainback was insolvent in 1865, but good in 1862, and the transfer of the account was never mentioned to T. D. Edmunds until the year 1865.

After the testimony was given in, the plaintiff moved the court to exclude the set-off from going to the jury upon the ground that it was an open account due by T. D. Edmunds to N. S. Edmunds and Peter Stainback, late merchants and partners trading under the name and style of Edmunds &

of the court appear in the record, it must be presumed that it affected the jury, and is therefore ground for reversal unless it plainly appear from the whole record that it did not and could not have affected the verdict. Citing the principal case and *Kincheloe v. Tracewells*, 11 Gratt. 587-8; *Danville Bank v. Waddill*, 27 Gratt. 448; *Railway Co. v. Garthright*, 92 Va. 627, 631.

Stainback, and therefore not a legal offset to the bond sued on. But the court overruled the motion and instructed the jury as follows:

1. If the jury believe from the evidence that N. S. Edmunds, P. Stainback and T. D. Edmunds all consented that the set-off filed should be put as a credit upon the bond in suit, they must allow it as an offset.

2. If the jury believe from the evidence that the set-off filed was passed upon and allowed as a debt against T. D. Edmunds by the bankrupt court, they must allow it as an offset.

The plaintiff excepted to the opinion 639 of the court, *and the court certified the facts proved substantially as hereinbefore given.

The jury found a verdict in favor of the plaintiff for the amount of the bond, subject to credits, including the amount of the set-off pleaded; and the plaintiff moved the court for a new trial on the grounds that the verdict was contrary to the evidence and the instructions of the court. But the court overruled the motion, and entered a judgment upon the verdict, and the plaintiff again excepted, and applied to a judge of this court for a writ of error; which was awarded.

Jones & Bouldin, for the appellant.

Friend and Davis, for the appellee.

STAPLES, J. This action is brought by the assignee of Thomas S. Edmunds, a bankrupt, against J. W. Harper, upon a bond executed in the year 1860 by Harper and Peter Stainback, the latter alleged also to be a bankrupt.

Upon the trial it appeared that Thomas S. Edmunds, the obligee, in the year 1860-61, after the date of the bond, became indebted to a mercantile firm composed of this Peter Stainback and N. S. Edmunds. In the year 1862 N. S. Edmunds assigned in writing all his interest in the account against Thomas S. Edmunds to his co-partner, who thus became the sole owner of the account. No question is raised as to the correctness of the account or as to the validity of the assignment.

It does not expressly appear that Stainback was the principal obligor in the bond in controversy, but it may be fairly inferred that such was the fact. It is in proof that when Edmunds, the obligee, was about to make a transfer of the bond for the benefit of his creditors it was to Stainback he applied to learn if he had any objection to the transfer.

Harper does not appear to have 640 *been consulted at all on the subject.

There is no doubt that Stainback's sole object in obtaining an assignment of the account against Thomas S. Edmunds was to use it as a set-off against the bond. With that view he continued to hold the account, and with that view he no doubt proved the account in the bankrupt court. The amount due upon the account in 1862 was not much less than the amount due upon the bond. And if Stainback was the principal debtor, it is easy to understand why it was he ac-

quired the whole account and retained it as a set-off against the bond. But upon the theory that Stainback and Harper were equally bound for the debt, we must assume that Stainback was willing, nevertheless, to pay the whole amount of the bond without ever calling upon Harper to refund or to contribute his proportion. Stainback's name is first on the bond, and throughout he appears to have acted as though he was the principal obligor. Certainly a jury would have been justified in so finding upon the facts already stated, and I have no doubt the case was conducted in the court below upon that idea.

The first question, then, to be considered is, whether Stainback, if he were sued, would have the right to use the account as a set-off against the bond.

The 4th section of chap. 168, Code of 1873, provides that in a suit for any debt the defendant may, at the trial, prove and have allowed against such debt any payment or set-off which is so described in his plea, or account filed therewith, as to give the plaintiff notice of its nature; but not otherwise. Although the claim of the plaintiff be jointly against several persons, and the set-off is of a debt not to all, but only to a part of them, this section shall extend to such set-off, if it appear that the persons against whom such claim is, stand in the relation of principal and surety,

and the person entitled to the set-off is
641 principal. This section, *it is conceded has made a radical change in the rules governing the application of set-offs in the common law courts. Under it, if the set-off is due the principal in the bond, he is entitled to the benefit of it, notwithstanding the bond may be a joint and not a several obligation. According to the English statute, a party cannot avail himself of a set-off unless his interest be such that he can bring an action in his own name for the recovery of the amount of the set-off; in other words, unless he is possessed of the legal title. But in this state, as was said in *Allen et als. v. Hart*, 18 Gratt. 722, the statute of set-offs has been liberally construed with a view to the furtherance of its obvious policy, which is to prevent multiplicity of suits; and so far as can be conveniently done, to effectuate in one action complete justice between the parties. In *Wartman v. Yost*, 22 Gratt. 595, it was held that the principal obligor might set-off against the bond a judgment recovered by a third person against the obligee, and assigned to the defendant. In discussing that case, the president of the court clearly showed the wide difference between the English and the Virginia statute. Under the former, the debts must be mutual between plaintiff and defendant, and the courts deal only with the legal title. 5 Rob. Prac. 979-80. Our statute is much more comprehensive in its provisions; and there is no good reason for rejecting the set-off, if valid in other respects, merely because the defendant is invested simply with the equitable title. If the assignee of a judgment may rely upon it as a set-off in an action at law, it is difficult to see why the assignee of an account may not do the same thing. In neither case does the assignee acquire

more than an equity; and in neither case can he maintain an action in his own
642 *name, because the statute authorizing an assignee to sue in his own name applies to bonds or notes in writing, and not to judgments or accounts. Code of 1873, ch. 141, § 17.

In the case before us the set-off is a partnership account, assigned by one of the partners to his co-partner. It would seem, therefore, to stand on higher ground than a common case of assignment, for as is well settled, partners are joint owners of the partnership effects. Between them there is an entire community of right and interest, and each has a concurrent title to all the partnership property. The partner, therefore, claiming under the assignment, claims in the double character of assignee and owner. Under all these circumstances, if Peter Stainback had been sued, it would be very clear that he might have relied upon the account as a proper set-off against the bond. And although by reason of his alleged bankruptcy he is not sued, his surety in the bond may rely upon any set-off which his principal might have claimed had the suit been brought against him. See Decolyear on Guarantees and Principal and Surety, pp. 431, 432, and notes; *Earl of Oxford's case*, 2 Lead. Cases, 1291, 1341.

It is said, however, that Stainback having gone into bankruptcy, all his effects are vested in his assignees, and that the bankrupt court is the proper tribunal to investigate and determine all the questions relating to the account of set-offs.

In the first place there is no proof in the record that Stainback is a bankrupt, beyond the single averment in the declaration. From the failure to join him in the action it may be fairly inferred that such is the fact. Still, if the plaintiff intended to rely upon the bankruptcy, and to claim the benefit of it as an estoppel, it was incumbent upon him to produce the record in bankruptcy, that the

court may see what proceedings have
643 *taken place in that court, and whether there was anything in them to preclude the defendant now from claiming the benefit of the set-off. On the trial of this case Harper, the surety, is found in possession of the original account, with the assignment, neither Stainback nor his assignee in bankruptcy, if he ever had one, making any objection. And if either or both had objected, it may be questioned whether they could have prevented Harper from relying on a set-off which his principal had acquired long before the bankruptcy.

It is worthy of remark that the objection in the court below to the set-off was not founded upon the supposed bankruptcy of Stainback, but upon the ground that the assignment of the account did not change its nature as involving a joint liability.

Another objection made is, that Thomas N. Edmunds, the obligee in the bond, having gone into bankruptcy, and Stainback having proved the account in the bankrupt court, is precluded from asserting his claim to it in any other court. It is very clear, however,

that the sole purpose of Stainback in proving the account was to rely upon it as a set-off. No one supposes he was willing to give up the account as a set-off against the bond, and to take his chances for a dividend among the obligee's creditors. Had the bankrupt court gone on, as it ought to have done, to administer the bankrupt's estate, the whole matter would have been settled in that court by simply applying the account to the bond, and thus adjusting finally the rights of the parties. Instead of that, it would seem that although Thomas S. Edmunds went into bankruptcy in 1867 or 1868, nothing was ever done in the bankrupt court until 1870 or 1871, when an order was entered, on motion of Thomas S. Edmunds, directing the assignee to bring the present suit. Whether any other proceedings were ever had, this record does not inform us.

644 *It does not appear, indeed, that Edmunds has to this day obtained his discharge in bankruptcy. Where the creditor elects to proceed in the bankrupt court with a view to share in the assets he will not be held thereby to have waived his right of action even against the bankrupt himself, unless the latter obtains his discharge. But when it is manifest that the sole object in proving the account in the bankrupt court is to use it as a set-off against a demand due the bankrupt, it would be a gross perversion of the rule to hold that the party thereby deprives himself of the right to rely upon the set-off whenever the occasion arises for so doing. No one is injured by allowing the set-off. No one can justly complain of it. For whenever there are cross demands, if they are equal, nothing is due either party; and if they are unequal in amount, the balance remaining after deducting the less sum from the greater is all that is justly due. In the case before us nothing could be more unjust than to require this surety to submit to a recovery in the present action, and to turn him over to a vain pursuit of indemnity or redress in the bankrupt courts. That the justice of the case is plainly with the defendant does not admit of a question.

The only difficulty in it grows out of the two instructions given to the jury in the circuit court on the motion of the defendant. From the facts certified it is clear there was no evidence before the jury tending to prove that Thomas D. Edmunds had ever consented that the set-off should be put as a credit on the bond, or that the bankrupt court had passed upon and allowed the set-off as a debt against him; and yet the circuit court instructed the jury, if they believed either of these facts they must allow the set-off. Here, then, we have instructions correct as a matter of law, but without testimony to sustain them. In such case, however, the appellate court does not reverse when it

645 *is apparent upon the whole record that no injustice has been done, and the jury could not have been misled by the instructions. *Colvin v. Menifee*, 11 Gratt. 87; *Danville Bank v. Waddill*, 27 Gratt. 448.

The circuit court might have gone much farther than it did. It might have told the jury

that the account, if correct, about which there was no dispute, was a proper set-off, although the obligee did not consent to it as a credit on the bond, and although the bankrupt court had not passed upon it. The instructions, therefore, fell short of what the defendant might justly have claimed. This court will never disturb a just verdict, fully sustained by the evidence, because the trying court has given an instruction upon an abstract proposition of law; more especially when it is apparent the excepting party cannot have been prejudiced by the ruling. For the reasons stated, I am of opinion there is no error in the judgment of the circuit court, and the same must be affirmed.

The other judges concurred in the opinion of STAPLES, J.

Judgment affirmed.

646 *Frommer v. City of Richmond.

[31 Am. Rep. 746.]

March Term, 1879, Richmond.

Municipal Corporations—Power to Tax Non-Residents.*—F, who lives outside of the city limits, rents a stall in the market-house of the city of Richmond, where he carries on his business as a butcher. He prepares his meat for market at his house, and owns two carts and horses, which he uses to bring his meats from his house to his stall, and take out such of it as is not sold; and he pays a tax on these carts and horses as property in the county—**Held:** Under the charter of the city, the city council may require F to take out a license for so using his carts and horses, and to pay a tax on said license.

This was an appeal from the judgment of the hustings court of the city of Richmond, affirming a judgment of the police justice, imposing a fine of ten dollars upon F. Frommer for his failure to take out a license upon a wagon used by him in the city.

The case is fully stated by JUDGE CHRISTIAN in his opinion.

Young, for the appellant.

Keiley, for the appellee.

CHRISTIAN, J., delivered the opinion of the court.

The court is of opinion that there is no error in the judgment of the hustings court affirming the judgment of the police justice.

A fine was imposed on the plaintiff in error by the police justice of the city of Richmond for a violation of one of the city ordinances. On appeal to the hustings court that judg-

***Municipal Corporations—Power to Tax Non-Residents.**—In *Petersburg v. Cocke*, 94 Va. 244, the principal case is cited with approval. The headnote in that case says as follows: "The legislature has power to authorize municipal corporations to impose taxes on persons whose ordinary avocations are pursued within the corporate limits although residing beyond those limits, the same as upon residents."

ment imposing a fine was affirmed, 647 *and from this judgment of the hustings court the plaintiff in error applied to one of the judges of this court for a writ of error and supersedeas; which was accordingly awarded.

The bill of exceptions taken to this judgment of the hustings court sets out the following facts:

That the appellant, F. Frommer, is a butcher in the Second or New market of this city, and is duly licensed as such by the council thereof, and occupies a stall therein, for which he pays the rent to the city, according to the ordinances on the subject; that said F. Frommer resides in the county of Henrico, about half a mile outside of the corporate limits of this city, and that his slaughter-pens and slaughter-houses are at the place of his residence, and that he slaughters there all cattle, sheep, &c., the meat of which is offered by him for sale at his said stall at said market; that he is the owner of two wagons, running on elliptic springs, which is kept by him at his said residence in the county, and one or the other of which is used by him daily in transporting his slaughtered meat from said slaughter-house every day to the said Second market-house in said city, where the same is to be sold, and in carrying back such of said meat as may not be sold, after the market hours are over; and that he also carries and delivers, during and after market hours, to the houses of such of his customers residing in said city as may desire the same to be done, any meat so purchased by any of them from him, but that this is done without reward or hire. It further appeared that said wagons are given in by said F. Frommer in his list to the commissioner of the revenue for said county for taxation, according to law, as a part of his personal property in said county; that said F. Frommer also sells and delivers as aforesaid cured meats chiefly, but not exclusively, of his own

648 curing—he occasionally *buying from commission merchants in said city such cured meats as he may need for his customers over and above what he cures himself, which meats are sent to him by the said commission merchants. His meats, which are cured by himself, are slaughtered and cured at his said slaughter-houses in said county, where such animals as he purchases for his business are, when their condition requires it, fattened before slaughter.

The fine imposed upon the plaintiff in error in this case was because of his refusal to pay a license tax upon his wagons employed in transporting his meats from his slaughter-pens, situated a short distance outside the corporate limits, to his stall in the New market, and also delivering meats to his customers in different parts of the city. The city, under its general powers of taxation conferred by its charter, under the decision of this court in the case of *Ould & Carrington v. The City of Richmond*, 23 Gratt. 464, might have imposed this tax. But special authority is conferred upon the city authorities by the 71st section of its

charter, in terms which cover this case, and leave no room for doubt or construction. That section provides as follows:

§ 71. The council may grant or refuse licenses to owners or keepers of wagons, drays, carts, hacks and other wheeled carriages kept or employed in the city for hire, and may require the owners or keepers of wagons, drays and carts using them in the city, to take out a license therefor, and may require taxes to be paid thereon, and subject the same to such regulations as they may deem proper, and prescribe their fees and compensation.

The plaintiff is an owner of wagons which he uses in the city in pursuit of his regular business, which is conducted in the city. It is difficult to conceive any just or reasonable ground why he should be ex-

649 empted from the *license-tax required by the city authorities under the foregoing provisions of the city charter. His counsel, in this court, suggested two grounds for such exemption: First, that it was the policy of the law to relieve butchers from taxation in order to cheapen the articles of prime necessity, which he furnishes to the people of the city; and second, because he lives outside of the corporate limits; that the wagons are not kept in the city for hire, and these same wagons are taxed as personal property in the county of Henrico.

As to the first suggestion, it is sufficient to remark that the same argument was zealously pressed in the case of *Sledd v. Commonwealth*, 19 Gratt. 813. But this court held upon the construction of a statute, certainly not more comprehensive in its terms than the provision of the charter above referred to, that butchers were liable to the tax.

It is to be observed that the tax imposed is for a license to use his wagons on the streets of the city in the pursuit of his business in the city: It is difficult to imagine why the owners of drays, wagons and carts used in the transportation of flour in the city should be required to pay a license-tax, while the same vehicles used in transporting meats are to be free from such license-tax. Meat is certainly no more an article of prime necessity than bread.

It is further insisted that the city cannot impose this tax because these wagons are kept in the county of Henrico, and are taxed in that county. But the question is not where the wagons are kept, but are they used in the city in the business of the butcher, whose place of business is in the city? If so, they clearly come within the provisions of the charter, as liable to the license-tax. The construction of the city ordinance, as contended for by the counsel for plaintiff in error, cannot be maintained. It is mani-

fest that the ordinance embraces wag- 650 ons employed *in the city, as well as those kept in the city. It can make no difference that the wagons are kept on premises just outside of the corporate limits, if they are used or employed on the streets of the city in his business conducted in the city.

Nor does the fact that the county of Henrico taxes these same wagons as personal

property make any difference. They are a part of the personal property of the plaintiff in error, subject to taxation. It is in no sense a double tax; the city does not tax them as property, but simply requires a license for the privilege of using its streets in the conduct of his business in the city. The city is subjected to constant and enormous expense in repairing and keeping its streets in order. This license-tax is intended to meet in part this heavy burden; and it is not only a legitimate but a most appropriate means of reimbursing the city, because it is the use of vehicles on its streets that causes, in the main, their wear and tear.

We are therefore of opinion that there is no error in the judgment of the hustings court, and that the same be affirmed.

It is proper to remark that there may be a question whether this court has jurisdiction in this case, it having originated before the police justice and the fine being only ten dollars, but we do not deem it necessary to pass upon that question, inasmuch as we affirm the judgment of the court below, and as it is desirable that the question should be settled upon its merits.

Judgment affirmed.

651 *Fechheimer v. National Exch. Bank of Norfolk.

March Term, 1879. Richmond.

L & S carried on two stores in Norfolk, on premises of which they held leases. On the 8th of May, 1866, they conveyed to F all their goods in these stores, all debts due them, and the leasehold premises, in trust to pay certain specified debts, with authority to take possession, sell the goods, and collect the debts. On the 15th of May W sued L & S in assumpsit for \$913.30, and on the same day sued out an attachment against their effects, and this attachment was levied on all the goods and debts at the two stores, which were taken possession of by the sergeant of the city. On the same 15th of May, but two or three hours after the attachment of W was levied, the National Exchange Bank of Norfolk sued out an attachment against the property of L & S, claiming a debt of \$11,665, and this attachment was levied by the same officer upon the goods, &c., in his hands under the other attachment, and also upon the leaseholds of the two houses. In this case F interpleaded, and there was a verdict and judgment in his favor; and afterwards the suit of W was dismissed. F then sued the Bank in an action of trespass on the case for the damages he had sustained by the levy of their attachment—HELD:

1. Practice—Remedies.—Though at common law action on the case was the proper remedy so far as the goods, &c., embraced in the first attachment were involved, and trespass *vi et armis* was the remedy as to the leaseholds which were not levied on by the first, yet as under the Virginia statute case may be brought wherever the action of trespass *vi et armis* could be brought, the action on the case was properly brought to recover the damages sustained as to all the property attached.

2. Wrongful Levy—Damages.—F has a right to recover from the Bank all the damages he has sustained by the levy of the attachment of the Bank upon two storehouses held under lease, and the withholding the possession from him.

652 *3. Joint and Several Liability.—

If the attaching creditors had been joint trespassers in seizing and detaining the attached effects, then they would have been jointly and severally liable for the whole amount of the damage resulting from such joint trespass. But their acts in so seizing and detaining said effects having been several, they are liable severally for the damage resulting from their several act.

4. Evidence—Admissibility.—The attachments and returns of the officer thereon showing that the property was held under both attachments, parol evidence is not admissible to prove that it was held exclusively under the first attachment.

5. Same—Purposes of Admission.—If the plaintiff seeks to introduce a copy of the record in the attachment suit for the purpose of showing the existence of said record and how the case therein mentioned had been disposed of, it can only be done by its being introduced for all the purposes for which it may properly be available to either party.

This was an action of trespass on the case in the circuit court of the city of Norfolk, brought in September, 1867, by Martin S. Fechheimer against the National Exchange Bank of Norfolk to recover the damages alleged by the plaintiff to have been sustained by the levy of an attachment, at the suit of the said National Exchange Bank of Norfolk, upon certain goods, wares and merchandise, debts, books, &c., and two leasehold interests in two storehouses, all in the city of Norfolk, the same having been attached as the property of Lublin & Steiner, but which the plaintiff claimed to be his, and to have been in his possession at the time of the levy. On the trial of the cause there was a verdict and judgment for the defendant, and a writ of error to this court.

In the progress of the trial the plaintiff took several exceptions to rulings of the court, marked, respectively, A, B, C, D, E and F, the last being to the refusal of the court to set aside the verdict on the grounds that the verdict was contrary to the law and the evidence, and that the court had given an erroneous *instruction to the jury at the instance of the defendant, and had refused to give an instruction asked for by the plaintiff. In this exception all the facts proved are set out.

It appeared that Lublin & Steiner were merchants carrying on two stores in the city of Norfolk, in houses which they held under leases. One of these was No. 9 east Market square, and the other No. 11 east Main street. On the 8th of May, 1866, they conveyed to the plaintiff, Fechheimer, all their goods in these stores, all debts due them, and the leaseholds, in trust to pay certain debts named in a schedule attached to the deed, with authority to take possession and sell the goods and collect the debts,

and for this purpose to employ the necessary agents and clerks to attend to the business.

On the 15th of May, 1866, Wm. T. Dixon & Brother sued Lublin & Steiner in assumpsit in the corporation court of the city of Norfolk to recover a debt of \$913.30, which they claimed to be due them; and on the same day sued out an attachment against their effects. And this attachment was levied on all the goods and debts at the two stores, which were taken possession of by the sergeant of the city. These plaintiffs did not file a declaration in their action, and at the September term (1866) of the court the suit was dismissed by order of the court. The record in this case is referred to as No. 2.

On the same 15th of May, 1866, but two or three hours after the attachment of Dixon & Bro. was levied, the National Exchange Bank of Norfolk sued out an attachment against the property of Lublin & Steiner, claiming a debt of \$11,665.47, and this attachment was levied by the same officer upon the goods, &c., in his hands under the other attachment, and also upon the leaseholds of the two storehouses.

654 *In this case Fechheimer interpleaded, claiming that all the property levied on was his, and that he was in possession of it at the time of the levy of the attachment. This attachment case came on to be tried at the July term of the court, and after a trial which lasted from the 5th to the 25th of the month, the jury found a verdict that "Fechheimer has title to the property levied upon by the attachment sued out by the National Exchange Bank of Norfolk," and the court rendered a judgment that the said property be discharged from the said levy, and that the sergeant of the city do forthwith deliver the said property to the said Fechheimer, his agents or attorneys; but this order is not to affect the authority of the said sergeant to hold the same for any other cause than the levy aforesaid. This case is referred to in this cause as record No. 1. The other facts in the case, and the questions involved in the exceptions, are sufficiently stated by JUDGE MONCURE in his opinion.

Scarburg & Duffield, for the appellant.

W. H. C. Ellis, for the appellee.

MONCURE, P., delivered the opinion of the court.

The court is of opinion that the circuit court erred in overruling the motion of the plaintiff in error to set aside the verdict and grant him a new trial, "because the said verdict is contrary to law and to the evidence produced before the jury at the trial of this cause," as stated in the last bill of exceptions, marked "F," in which are certified the facts proved at the trial of cause.

It was proved as a fact in the cause, that at the time of the levy of the attachment referred to in said certificate *sued out by the defendant, the National Exchange Bank of Norfolk, against the estate of Lublin & Steiner for the amount of a debt of which the principal was \$11,665.47,

claimed by the former to be due to it by the latter, the property so levied on, to-wit: "all the goods, wares and merchandise, consisting of boots, shoes, &c., at the stores No. 9 Market square and 11 Main street, Norfolk, Virginia, and also on the unexpired terms of the leases of said stores," was the property of the said plaintiff in error, Martin S. Fechheimer, as claimed by him, and not the property of the said Lublin & Steiner, as contended by the defendant in error, the National Exchange Bank of Norfolk, aforesaid. It also appears from the facts set forth in said certificate that the said attachment was levied on the said property at the instance and request of the said defendant in error. And although it appears that at the time of such levy the said property, except "the unexpired terms of the leases of said stores," was subject to a levy which had previously, on the same day, been made thereon by the same officer, under another attachment sued out in the same court by William T. Dixon & Brother against the estate of the said Lublin & Steiner, for a debt claimed by the former to be due to them by the latter, the principal of which is \$913.30, with interest and costs; and that the said property on which the attachment in favor of William T. Dixon & Brother was levied as aforesaid, remained subject to both of the said attachments until the 25th day of July, 1866, when a verdict and judgment were rendered in favor of the plaintiff in error, the said Martin S. Fechheimer, on his petition of interpleader in the said attachment case of the National Exchange Bank of Norfolk against the said Lublin & Steiner, and continued subject to the said attachment in favor of the said William T. Dixon & Brother until two or three days after the day and year last aforesaid, when pos-

656 session of *the said property was delivered by the sergeant to the plaintiff, Martin S. Fechheimer, by the direction of the counsel of the said Dixon & Brother, upon the advice of the counsel of the National Exchange Bank of Norfolk aforesaid, to the counsel of the said Dixon & Brother, for the reason that the said Martin S. Fechheimer had established his title to the said property.

Without deciding, therefore, what amount of damage the plaintiff is entitled to recover, for the seizure and detention of his said property, against the defendant under the said attachment of the latter—that being a question of fact for the jury to decide, with the aid of the court in the solution of any question of law which may arise in the course of enquiry as to the said fact—it seems to be very clear that there ought to have been a verdict and judgment in the cause in favor of the said plaintiff instead of the said defendant, and that the circuit court therefore erred in overruling the motion of the plaintiff to set aside the verdict and grant him a new trial as aforesaid.

In regard to the unexpired term of the leases of said stores, which was conveyed with the other property aforesaid by said Lublin & Steiner to said Fechheimer, the same was not included in the levy of the said attachment in favor of the said Dixon

& Brother, but was included in the levy of the said attachment in favor of the National Exchange Bank of Norfolk aforesaid. For damages arising from the unlawful seizure and detention of the said leasehold estates under the said attachment in favor of the National Exchange Bank of Norfolk against the said Lublin & Steiner, an action of trespass vi et armis at common law was the proper remedy. And the Code, ch. 145, § 6, p. 995, provides that "in any case in which an action of trespass will lie, there may be maintained an action of trespass on the case." The latter is the form of action in this case. It is perfectly clear, therefore,

that in regard to the said leasehold
657 estates, the *right of action exists; and that is enough to show that the circuit court erred in overruling the motion to set aside the verdict and grant a new trial as aforesaid.

But in regard to the other property on which the said attachment in favor of the National Exchange Bank of Norfolk was levied—being the same property on which the said attachment in favor of said Dixon & Brother was levied as aforesaid—both of the said attachments were actually levied on the said property, and were certainly intended so to be by the plaintiffs therein respectively. Certainly the detention of the said property thereafter by the officer who made the said levies was with the consent and approbation and upon the responsibility of the plaintiffs respectively, at whose instance the said property was so detained. It is unnecessary, and would be premature now, to decide in what proportion the said plaintiffs would be so liable. That several attachments may successively be levied upon the same property, is perfectly clear and a fact of frequent occurrence. It would be strange if by levying an attachment for a small debt upon property worth ten times the amount of the debt, the property should be exempt from the levy of any other attachment until it should be discharged from the first attachment. The Code, ch. 148, § 26, p. 1015, expressly provides that "the attachment first served on the same property, or on the person having the property in possession, shall have priority of lien." Certainly the levy of the second attachment in this case on the property in question was at the instance and with the consent of the attaching creditor and his counsel, and the said creditor is therefore liable for any damages which may be sustained by any person by reason of a wrongful seizure or detention of such property. In this case the debt claimed by the

first attaching creditor was small compared with that claimed *by the second
658 attaching creditor. It is not improbable that if the first had been the only attachment in the case, there might have been a replevin of the property, which would have prevented any damage to the claimant by reason of the seizure and detention of the property; whereas the large amount of the aggregate of the claims of the two attaching creditors might have deterred or prevented the claimant from replevying it.

But we repeat that we do not mean to intimate in this opinion, in the slightest degree, what ought to be the measure and proportion of the damages to which the different attaching creditors would or ought to be held liable in such a case. At common law the form of action against the second attaching creditor for the seizure and detention of the same property levied upon by the first attaching creditor would have been trespass on the case, the form pursued in this instance. But as by the statute now in force, that form may be pursued when the cause of action is trespass vi et armis, therefore one action of trespass on the case will cover a cause of action, though at common law, as to part of it, trespass on the case, and as to the other part, trespass vi et armis, would have been the proper remedy.

The court having thus disposed of the principal question in the case, to-wit: whether the circuit court erred in overruling the defendant's motion for a new trial because the verdict was contrary to the law and the evidence, which arises on the last bill of exceptions in the case, marked "F," will now take notice of the other bills of exceptions, or such of them as may seem to require notice. And first, as to

Bill of exceptions marked "A":

We do not think that the circuit court erred in refusing to give the instruction asked for by the plaintiff as mentioned in that bill of exceptions. That instruction assumes that the defendant is liable for the whole
659 amount *of damage sustained by the plaintiff from the seizure and detention of his property therein mentioned, without regard to any liability therefor of the first attaching creditors. If the attaching creditors had been joint trespassers in seizing and detaining the attachments, then such trespassers would have been jointly and severally liable for the whole amount of the damage resulting from such joint trespass. But their acts in so seizing and detaining said effects were several; and they are only liable severally for the damage resulting from their several acts. The instruction, in the form in which it was asked for, was calculated to mislead the jury, and ought to have been so modified as to inform the jury of the extent of the appellee's liability as aforesaid. Second, as to

Bill of exceptions marked "B":

We think that the circuit court erred in refusing to give the instruction asked for by the plaintiff, and set out in this bill of exceptions; which is, that if the jury believe from the evidence that it proves what it tends to prove as stated in said bill, then the levies mentioned in the said first bill of exceptions, marked "A," and which were made upon the goods, wares and merchandise and leaseholds mentioned in the said first bill were wrongful, and that as to the said leaseholds the defendant in this action is liable to the plaintiff in this action for damages therefor, and also for the detention of the said leaseholds from the possession of the said plaintiff, and that the defendant's said liability is for such damages as will compensate the

plaintiff for the injury sustained by him as to the said leaseholds by reason of the said levies and the detention aforesaid of the said leaseholds from the possession of the said plaintiff. The attachment in favor of the National Exchange Bank of Norfolk, but not the attachment in favor of 660 Wm. T. Dixon & Bro., having *been levied upon the said leaseholds, the former plaintiff is exclusively liable for the said damages. Third, as to

Bill of exceptions marked "C":

We think the circuit court erred in overruling the objection of the plaintiff to the introduction of "W. H. C. Ellis, a witness, to testify that the sergeant of the city of Norfolk held the goods, wares and merchandise and leaseholds mentioned in the said first bill of exceptions, marked 'A,' as aforesaid, under, or under color of, the attachment mentioned in the record set out in the plaintiff's said first bill of exceptions, of which the No. 2 therein mentioned is a copy, and not under, or under color of, the attachment mentioned in the record set out in the plaintiff's said first bill of exceptions, of which the No. 1 therein mentioned is a copy." We think that the said attachments and returns thereon show that the said goods, &c., and leaseholds were not held by the said sergeant, as the testimony of the said witness tends to show they were held, and cannot be contradicted by parol testimony. Fourth, as to

Bill of exception marked "D":

It is stated in that bill, that at the trial of the cause "the plaintiff, to maintain the issue joined on his part, offered to introduce in evidence before the jury an authenticated copy of a record, which is the same mentioned in the plaintiff's first bill of exceptions marked 'A,' and is therein referred to as marked 'No. 2,' for the purpose of showing the existence of said record and how the case therein mentioned had been disposed of; but the defendant, by its counsel, objected to the introduction of the said copy of the said record in evidence before the jury, unless the same should be introduced for all the purposes for which it might be properly available to either party; and the court sustained the said objection of the defendant, and refused to allow the said copy of

661 the said record to be *introduced in evidence, unless the same should be introduced by both parties for all the purposes for which it might properly be available to either party; to which ruling of the court the plaintiff excepted," &c.; "and then the plaintiff introduced in evidence the said copy of the said record, reserving the benefit of and not waiving his said exception." We think there is no error in the said ruling of the court. Fifth, and lastly, as to

Bill of exceptions marked "E":

It is stated in that bill, that after the jury were sworn to try the issue joined in the case, and after all the evidence on both sides had been produced, which evidence tends to prove the facts certified in the plaintiff's sixth bill of exceptions, marked

"F," the defendant moved the court to instruct the jury as follows:

"If the jury believe from the evidence that before the attachment of the National Exchange Bank against Lublin & Steiner was levied by the sergeant, he had taken the property in his return mentioned out of the possession of Lublin & Steiner or Fechheimer, by virtue or under color of a prior attachment issued in the suit of Dixon & Bro., then pending, and that he kept the actual possession of said property and held the same by virtue or under color of the said attachment of Dixon & Bro. until and after the verdict of the jury and the judgment of the court in the case mentioned in the record of which the No. 1 mentioned in the plaintiff's first bill of exceptions ('A') is a copy, and then delivered the said property to the said Fechheimer in consequence of the instructions of said Dixon & Bro., or their counsel, so to do, they ought to find for the defendant."

The court gave the said instruction, to which the plaintiff excepted.

662 *We think that the record shows that after the attachment of the National Exchange Bank against Lublin & Steiner was levied by the sergeant, which was on the same day, though after the attachment of said Dixon & Bro. was levied, he kept the actual possession of said property, and held the same by virtue or under color of both of the said attachments until and after the verdict of the jury and the judgment of the court on the said verdict in favor of the said Fechheimer, on his interpleader, in the attachment of the National Exchange Bank of Norfolk aforesaid, and then delivered the said property to the said Fechheimer, in consequence both of the said verdict and judgment in favor of the said Fechheimer, and of the instructions of said Dixon & Bro., or their counsel so to do. The said instruction was therefore not warranted by the facts of the case as certified by the court, which erred in giving the said instruction to the jury. The court is therefore of the opinion that the judgment of the said circuit court, to which a writ of error and supersedeas were awarded by this court in this case is erroneous for the reasons and on the grounds aforesaid, and ought to be reversed and annulled, the said verdict set aside, and the cause remanded to the said circuit court for a new trial to be had therein in conformity with the foregoing opinion.

The judgment was as follows:

The court is of opinion, for reasons stated in a written opinion of the court, filed with the record, that the said judgment of the said corporation court is erroneous. Therefore it is considered and adjudged that the said judgment be reversed and annulled, and that the plaintiff recover against the defendant his costs by him expended in the prosecution of his writ of error and 663 supersedeas aforesaid *here. And it is further considered and adjudged that the verdict rendered by the jury in the said case be set aside, and the cause remanded

to the said corporation court for a new trial to be had therein in conformity with the said opinion filed as aforesaid; which is ordered to be certified to the said corporation court of the city of Norfolk.

Judgment reversed.

664 *Old Dom. Steamship Co. v. Burckhardt.

March Term, 1879, Richmond.

1. Fraud—Innocent Purchaser.*—Where a vendee obtains possession of a chattel with the intention by the vendor to transfer both the property and possession, although the vendee has committed a false and fraudulent misrepresentation in order to effect the contract and obtain the possession, the property vests in the vendee until the vendor has done some act to disaffirm the transaction. And the legal consequence is, that if before the disaffirmance the fraudulent vendee has transferred either the whole or a partial interest in the chattel to an innocent transferee, the title of such transferee is good against the vendor. Quoted by CHRISTIAN, J., with approbation.

2. Same—Rights of Innocent Purchaser.—Upon the sale of a chattel, to be paid for on delivery, if possession is delivered without the payment, and before the vendor claims the chattel it is sold by the vendee to an innocent purchaser and paid for, the vendor cannot recover the chattel from the innocent purchaser.

3. Same—Vendor Retaining Title.†—But if there has not been a contract of sale, but only a transfer of possession, to become a contract of sale when payment is made, the person in possession has no title to the chattel, and can therefore convey none to an innocent purchaser, and the owner may recover the chattel.

4. Same—Decision in This Case.—In this case held there was a contract of sale as well as delivery, and though the vendee failed to pay, the vendor could not recover the chattel from an innocent purchaser for value.

This was an action of detinue in the circuit court of the city of Richmond, brought by Frederick Burckhardt against the Old Dominion Steamship Company, to recover ninety tierces of stearine, of the value of \$3,600. The defendant pleaded non detinet, and it was agreed that any defence might be made under that plea that might be made under any proper special plea.

665 *When the cause was called for trial the parties agreed to dispense with a jury and submit the whole matter of law and fact to the court; and the court having heard the evidence and argument of counsel, rendered judgment in favor of the plain-

***Fraud—Innocent Purchasers.**—The rules laid down in the first and second headnote are based on well-settled principles of law. See generally 15 Am. & Eng. Enc. Law (2d Ed.) 163; Jones v. Christian, 86 Va. 1017.

†Same—Vendor Retaining Title.—As sustaining the proposition contained in the third headnote where possession is delivered but the title to the property retained, see McComb v. Donald, 82 Va. 903, citing the principal case.

tiff for the ninety tierces of stearine, or the alternative value of \$3,332.67, with interest and costs.

The defendants excepted to the judgment of the court, and the exception contained all the evidence. And they then moved the court for a new trial; which motion the court overruled; and they again excepted. And the court certified the facts and the evidence to be as set forth in the first bill of exceptions. And thereupon the Old Dominion Steamship Company obtained a writ of error and supersedeas to this court. The view of the evidence taken by this court is shown in the opinion of CHRISTIAN, J.

Crump and Sands, Leake & Carter, for the appellants.

Stallo & Kittridge and Berkeley & Berkeley, for the appellee.

CHRISTIAN, J., delivered the opinion of the court.

This is a case before us on a writ of error to a judgment of the circuit court of the city of Richmond. The action was detinue for ninety tierces of stearine in the possession of the Old Dominion Steamship Company, and claimed as the property of Burckhardt, a merchant resident in the city of Cincinnati. In the circuit court a jury was waived by the parties, and both matters of law and fact submitted to the court for its decision. The circuit court found in favor of the defendant in error (Burckhardt), and pronounced its judgment in his favor **666** *against the plaintiff in error for the ninety tierces of stearine of the value of \$3,332.67, if to be had, or the value thereof if not to be had, with interest on said value, to be computed after the rate of six per centum per annum, from the 2d day of May, 1876, until paid, and costs.

There was a demurrer to the declaration, which was afterwards withdrawn. The only plea tendered was non detinet, and on that issue alone the cause was heard and determined in the circuit court. A motion was made by the plaintiff in error to set aside the judgment and grant a new trial, which motion was overruled. A bill of exceptions, setting out the evidence, was tendered and signed and sealed by the court. And thereupon the plaintiff in error applied to this court for a writ of error; which was accordingly awarded.

The question we have to determine is, was the judgment of the court upon the evidence appearing in the record before us erroneous? And first, it is to be premised that the question as to how the appellate court will regard and give effect to a bill of exceptions in which the evidence and not the facts proved are certified, in a case tried by the court without a jury, and where the evidence is conflicting, is a question not definitely settled by the decisions of this court.

There is certainly some conflict of authority on this point. Some of the cases hold that the same rule is to be applied to a case where a jury is waived and the case is tried by the court upon the law and facts, as

to a case where there is a verdict of a jury; and that in both cases where the evidence (and not facts proved) is certified, and the evidence is conflicting, the bill of exceptions must be taken as a demurrer to the evidence, and so regarding it, the appellate court will only reverse when it appears that by rejecting all the oral evidence of the plaintiff in error and giving full credit to that of the defend-

ant in error, together with all fair and 667 legal inferences *to be deduced from said evidence, the judgment is erroneous. See *Pryor v. Kuhn*, 12 Gratt. 615, and *Backhouse's ex'or v. Selden*, 29 Gratt. 581; *Hodges' ex'or v. First National Bank of Richmond*, 22 Gratt. 61.

In *Mitchell v. Barratta*, 17 Gratt. 445, two judges out of three (the court then composed of three judges) held that a different rule prevailed where the judgment is by the court upon the law and facts; and it was so held also in *Wickham & Goshorn v. Martin, Lewis & Co.*, 13 Gratt. 427, by two judges out of four.

According to these last-mentioned authorities, the rule in such case is different from that which prevails where there is a verdict of a jury; the bill of exceptions is not in such case to be regarded as a demurrer to evidence, but in case of a conflict of evidence in such a case, the preponderance will be given to that side which prevailed in the court below.

In the case before us, I do not think it necessary to reconcile these conflicting decisions and to declare which is the true rule settled by the weight of authority.

The question is not altogether free from doubt; it was not argued in this case, and its decision is not necessary to a determination of the controversy upon its merits; for, in my view, if we adopt either rule the result in this case will be the same. Adopting that rule which is most favorable to the defendant in error, and regarding the bill of exceptions as a demurrer to the evidence, I think it clear that the plaintiff in the court below was not entitled to recover, and that the judgment of the court below is erroneous.

In forming my judgment in this case. I will look alone to the evidence offered on behalf of the plaintiff in the court below, and so much of the evidence offered by the defendant as is not in conflict with the plaintiff's evidence. This evidence consists of the depositions *of Frederick

668 Burckhardt (the plaintiff in the court below), and of several of his employees, and also of certain teamsters and employees of the Cincinnati Transfer Company, who were engaged in transferring the stearine in controversy from Burckhardt's factory to the wharf-boat of the Chesapeake and Ohio Railroad Company.

Burckhardt's deposition was twice taken—the first on the 24th June, 1876, the second on the 19th October, 1876. He also testified in person before the court at the December term, 1876.

The question to be determined, upon the plaintiff's evidence, and so much of the defendant's as is not in conflict therewith, is, whether there was, on the 26th of April, 1876

(the date of the transaction out of which this suit originated), a sale by Burckhardt to Goettle Bros. of the ninety tierces of stearine in controversy, which, upon delivery, transferred the title to Goettle Bros., or whether there was simply a transfer of possession of the goods; in other words, whether the owner (Burckhardt) intended by that transaction to transfer both the property in and the possession of the goods to Goettle Bros., or to deliver nothing more than the bare possession. If the transaction was a sale which transferred both title and possession, although such title and possession was obtained by false and fraudulent representations by Goettle Bros., the goods cannot be recovered from Hall, the bona fide purchaser, who paid value for them without notice of such fraud, nor from the Old Dominion Steamship Company, which had the goods to be delivered to Hall. If, on the other hand, there was no sale which, upon delivery, passed the title, but it was intended to pass the bare possession only, then the sale by Goettle Bros. could pass no title to their vendee, and Burckhardt not having parted with the title, could

669 claim *the goods in the hands of whomsoever they might be found.

To determine this question, let us look back to the deposition of Burckhardt taken on the 24th June, 1876.

After stating that he was a merchant who had been doing business in Cincinnati for thirty years in the firmname of Burckhardt & Co., he is asked to state if he had any transactions with Goettle Bros. in respect to ninety tierces of stearine in the latter part of April, 1876; if so, to state in detail what that transaction was. He answers this question as follows:

"Mr. Goettle, the one who is lame, Emil, I think his name is, asked me on 'Change, about the 23d or 24th of April, if we had any stearine; I told him we had some of off-grade on hand. He asked me then if I would let him telegraph on it, and I said yea, he could telegraph. He asked then if he could send for samples, which were called for by some one from his office. On the morning of the 26th of April Mr. Emil Goettle called at my works and said that he had an order for the ninety tierces (there were two lots of which samples were given him) which he could use at eleven cents; eleven and one-quarter was the figure given by us when he got the sample. He requested to have fresh samples drawn from them, and he stood and examined the samples when they were drawn, and I said that eleven cents was the best that could be done and I would let it go at that. He said that we might have it weighed off as soon as convenient, which was done. In the afternoon of April 26th, the same day, during my absence from the store, he sent this paper which is hereto attached and marked exhibit No. 1, a copy of which is as follows:

"Messrs. Burckhardt & Co.:

"Please deliver to dray 90 trs. stearine and oblige

"Goettle Bros.

"Mark H——. April 26th, 1876."

670 *"He got the stearine on this order, which was delivered to him by the employees at my store late in the afternoon; it must have been after two o'clock, for I was at the store then, and the order had not then come. After I went away I returned late in the afternoon, and then found it had gone."

In answer to the question, "How and where expression 'to telegraph on it' is a term used in the trade in Cincinnati, and, if so, what it signifies?" he answered:

"Brokers and provision brokers confer with their principals in respect to goods that they order; it is a usual term with provision brokers on 'Change."

In answer to the question, "How and where was this stearine to be paid for, and what did the price come to?" he says:

"It was to be paid for immediately on delivery; as soon as the goods are delivered it is expected that the money shall be paid by the brokers, or that they give their principals; the price came to \$3,409.67 for the ninety tierces."

In answer to the question, "What was done about the payment of this stearine?" he says:

"My collector went to Goettle, I think, in the evening of the 26, or the following morning, to get the money; he came back and said that Mr. Goettle would see me on 'Change; I went there on 'Change and could not find Mr. Goettle there; in the afternoon I sent again to his office and did not find him in, and came back without finding him. The following morning, the 28th, I sent again, and he waited there, at Goettle's office, until near 'Change, and told me that he could not get any money, and that Mr. Goettle would see me on 'Change again; I met Mr. Goettle in front of the Exchange about 12 o'clock, or a little after; I demanded of him to pay for the stearine, or the bill of lading; he said he was sorry he could not pay it; I told him that he must either

671 pay *for the goods, or return them or the bill of lading for them; that the goods were ours and I wanted the money for them. He said that he had shipped them and drawn against them; I asked him who they were shipped to; he gave me the name of Charles Hall of New York; I demanded of him the bill of lading, and he said that he could not return it, as he had used it and drawn against it; I told him to give me the draft or else have the draft stopped from being paid; he assented to stop the payment of the draft and sent a dispatch, a copy of which is hereto annexed and marked exhibit '2,' a copy of which I took at the time; his brother, while we were in conversation, came up to us and said that the draft was used in Kuhn's bank, on Third street; I requested Mr. Goettle to go with me to Mr. Kittridge, my attorney, to determine what steps were necessary to protect us in our rights; the brother came with me; he agreed at Mr. Kittridge's office to telegraph Mr. Hall to have the payment of the draft stopped; I also telegraphed, and a copy of the first dispatch is hereto attached, marked exhibit '3'; and after I saw

Mr. Kittridge I again dispatched, a copy of which is hereto attached, marked exhibit '4'; I went to Mr. Kuhn's office also to give him notice, and I told him that the stearine was our property, and that we should follow it at once and replevy or attach it wherever we could find it. This all happened on April 28th, and I after—succeeded in stopping the tearine at Richmond."

The telegrams referred to in the foregoing depositions are as follows, and were offered in evidence by the plaintiff:

Exhibit "2," referred to in the foregoing depositions.

"28th Apl., 1876.

"Chas. G. Hall, New York:

"Burckhardt & Co. claim and are entitled to proceeds ninety tierces stearine marked V. They telegraph you.

[Signed] "Goettle Bros."

672 *Exhibit "3," referred to in the foregoing depositions.

"Apl. 28th, 1876.

"Chas. G. Hall, New York:

"We claim proceeds ninety trs. stearine shipped by Goettle Brothers. Don't pay d't.

"Burckhardt & Co."

Exhibit "4," referred to in the foregoing depositions.

"Chas. G. Hall:

"The 90 tierces stearine shipped by Goettle Bros. April 26th is ours. We have ordered the railroad company not to deliver it except on our order.

"Burckhardt & Co."

Exhibit "5," referred to in the foregoing depositions.

"The Western Union Telegraph Company, 174 N. Y.; No. of message 456, dated New York, April 28th, 1876. Received at N. W. cor. Fourth and Vine str., Cincinnati, 4 P. —.

"To Burckhardt & Co.:

"Goettle Bros.' draft on ninety tierces stearine paid and charged to their account.

"Chas. G. Hall."

On cross-examination, in answer to the question whether at the time of the transaction the credit and standing of Goettle Brothers were good, he answered: "I knew nothing to the contrary." He admitted also that he told his men to have the stearine weighed off for Goettle Brothers, and that the letter "H," directed to be marked on the packages in the order for delivery, indicated that they were to be shipped.

673 *It was further proved by Frederick S. Cavally, the collecting clerk of Burckhardt, that he presented an invoice for ninety tierces of stearine on April 26th, 1876, between three and four o'clock in the afternoon; that he saw Mr. Emil Goettle, who stated that it was not all hauled at that time, and that he would hand Mr. Burckhardt a check on 'Change in the morning; that he called again on the morning of the 27th, when he saw Al. Goettle, and he prom-

ised that he would bring a check for the proceeds on 'Change on the next morning; saw both the Goettles on the 28th, and both promised that the matter should be fixed up promptly. Witness was not present when sale was made. Heard Emil Goettle enquire for Mr. Burckhardt, and saw him and B. go together to the factory, where he presumes the sale was made. After Goettle left it was reported that the stearine was sold to Goettle Brothers.

It was further proved by the foreman of Burckhardt & Co. that he delivered the ninety tierces of stearine upon the order above referred to, signed by Goettle Brothers, to the wagons of Transfer Company, and placed the shipping mark upon the packages; that the last load was delivered when it was nearly four o'clock. This was the evening of the 26th of April, 1876. It was further proved by the teamsters who hauled the stearine to the wharf-boat of the Chesapeake and Ohio Railroad Company, that it was delivered on the afternoon of the 26th April. It was also proved by the clerk of the Transfer Company, that ninety packages of stearine were hauled by their wagons from Burckhardt's factory to the wharf-boat of the Chesapeake and Ohio Railroad Company, and the drayage charged to Goettle Brothers.

The plaintiff also testified before the court that on the evening of the 26th of April, on his return to the factory, about four o'clock

P. M., he found that the stearine
674 *had either been all just delivered, or nearly all delivered, and that he gave himself no further concern about the matter, as he knew he could not get the money that evening, it being after banking hours. He also testified that he knew the goods had been delivered from his factory for immediate shipment, and that the letter "H" on the order of Goettle Brothers was a shipping mark; that the stearine was charged on his books to Goettle Brothers, and the bill sent by his clerk for collection was made out against them.

It was further proved by the defendant's evidence (and we may look to this because it is not in conflict with, but is corroborated in part by, plaintiff's evidence), that Goettle Brothers took a bill of lading for the goods, and drew a draft on Charles G. Hall, of New York, to whom the stearine was shipped. "The draft was for about ninety tierces of stearine, and called for between thirty-four and thirty-five hundred dollars" (the words of the witness are here quoted), and the draft was negotiated by Kuhn & Sons, brokers, in Cincinnati, who forwarded the draft with the bill of lading attached thereto, to said Hall at New York. It was paid by Hall before he had any notice of any claim on the part of Burckhardt to the goods. It is also proved that Goettle Brothers failed a few days after the transaction with Burckhardt.

Upon this evidence, I think, it is clear that on the 26th of April, the day of the delivery of the goods, there was a sale from Burckhardt to Goettle Brothers, which transferred to them the title as well as the possession of

the goods, and that it was not the delivery of the bare possession which entitled Burckhardt to claim the goods in the hands of a bona fide purchaser without notice of Burckhardt's claim.

On that day (the day of delivery) there was no enquiry of Goettle Brothers as to who were their principal, or whether they had a principal at all. Burckhardt inferred
675 *that they were acting as brokers for an unnamed principal, because one of the Goettles enquired of him "if he could telegraph" on the price fixed (11 cents), but this was a mere matter of inference. If it was true, as Burckhardt says in his second deposition, that he would not have trusted Goettle Brothers, it is passing strange that before the delivery he did not make the same demand which he says he made on the 28th, that he should disclose the name of his principal on the 26th. On that day who was he trusting, if not Goettle Brothers? Certainly not an undisclosed principal, whose credit and whose name were both equally unknown to him. He says the sale was for cash on delivery. To whom was he looking for that cash? To Goettle Brothers, or to some unknown and unnamed principal? What did it matter to him whether Goettle Brothers had a principal, or who was their principal, or whether that principal was known or not known, if his contract with them was "cash on delivery?" In such a contract the delivering and the payment of the cash must be cotemporaneous acts, or the goods must be paid for before delivery.

Why was not the cash demanded on delivery? Burckhardt could have protected himself either by demanding cash before the goods were delivered, or seizing the goods before they left the Chesapeake and Ohio railroad wharf; or by demanding that the bill of lading should be delivered to him instead of Goettle Brothers. If he had intended to deliver the bare possession of the goods without transferring the title by making a sale, out and out, to Goettle Brothers, why did he charge the goods to Goettle Brothers, and send his clerk to them for payment? He well knew that the packages, which were delivered from his factory on the order of Goettle Brothers, were marked for immediate shipment, and yet, knowing this, he permitted them to get out of his possession without being paid for. He was in his

676 factory *when the last package was shipped, for he said when he returned about 4 o'clock on the afternoon of the 26th April, he found that the stearine had nearly been delivered, yet he took no steps to prevent its delivery, but charged the proceeds on his books to Goettle Brothers, and sent his clerk next morning to them to demand of them, not the stearine, which he now insists he had not sold to them, but the cash for the amount of the proceeds of sale. He did not see the Goettle Brothers until the 28th. It was then, he says, he pressed them either to have the goods, or an order for the goods or the money. It was then he demanded of them the name of the party to whom the goods had been shipped, and being informed it was Chas.

G. Hall, of New York, telegraphed to him "we claim proceeds of ninety tierces of stearine shipped by Goettle Brothers. Don't pay draft." He was then informed that Goettle Brothers had sent the draft and bill of lading to Hall, and that the draft had been negotiated by Kuhn & Sons. He still claims the proceeds in his first telegram. It was after he saw his counsel that he sent the second telegram claiming the goods. Now, I think it is clear that the pretensions of Burckhardt that he made no sale of the stearine to Goettle Brothers, but only delivered the bare possession of the goods to them as the brokers of an unknown and unnamed principal, and that therefore no title passed by delivery, is purely an afterthought, produced by the events which happened between the 26th of April, the day of the delivery, and the 28th, the day of the interview between Burckhardt and Goettle Brothers. In this interval the latter had failed; in this interval a bill of lading and draft had been negotiated and forwarded to Hall, paid by him, and charged to account of Goettle Brothers. In this interval counsel had been consulted, and then for the first time the goods claimed as the property of Burckhardt. When these important facts came to light on the 28th it is made

677 *apparent that Burckhardt must suffer loss unless it can be shown that the delivery of the property was not a sale to Goettle Brothers, but only the delivery to them of the bare possession, as the brokers representing an unknown principal, and that no title passed by the delivery. But in determining whether it was a sale and delivery which passed the title, it is plain we cannot be governed by these subsequent events, but by the facts as they occurred on the day of the delivery of the goods. On that day, so far as the record shows, there was not a whisper of the insolvency or failing condition of Goettle Brothers. Indeed, the record shows that their failure was sudden and owing to unexpected failures of some of their customers in the South. And Mr. Burckhardt himself, in answer to the question, "At that time (April 26th), as far as you knew, was not their credit and standing good?" says: "I knew nothing to the contrary."

The transactions on that day (not affected by subsequent events) had all the constituent elements requisite to a sale and transfer of title. The price of the goods was agreed upon between Burckhardt and Goettle Brothers. No enquiry was made if he was buying for a principal, and no principal, either known or unknown, was spoken of. The goods were delivered by Burckhardt on the order of Goettle Brothers, marked for immediate shipment. The goods were charged by Burckhardt on his books to Goettle Brothers, and Burckhardt's collector applied repeatedly to Goettle Brothers for payment of the cash promised on delivery of the goods, and there is no hint that Burckhardt claimed title to the goods, or that there had been no sale to Goettle Brothers until after their insolvency had become known, and after the goods had come into the hands of a bona fide purchaser, who had paid for them without notice of

Burckhardt's claim, asserted by a telegram sent from his attorney's office, in which 678 he claims, two days after the *sale, that the goods are still his. I am, therefore, clearly of opinion that, looking only to the plaintiff's evidence, the transaction between Burckhardt and Goettle Brothers on the 26th of April, 1876, was a sale, which, on delivery, passed the title to the ninety tierces of stearine; and from that moment Goettle Brothers had a property in the goods, while Burckhardt had a property in the price. This being the case, and the goods having come into the hands of a bona fide purchaser from Goettle Brothers, it matters not whether they were obtained from Burckhardt by false pretences and fraud or not. It may be admitted that they were—and it certainly is not proved in the record that they were—and yet the title of Hall, to whom the goods were consigned by Goettle Brothers, who received the bill of lading and draft from them, and paid the draft without notice of Burckhardt's claim, is not affected by the fraud of Goettle Brothers, even if it was distinctly proved.

Whatever conflict of authority there may have been formerly upon the question, whether the property in goods passes by a sale which the vendor has been fraudulently induced to make, that question is now definitely and firmly settled by the more recent cases, both in England and in this country.

Mr. Benjamin in his admirable and accurate work on Sales says (§ 433, p. 394, ed. 1877):

"It is not until quite recently that it was finally settled whether the property in goods passes by a sale which the vendor has been fraudulently induced to make. The recent cases of *Stevenson v. Newerham*, in Exchequer Chambers, and *Pease v. Glonhec*, in the Privy Council, confirming the principles asserted by the Exchequer in *Kingsford v. Murray*, taken in connection with the decision in the House of Lords in *Oaks v. Turquand*, leave no room for further question. By the rules established in these cases,

679 whenever goods are obtained from the *owner by fraud, we must distinguish whether the facts show a sale to the party guilty of the fraud or a mere delivery of the goods into his possession induced by fraudulent devices on his part. In other words, we must ask whether the owner intended to transfer both the property in and the possession of the goods to the person guilty of the fraud, or to deliver nothing more than the bare possession. In the former case there is a contract of sale, however fraudulent the device, and the property passes; but not in the latter case. This contract is voidable at the election of the vendor, not void ab initio. It follows, therefore, that the vendor may affirm and enforce it, or may rescind it. He may sue in assumpsit for the price, and thus affirm the contract, or he may sue in trover for the goods or their value, and thus disaffirm it. But in the meantime and until he elects, if his vendee transfer the goods in whole or in part, whether the transfer be of the general or of a special property in them, to an innocent third person for a valuable consideration,

the rights of the original vendor will be subordinate to those of such innocent third person. If, on the contrary, the intention of the vendor was not to pass the property, but merely to part with the possession of the goods, there is no sale, and he who obtains such possession by fraud can convey no property in them to any third person, however innocent, for no property has passed to himself from the true owner."

This doctrine has been well established by the American courts. It has been affirmed and definitely settled by the decisions of the highest courts, certainly (if not in others) in New York, Massachusetts, Pennsylvania, Maine, Maryland, Ohio, Illinois, Iowa, Wisconsin and Virginia. See note to § 443, second American edition, and the numerous cases there cited. The same doctrine has been repeatedly affirmed by this court. In *Williams v. Givin*,

6 Gratt. 268, it was held that where the owner of personal goods sells and delivers the same to a purchaser, a title to the property passes, though voidable and defeasible as between vendor and vendee, if obtained by false and fraudulent representations of the latter to the injury of the former in regard to the consideration; in which case the vendor may reclaim his property from the vendee, but not from a bona fide purchaser from or under the vendee, for value paid without notice of the fraud. And this rule is not varied by the circumstance that the fraudulent purpose has been accomplished by the vendee's knowingly paying the consideration in counterfeit money received by the vendor under the belief that it is genuine.

In *Wickham & Goshorn v. Martin, Lewis & Co.*, 13 Gratt. 427, where an insolvent merchant purchased goods not intending to pay for them, and after fraudulently getting possession, conveys those goods with all of his other estate in trust for the payment of his debts, the trustee having no notice of the fraud, it was held that the trustee was a purchaser for value without notice. In that case Judge Samuels said: "If Gaff had bought the goods, knowing his own insolvency, or had industriously used devices to deceive the sellers, still Wickham & Goshorn, subsequent purchasers without notice, have a title better than that of Martin, Lewis & Co., the original sellers."

In a recent English case, on appeal from the admiralty court, twice argued by very able counsel, the privy council, composed of Lords Chelmsford, Knight, Bruce and Turner, Lord J. J. and Sir E. V. Williams, by a unanimous decision, affirmed the following to be the true rule of law, viz: "Where a vendee obtains possession of a chattel with the intention by the vendor to transfer both the property and the possession, although the vendee has committed a false and fraudulent misrepresentation in order to effect the contract or obtain the possession, the property vests in the vendee until the vendor has done some act to disaffirm the transaction; and the legal consequence is that if before the disaffirmance the fraudulent vendee has transferred, either

the whole or a partial interest in the chattel, to an innocent transferee, the title of such transferee is good against the vendor."

In *Rowley v. Bigelow*, 12 Pick. R. 307 Shaw, C. J., said: "We take the rule to be well settled that where there is a contract of sale and an actual delivery pursuant to it, a title to the property passes, but voidable and defeasible as between the vendor and vendee, if obtained by false and fraudulent representations. The vendor can therefore reclaim his property as against the vendee * * * but not against a bona fide purchaser without notice of the fraud. The ground of exception in favor of the latter is, that he purchased of one having a possession under a contract of sale and with a title to the property, though defeasible and voidable on the ground of fraud; but as the second purchaser takes without fraud, and without notice of the fraud of the first purchaser, he takes a title freed from the taint of fraud." In the case of *Hall v. Hinks*, 21 Mary. R. 406, a case singularly like this in all its features, Bartol, J., delivering the unanimous opinion of the court, speaking of the rule above referred to, says: "The rule rests upon the well established principle of equity, that when one of two innocent persons must suffer by the fraud of a third, the loss shall fall upon him who has enabled such third person to do the wrong." This case is so like the case under consideration, and the views of the learned judge so appropriate to this, that I extract still further from his able opinion: "There can be no doubt, upon all the authorities, that consignees who bona fide advance money on consignments made to them upon bills of lading, acquire an interest in the property and are purchasers for value."

*Persons so situated come within the definition of bona fide purchasers recognized in numerous cases."

In that case, as in this, it was earnestly urged that the sale was a conditional one, which condition was "cash on delivery," and therefore no title passed, because the condition to pay cash on delivery was not complied with. In meeting this view, the learned judge says: "An examination of the authorities and a careful consideration of the subject have led us to the conclusion that the same rule applies; and that a bona fide purchaser without notice of the condition upon which his vendor has acquired the possession, will be protected against the claim of the original vendor in the same manner where the sale and delivery are conditional, as where the possession has been obtained by fraud. It seems to us that the same equitable principle lies at the foundation of the rule, and is equally applicable to both classes of cases. If a party purchase goods for cash, and they are delivered to him upon the condition that he shall pay for them on delivery, he perpetrates a fraud by selling them to another before complying with the condition; but if the person to whom he sells deals with him in good faith, ignorant of the secret defect in his title, and pays value, it is difficult to see why, upon the

principle before stated, the innocent purchaser ought not to be protected against the claim of the original vendor, who, by his own act, has enabled his vendee to perpetrate the fraud. This view is consistent with the general current of authorities, and supported both by the adjudicated cases and the elementary writers." And he cites a number of cases, with Kent's Com. and Story on Sales, in support of this view. See, also, on this point, that the sale was on condition, *Wait v. Green*, 36 New York R. 556; *Huffman v. Noble*, 6 Metc. R. 68; *Western Transportation Co. v. Marshall*, 37 Barb. R. 509.

683 *Without being committed to all the doctrines of that case, it is sufficient to say that both in that case and in this the sale was "for cash on delivery;" and when the goods were delivered marked for immediate shipment without the cash being paid contemporaneously or before the delivery, it must be taken that the vendor has waived the condition.

It would protract this opinion (already too long) beyond reasonable limits to review the cases relied on by the learned counsel for the defendant in error in the able and ingenious arguments submitted by them in support of the judgment in the court below. A careful examination of these cases will show that they do not militate against the principles established by the decisions of English and American courts above referred to; and that while in some of them there may be apparent conflict, I think even the few (modern) cases relied on can be easily reconciled upon the special facts and circumstances of these cases. There is certainly nothing in them to overthrow the principles established by the great current of English and American authorities.

I am of opinion, therefore, for the reasons herein stated, that Hall, the consignee of Goettle Bros., being a bona fide purchaser without notice, has acquired in the ninety tierces of stearine in controversy a title superior to that of Burckhardt; and that the judgment of the court below ought to have so determined. I am, therefore, for reversing the judgment and entering a judgment for the plaintiff in error.

The judgment was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the judgment of the said circuit court is erroneous. It is therefore considered by 684 *this court that the said judgment be reversed and annulled, and that the plaintiff in error recover against the defendant in error his costs by him expended in the prosecution of this writ of error and supersedeas here, together with his costs in the said circuit court. And this court now proceeding to enter such judgment as the said circuit court ought to have rendered, it is further considered by this court that the defendant in error take nothing by his bill in the said circuit court, and go thereof without day; which is ordered to be certified to the said circuit court of the city of Richmond.

Judgment reversed.

685 *Talbot v. Richmond & Danville R. Co.

March Term, 1879, Richmond.

1. C and G owning lots in Richmond each bounded east by Seventeenth street, and separated by what was at one time the bed of Shockoe creek, but from which the water of the creek had been diverted, enter into a deed by which they fix the boundaries of their lots respectively, and they covenant and agree that there shall be between their lots a street thirty feet wide extending from Seventeenth street westwardly to the eastern boundary of their lots, and that said street shall be forever kept open as a highway and common for the use of the persons who may be the owners of the lots or land bounded on either side of said street. The street thus provided for did not extend west to any street or alley—HELD:

1. **Municipal Corporation—Dedication of Streets.**—Looking to the whole deed and the surrounding circumstances, there was not a dedication of the street to the public generally, but only to the owners of the lots or parts of the lots spoken of in the deed; and it is not, therefore, a street over which the city authorities have control, and can authorize a railroad company to lay its track along it.

This was an action on the case in the circuit court of the city of Richmond, brought by Charles Talbot against the Richmond and Danville Railroad Company, to recover damages for injury done to certain real property of the plaintiff by a railroad track laid by the company in a street or alley in the city. The question on which the case turned is whether this street or alley was a public

Written Contracts—Construction by Courts.—The principal case is cited in *Scoville v. Terry*, 84 Va. 549, as authority for the rule that in construing written contracts courts must look to the language employed, the subject matter and the surrounding circumstances. See also *Bank v. McVeigh*, 32 Gratt. 531 and *note*; *French v. Williams*, 82 Va. 467; *Collier v. Express Co.*, 32 Gratt. 718.

Same—Same—Parol Evidence.—That, in order to arrive at a proper construction of written contracts oral evidence to show the circumstance under which it was executed may be admitted, see *Richardson v. Planters Bank*, 94 Va. 137, citing the principal case and *Crawford v. Jarrett*, 2 Leigh 630; *Tuley v. Barton*, 79 Va. 387; *French v. Williams*, 82 Va. 467. See also *Knick v. Knick*, 75 Va. 21; *Senger v. Senger*, 81 Va. 704.

Municipal Corporations—Dedication of Streets.—As to what constitutes a valid dedication of a street to the public, see *Burtin v. Danville*, 93 Va. 204, citing the principal case and *Richmond v. Stokes*, 31 Gratt. 713; *Kelly's Case*, 8 Gratt. 632.

Railroads in Streets—Rights of Lot-Owners to Compensation.—Concerning the question as to whether owners of adjoining lots are entitled to compensation from a railroad company legally occupying a street, see *Spencer v. R. R. Co.*, 23 W. Va. 423, citing the principal case and *Mayo v. Murchie*, 3 Munf. 358; *Kanawha Co. v. Anderson*, 12 Leigh 278; *Skeen v. Lynch*, 1 Rob. 186; *Bolling v. Petersburg*, 3 Rand. 563; *Warwick v. Mayo*, 15 Gratt. 528; *Norfolk v. Chamberlaine*, 29 Gratt. 534; *Wheeling v. Campbell*, 12 W. Va. 36.

street or alley, over which the city of Richmond had authority under its charter, and could authorize the railroad company to lay down a track along it. This question depended upon the construction to be given to

the provisions of a deed bearing date **686** June 16th, 1838, entered *into between John G. Gamble, who owned the ground on one side of the street or alley, and George M. Carrington, who owned, or represented the parties who owned, the ground on the other side of said street.

After the evidence had been introduced the defendant moved the court for two instructions; which the court refused to give; but gave another. These instructions are as follows:

First instruction asked for by defendant.

If the jury believe, from the evidence, that the railroad track mentioned in the declaration was constructed with the assent of the common council of the city of Richmond, then they must find for the defendant.

Second instruction asked for by defendant.

If the jury believe, from the evidence, that the plaintiff's claim of title to the use of the alley is founded upon the deed of _____ and possession thereunder of the property conveyed in said deed, they are instructed that this deed constituted a dedication to the use of the city of Richmond, and that the defendants are not liable in damages for constructing and using their railroad track through said alley with the assent of the proper authorities of said city; which the court declined to give, but gave to the jury the following instruction, which is in the words and figures following, to-wit:

Instruction given by the court.

The jury are instructed, that under the deeds exhibited in evidence by the plaintiff, in tracing his title to the property in the declaration mentioned, taken in connection with

the deed also exhibited by the plaintiff, **687** of date of *June 16th, 1838, between

George M. Carrington, administrator de bonis non, &c., and John G. Gamble, the rights of the plaintiff in and to the alley through which the railroad track of the defendants passes, were limited to the use of the same as a highway in common with the owners of lots on the other side of the alley, and subject to the control of the municipal authorities of the city of Richmond, whenever they should elect to exercise control over the same as a public highway or street. And the defendants, having shown that they became by purchase from Solomon A. Myers, the owner of a lot on the other side of said alley, and that they were authorized by the common council of the city of Richmond to construct a railroad track through the said alley, if the jury shall believe, from the evidence, that the defendants did construct their railroad track through the said alley, under the supervision of the authorities of said city, and in accordance with the conditions upon which they were authorized by the said common council to construct the same, and with reasonable care and caution to avoid injury to the plaintiff in the obstruction of the right of ingress and

egress to his property, the plaintiff has no right to recover any damages in this action, and the jury should find for the defendants; to which instruction and the opinion of the court granting the same, the plaintiff, by counsel, excepted, and prayed that his bill of exceptions may be signed and sealed and allowed by the court, which is accordingly done.

There was a verdict and judgment for the defendant, and Talbott applied to this court for a writ of error; which was allowed. The facts are stated by Judge Burks in his opinion.

Steger & Pleasants, and Guy & Gilliam, for the appellant.

H. H. Marshall and F. Smith, for the appellees.

688 *BURKS, J., delivered the opinion of the court.

The assignments of error in this case are based exclusively on the instruction to the jury on the trial in the court below. The foundation of the instruction rests on the assumption that the alley on which the defendant laid its track was a highway, one of the streets of the city of Richmond, subject to the municipal authorities of said city, and that the defendant was duly licensed by said authorities to construct its road over and through the said alley. It is not claimed that there was any implied dedication of this alley to the public use, deducible from acts in pais, parol declarations, user, and the like. If there was any dedication at all, it was an express dedication by the deed of the 16th of June, 1838, between Carrington and Gamble, the former acting for himself and also in behalf of the devisees of Richard Adams, deceased, their representatives and assigns, under whom the plaintiff claims title.

The court did not err, as the learned counsel for the plaintiff in error seem to suppose, in not referring the question of dedication to the decision of the jury. It was the province of the court to determine that question, as it depended upon the construction of the deed. The true enquiry for this court is, whether there is any error in the construction adopted by the circuit court.

Intent is the vital principle of dedication. In a case where acts and declarations are relied upon to show such intent, to be effectual, they must be unmistakable in their purpose and decisive in their character; and in every case it must be unequivocally and satisfactorily proved. Harris' case, 20 Gratt. 833; Holdane v. The Trustees of the Village of Cold Spring, 21 New York R. 474, 477; Washburn on Easements, marg. pp. 133, 134; 2 Dillon on Mun. Corp. § 499, and notes. And

this would seem to be the right guide **689** to judicial interpretation *in such cases; for we know that the individual owners of property are not apt to transfer it to the community, or subject it to the public servitude, without compensation, and such donation is not to be readily inferred.

To ascertain the intent of the parties is said to be the fundamental rule in the con-

struction of agreements; (*Canal Co. v. Hill*, 15 Wall. U. S. R. 94); and in such construction courts look to the language employed, the subject matter and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and in that view they are entitled to place themselves in the same situation which the parties who made the contract occupied, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described. *Nash v. Towne*, 5 Wall. U. S. R. 689, 699. See also *Maryland v. Railroad Co.*, 22 Wall. U. S. R. 105; *Moran v. Prather*, 23 Id. 492, 501.

It appears by the recitals in the deed, which is the subject of construction, that at the time it was executed, the dividing line between Adams' lot, known in the plan of the city as lot No. 339, now the property of the plaintiff, and the Gamble lot, which lay south of it, designated in said plan as lot 323, was the ancient course and channel of Shockoe creek, which had been changed by certain artificial works constructed by the said city, so that it was matter of doubt and difficulty to determine where the ancient channel of the creek was. The object of the deed, as indicated by the recitals, was twofold: First, to fix permanently and with certainty the boundary between the two lots, "for the purpose," as expressed, "of avoiding disputes and litigations respecting boundaries." Second, to promote "the convenience of all parties interested"

690 *in the lots. To accomplish this double purpose, the parties agreed as follows: "The parties to this indenture have this day agreed that the boundary between said described land of said Richard Adams, deceased, and said lot number three hundred and twenty-three (323), shall be a street thirty feet wide, extending from 17th street westwardly to the eastern boundary of lot number three hundred and thirty-nine (339), which street shall be parallel to D street, and distant therefrom one hundred feet; and it is agreed that said street shall be forever kept open as a highway for the benefit of the lands and lots on both sides thereof."

The deed, after conveying to Gamble, on behalf of the devisees of Richard Adams, all the right, title and interest which the said Richard Adams, at the time of his death, had in and to all and every part and portion of the land and lot of ground lying south of said thirty-foot street, and to the said devisees, on behalf of Gamble, all the right, title, and interest which said Gamble has in and to all and every part of said land, lying on the south side of D street, between seventeenth street on the east, and lot No. 339 on the west and north of the said thirty-foot street, concludes with the following covenant, substantially the same as the agreement before recited: "And the said parties do covenant and stipulate with each other that said thirty-foot street shall forever remain open as a highway and common for the use of the persons who may be the owners

of the lots or land bounded on either side of said street."

It is upon the language of this covenant and the preceding one before recited, that the learned counsel for the defendant in error chiefly rely as establishing the alleged dedication to the public use of the strip of land concerning which the controversy in this case has arisen. The land is designated

691 as a "street"—"a *thirty-foot street"—and the agreement is, "that said street shall forever be kept open as a highway." This language, taken alone, might be a sufficient indication of a purpose to dedicate to the public use. The term "highway" is a generic name for all kinds of public ways—ways common to all the people of the state having occasion to pass over them. *Holt, Chief Justice, Queen v. Saintiff*, 6 Mod. R. 255, 258. To constitute a highway, it must be one over which all the people of the state have a common and equal right to travel, and which they have a common, or at least a general, interest to keep unobstructed. *People v. Jackson*, 7 Mich. R. 432, 446.

But seeking the intent of the parties as manifested by the instrument, we are not, under the established rules of construction, to be tied down to the terms and expressions referred to. Especially are we not at liberty arbitrarily to break up the intimate companionship of words and lop one member of a sentence from another. The maxim is, *noscitur a sociis*. We must consider all the language employed—the instrument as a whole and every part of it. The general intention to be collected from the whole context, and every part of the written instrument, is always to be preferred to the particular expression. "Every deed," observes *Hobart, Chief Justice*, "ought to be construed according to the intention of the parties, and the intent ought to be adjudged of the several parts of a deed as a general issue out of the evidence, and ought to be picked out of every part, and not out of one word only:" and such a construction should be put upon particular words as will best answer and effectuate the apparent general intention. *Ex antecedentibus et consequentibus optima fit interpretatio*. *Addison on Contracts* (2d Amer. ed.), top p. 845, marg. 846.

692 *The agreement of the parties is not merely that there "shall be a street thirty feet wide" and "that said street shall be forever kept open as a highway," but the purpose for which it is to be kept open is declared. It is called a highway, but it is expressly for "the benefit of the lands and lots on both sides thereof." While called a highway, it is not for the public accommodation, not for the public use, but, in express terms, "for the use of the persons and parties who may be the owners of the lots or land bounded on either side of the said street." The common meaning of the term "highway" is explained and qualified by the language used in connection with it. If, indeed, it was used by the parties to the deed in the sense of a public way, then the attempted dedication was to a limited portion of the public, and

such a partial dedication is simply void and will not operate in law as a dedication to the whole public. There may be a dedication of a way to the public for a limited use, but there cannot be a dedication to a limited part of the public. *Poole v. Huskinson*, 11 Meeson & Welsby, 827. But I do not regard any dedication, partial or otherwise, as intended. I think the language of the deed fairly construed manifests a purpose merely to adjust and fix with certainty the boundary between the two lots, and establish a common right of way to be annexed as a permanent easement to the lots, and not for the accommodation of the public.

This construction appears the more reasonable, when we consider the situation of the property in dispute. It is not a thoroughfare, but what is denominated a cul-de-sac. It is an alley thirty feet in width, and only two hundred feet in length, with an entrance from Seventeenth street on the eastern side and no outlet on the western. It affords no accommodation to any persons except the owners of the lots bounded by it. To them it is of great convenience. It is of no advantage to the public, and could not be unless extended westwardly so as to connect

693 *with some public street in that direction. It is most unreasonable, therefore, to suppose that any dedication of a way to the public could have been intended. *People v. Jackson*, 7 Mich. R. 432, 448.

The conduct, too, of the parties, which may be looked to in a case like this, throws much light on the subject. *Railroad Company v. Trimble*, 10 Wall. U. S. R. 367.

In 1846, the plaintiff, in conjunction with his brother, became the purchaser of one-half of the Adams lot, upon which they immediately erected a foundry. They found the thirty-foot alley, from its condition, wholly useless, and they filled it up and improved it at their own expense, so as to make it a fit way of ingress and egress to and from their foundry. They purchased the residue of the lot in 1853, and from the date of their purchases they had the continued use and enjoyment of the lot and the alley in the rear without any objection from any quarter, and without molestation until the defendant laid the railroad track, which was the occasion of the present suit. In 1846, when the first purchase was made, the plaintiff and his brother, who were co-purchasers, put up a high gate, closing the entrance to the alley on Seventeenth street, without objection on the part of the owners of the Gamble lot or any other person, and this gate remained until removed some time in the winter of 1865-6. In the mean time and hitherto, so far as appears, the municipal authorities of the city of Richmond have never in any way recognized the alley as a public street, or exercised any control over it in the way of grading, paving, lighting, police regulations, or user of any sort.

As it thus appears that no dedication to the public was intended, there could be, of course, no acceptance, without which a dedication is incomplete, and the common council of Richmond, if it attempted to do so,

could not confer a right where it had none.

694 *It follows, from what has been said, that the instruction given to the jury is, in my opinion, erroneous, and that the judgment of the circuit court should be reversed, the verdict of the jury set aside, and the cause remanded for a new trial.

It appears that the defendant has purchased from one Myers a portion of the property bounded by the alley in question, and is therefore a tenant in common with the plaintiff of the way over it. As such tenant, it is entitled to use said alley as a way in common with its co-tenants, but without prejudice to their rights. Whether it has the right to lay a railroad track at all on said alley and use it as such, is a question not presented by the instruction given in this case, and I express no opinion upon it.

Judgment reversed.

695 *Redd & als. v. The Supervisors of Henry County.

March Term, 1879, Richmond.

1. **Equity Jurisdiction—Enjoining Issuance of Bonds.***—Though the act of January 15th, 1875, Sess. Acts 1874, ch. 37, p. 29, provides a mode by which the qualified voters of a county or corporation may contest the due returns of the election or decision of the voters of said county or corporation upon the question whether the county or corporation shall subscribe to the stock of an internal improvement company, a court of equity still has jurisdiction of the question upon a bill filed by fifteen or more of the citizens and tax-payers of the county or corporation, and to enjoin the issue of the bonds of said county or corporation in payment of said subscription if the proceeding has not been properly conducted.
2. **Statutes—Substantial Compliance with Provisions.**—In the proceeding under the statute, Code of 1873, ch. 61, §§ 62, 63, 64, 65, in relation to subscriptions by a county or corporation to the stock of an internal improvement company, the provisions of the law must be strictly pursued; but a literal compliance in every particular, however unessential, is not required. Substantial compliance with the law in every essential feature is all that is necessary.
3. **Same—Same—Directory and Mandatory Provisions.**—The failure to comply strictly with the provisions of the statute which are not manda-

***Equity Jurisdiction—Injunction.**—In *Railroad Co. v. Dameron*, 95 Va. 546, the court says: "The jurisdiction of a court of equity to restrain a municipal corporation and its officers from levying and collecting an unauthorized tax or from creating an unauthorized debt, upon the application of one or more taxpayers of the corporation, who sue for the benefit of themselves and all others similarly situated, is too well settled to admit of dispute. Citing the principal case and *Bull v. Read*, 13 Gratt. 78; *Eyre v. Jacob*, 14 Gratt. 422; *Roper v. McWhorter*, 17 Va. 214; *Crampton v. Zabriskie*, 101 U. S. 601; 2 *Dillon Mun. Corp. secs. 914, &c.* See also *Blanton v. Fertunizing Co.*, 77 Va. 335, citing the principal case.

tory, but merely directory, will not vitiate the proceedings, so as to render the subscription invalid.

4. Same—Same—Time and Mode of Performance.—Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly, and prompt conduct of the business, and by a failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; and if the act is performed, but not in the time or in the precise mode indicated, it may still be sufficient, if that which is done accomplishes the substantial purpose of the statute.

5. Same—Provisions by Implication.—The order of the county court directing the sense of the qualified voters to be taken directs the election to be held by the commissioners of election in conformity to law. Though the order does not expressly require the sheriff to act, so far as the
696 *agency of the sheriff was rendered necessary by the law, although not named in the order, he was within its operation.

6. Same—Commissioners.—It was not necessary, under the statute, that the commissioners of election should be designated by name in the order, as there were already commissioners legally appointed. They were appointed at the May term of the court, and though the statute directs they shall be appointed at the April term, this provision of the statute is clearly directory.

7. Same—Other Questions.—For other questions in relation to the appointment of the board of commissioners to examine the return, and the time when the commissioners of election shall make their returns, see the opinion of BURKS, J.

8. Commissioners of Election—Duties.—The commissioners of election are the body to compute and ascertain the number of registered voters in the county, the number of votes cast at the election, the number voting for and the number voting against subscription. In ascertaining and reporting the number of registered voters in the county they are to be guided and controlled by the registration books. But where the register had noted on the book the death or removal of a person registered, it was proper to omit his name from the count.

9. Supervisors—Subscription to Stock.—It was for the supervisors to fix the amount of the subscription to the stock, not exceeding the sum limited by the statute.

10. Same—Conditional Subscriptions.—The supervisors of the county having resolved to subscribe the sum of \$100,000 on condition that the town of D subscribed \$50,000, that subscription cannot subsequently be rescinded by them; and a resolution by them to this effect was invalid. And the town of D having made the subscription of \$50,000, the supervisors may carry out their subscription of \$100,000, and direct the issue of the bonds of the county therefor in the mode prescribed by the statute.

11. Stock Subscriptions—Order of Court.—It was not necessary that the order of the court directing the vote upon the subscription should state that the amount to be subscribed will not require an annual tax in excess of twenty cents, or that it is not more than one-fifth the capital stock of the company.

12. Evidence in Record—Duty of Court to Look Outside.—There being no evidence in the record that the subscription will require a tax in excess of twenty cents on the \$100 of the taxable property of the county, and no such question made

in the pleadings, the court cannot look outside of the record to take *notice of the auditor's reports, and the assessor's books, to ascertain the amount of taxable property in the county.

13. Power of Legislature—Curative Acts.—The legislature may, by a subsequent act, legalize the proceedings, if they were irregular, and so confirm the subscription.

This was a bill in equity in the circuit court of the county of Henry, brought by James S. Redd and fifteen other citizens and tax-payers of Henry county, to enjoin the supervisors of the said county from issuing the county bonds for \$100,000, for payment of the county subscription to the stock of the Danville and New River Narrow-Gauge railroad company. This was a company incorporated by an act of the general assembly of Virginia, approved March 29th, 1873. The provisions of the charter as to the powers of the company, and the authority of counties through which the road was to run to subscribe to its stock, are set out in the opinion of Judge Burks. The plaintiffs in their bill set out many objections to the proceedings of the court in directing the vote of the people to be taken whether the subscription should be made, to the action of the officers taking and counting the vote, and to the conduct of the supervisors in relation to the subscription. These are also stated in the opinion of Judge Burks.

The supervisors answered the bill, controverting the objections made by the plaintiffs. And the cause coming on to be heard on the 23d of October, 1868, the court dissolved the injunction and dismissed the bill, with costs. And thereupon the plaintiffs obtained an appeal to this court.

J. B. Young and J. A. Early, for the appellants.

James Alfred Jones, for the appellees.

BURKS, J. The jurisdiction of a court of equity in a case like the present, unless
698 it has been taken away by *statute, is too well established to admit of dispute. *Bull & others v. Read & others*, 13 Gratt. 78; *Goddin v. Crump*, 8 Leigh, 120; *Jones on Railroad Securities*, § 268; 2 *Dillon on Municipal Corporations*, §§ 731, 732, 733, 734, 737, and cases cited in the two last-named works. It is insisted, however, by the learned counsel for the appellees that the equitable remedy has been superseded in this state by act of the legislature approved January 15, 1875. That act provides a remedy for contests, and a determination thereof, in elections held to take the sense of qualified voters on subscriptions to stock of internal improvement companies, and may be found in the Acts of Assembly for 1874-75, ch. 37, p. 29.

"In modern times," says Mr. Justice Story, "courts of law frequently interfere, and grant

***Power of Legislature—Curative Acts.**—As sustaining the rule laid down by the principal case that the legislature may, by a subsequent act, legalize the proceedings if they were irregular and so confirm the subscription, see *Bell v. Farmville, &c., R. Co.*, 91 Va. 112; *Supervisors v. Randolph*, 89 Va. 614.

a remedy under circumstances in which it would certainly have been denied in earlier periods. And sometimes the legislature, by express enactments, has conferred on courts of law the same remedial faculty which belongs to courts of equity. Now, in neither case, if courts of equity originally obtained and exercised jurisdiction, is that jurisdiction overturned or impaired by this change of the authority at law in regard to legislative enactments; for, unless there are prohibitory or restrictive words used, the uniform interpretation is that they confer concurrent and not exclusive remedial authority." 1 Story's Eq. Juris. § 80. It is an established principal of a court of equity never to abandon a jurisdiction which it has once assumed. Express statutory enactment can alone take away any part of the original jurisdiction of the court. *Kerr's Injunctions in Equity*, 6. See, also, *Wayland v. Tucker & others*, 4 Gratt. 267.

There are no prohibitory or restrictive words in the act referred to, and there would seem to be nothing in the nature of the act or the language employed to
 699 *indicate an intent to make the new remedy thereby provided exclusive; and this opinion will proceed on the assumption that the equitable remedy exists.

The Danville and New River Railroad Company was incorporated by an act of the legislature approved March 29th, 1873 (Acts of 1872-3, ch. 286), and invested with all the powers, rights and privileges necessary and proper to locate, construct and maintain a railroad, to be known as the Danville and New River Narrow-Gauge railroad, to begin at or near Danville, in the county of Pittsylvania; thence by Martinsville, in Henry county; Patrick Courthouse; Hillsville, in Carroll county, to some point on the Atlantic, Mississippi and Ohio railroad not east of Christiansburg. The act provides for the temporary organization of the company, and, among other provisions, contains the following: "Any county or incorporated town or city along the line of said road, or any of its connecting branches, is hereby authorized, in the manner and under the rules and regulations prescribed by law, to subscribe to the capital stock of said company; and to this end it shall be the duty of the county courts of such counties, or the hustings court of such town or city, in their discretion, to cause a vote of the qualified voters to be taken in the manner prescribed by law, at such time as the president and directors of the Danville and New River Narrow-Gauge railroad company may ask, and to issue bonds in such form, running such lengths of time, and bearing such rate of interest, and payable at such periods and places, as such courts may determine."

After the temporary organization of the company, authorized by the charter, had been effected, the proceedings complained of in this suit were had under the law as contained in §§ 62, 63, 64, 65, ch. 61, Code of 1873, terminating in a subscription by the
 700 supervisors, on behalf *of the county of Henry, of one hundred thousand dol-

lars to the capital stock of said company.

No fraud or corruption is charged against any officer, agent or other person concerned, but the allegation is, that the proceedings did not conform to the requirements of the statute in many particulars, which are specified, and are therefore invalid.

I propose to notice the assignments of error set out in the petition for appeal as briefly as the nature of the case will admit, premising that I recognize the rule contended for by the counsel for the appellants, that in cases like the present, the provisions of the law must be strictly pursued; with this qualification, however, that a literal compliance in every particular, however unessential, is not required. If the rule were applied without the qualification, no subscription by a county or municipality under the statute would probably stand the test. Substantial compliance with the law in every essential feature is all that is necessary. "The sound doctrine," says a learned author, "is, that compliance, with all substantial or material conditions is essential." 1 Dillon on Municipal Corporations, § 108.

Nor must we fail to distinguish between provisions that are mandatory and such as are directory merely; by which latter is meant those provisions that are to be considered as giving directions which ought to be followed, but not as so limiting the power in respect to which the directions are given that it cannot effectually be exercised without observing them. Cooley's Constitutional Limitations, 74, marg. p. Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly and prompt conduct of the business, and by a failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; and if the act is performed, but not in the time or
 701 *in the precise mode indicated, it may still be sufficient, if that which is done accomplishes the substantial purpose of the statute. Id. 78, marg. p.

The order of the county court directing the sense of the qualified voters to be taken on the question of subscription was sufficient. It is objected that the sheriff was not expressly required to act. That is so; but the election was ordered to be held by the commissioners of election "in conformity to law." So far as the agency of the sheriff was rendered necessary by the law, although not named in the order, he was within its operation.

Nor was it necessary, under the statute, that the commissioners of election should be designated by name in the order, as there were already commissioners "legally appointed." They had been appointed at the previous May term of the county court, whereas the statute requires that they shall be appointed at the April term. This provision of the statute is clearly directory. If they were appointed by the proper authority, that is sufficient. These commissioners acted, and the answer to the bill stated, and the statement is responsive,

that they took the oath required by law, and a copy of the oath taken by the commissioners at the Martinsville voting place is filed, which oath is averred to be in substance the same as that taken by the commissioners at the other voting places.

The board of commissioners were appointed by the court and before the election ordered had taken place, and it is insisted that the statute requires the appointment to be made by the judge in vacation, and after the election takes place. If this be the proper construction of the statute, still the objection has no force. Surely an act to be done by a judge in vacation may be done by him in term as well, and it would seem to be

immaterial whether the board of commissioners **702** *were appointed before or after the election, if appointed in time to discharge the duties devolved upon them. If, however, it was indispensable that the appointment should be made after the vote ordered had been taken, the appointment was substantially so made in this case. Four commissioners were appointed on the 9th day of August. On the 15th day of September (the fourth day after the election) two of the commissioners, to-wit: John H. Schoolfield and W. A. Sheffield, not being present to transact the business required of the board, others were substituted for them. The language of the order is: "Ordered, that Dr. Jas. M. Smith and S. G. Whittle be appointed to act in connection with George D. Grandy and B. F. Dyer as a board of commissioners for Henry county, as the law directs." This order was substantially an appointment of all the members of the board.

The commissioners of election at the several voting places are required by the law to make their returns to the judge of the county court within two days after the election. The returns were made, but it does not appear whether they were made within the two days, and this is alleged as a defect in the proceedings. The returns were certainly made within a few days after the election, for they were examined by the board of commissioners on the 16th day of September, which was the fifth day after the election. The substantial purpose of the statute was accomplished, although the returns may not have been made within the two days, and, indeed, for aught that appears to the contrary, they were made within that time.

It is further objected that while the order of the court submitted the question to the voters whether there should be a subscription not exceeding one hundred thousand dollars, the vote was for that sum absolutely. In

support of this objection, reliance is **703** placed on the report of the *board of commissioners and the order of the county court convening the supervisors to make the subscription. There is nothing else in the record, as far as I have seen, even tending to show that the vote was for the subscription of an absolute sum. The recitals in the report of the commissioners have reference to the order of the court under which

they acted, and I do not understand that they meant to affirm that the question voted on was different from the question submitted by the order. The order of court concerning the supervisors simply pursues the language of the report. It may have been supposed by the voters at the time they cast their votes that if the result of the election was in favor of subscription, the maximum amount would be subscribed by the supervisors, and those favoring subscription may have so desired; but we are not to presume that they voted in ignorance of the fact that the amount to be subscribed was, under the law, in the discretion of the supervisors, limited only as to the maximum sum.

It is contended that the computation and ascertainment of the number of the registered voters of the county, the number of votes cast at the election, the number voting for and the number against subscription, was a duty devolved, by the law, on the county court; and it is assigned as error that it was discharged by the board of commissioners and not by the court. This assignment of error seems not to be well founded. We must construe the two sections in the Code (§§ 63, 64, ch. 61) together. While this duty is not expressly mentioned in the 63d section among the enumerated acts to be performed by the commissioners, yet it would seem to be plainly implied by the language employed in the 64th section: "If it shall appear, by the report of the board of commissioners, that three-fifths of the qualified voters," &c. The

report is the basis for the court's action, and from which it is **704** *to determine whether three-fifths of the qualified voters of the county voting are in favor of subscription, and whether said three-fifths include a majority of the registered voters of the county and a majority of the votes cast by freeholders at the election. The commissioners, therefore, did not, in this case, transcend their authority in ascertaining the facts necessary for the action of the court.

But it is further insisted that if the commissioners were charged by the law with the duty of ascertaining and reporting the number of registered voters in the county, they violated the law in rejecting from the count voters whose names appeared on the registration books, and their report and the subsequent proceedings thereon were therefore invalid. I think the objection is well taken, so far as it applies to registered voters rejected from the court wholly upon extrinsic evidence. I think the commissioners should have been guided and controlled by the registration books. It does not appear that they erased any names from the books or added any. It appeared on the face of these books, which it would seem had not been recently revised, that there were marks or memoranda made by the registers, indicating the death or removal of voters whose names were still on the books. It was competent, I think, and proper for the commissioners to omit these names from the count. I am satisfied from the evidence that if the names improperly rejected had been counted, the result of the

election would not have been changed; that is, there would have been still three-fifths of the qualified voters voting on the question in favor of subscription, and said three-fifths would have included a majority of the votes cast by freeholders at the election, and a majority of the registered voters of the
 705 county. Such being the *fact, the errors committed by the commissioners were not fatal to the proceedings.

At the term of the court next after the date of the commissioner's report, to-wit: on the 11th day of October, 1875, the county court made the order before referred to convening the supervisors on the 23d day of that month, to carry into effect the wishes of the voters as expressed at the election, by subscribing on behalf of the county the sum of one hundred thousand dollars to the capital stock of the railroad company. I have already anticipated the objection made to this order. The form of the order of the court could not have the effect of limiting the powers of the supervisors in respect of the amount of the subscription to be made, those powers being derived from the law and not from the court. The supervisors seem to have met, pursuant to the order, on the 23d day of October, and taking no action in the matter of the subscription, adjourned till the 9th of November, when they again adjourned till the 6th day of December. They then resolved to subscribe the sum of one hundred thousand dollars on behalf of the county whenever the people of Danville should vote a subscription of fifty thousand dollars. They seem to have taken no further action in the matter till the 8th of April, 1878, when, on account of the alleged delinquency of Danville in making any subscription, they passed a resolution annulling and rescinding, as far as they had the power, the vote for the subscription by the people of Henry county on the 11th day of September, 1875. On the 19th day of the same month (April) they adopted a similar resolution; and on the 28th day of June following, the voters of Danville having in May preceding voted a subscription of \$50,000 to the stock of the company, the supervisors of Henry rescinded the resolutions of the 8th and 19th of April, resolved to make the subscription of
 706 \$100,000 to the stock of the company, and ordered their clerk to subscribe that sum on behalf of the county on the books of the company.

The resolutions of the 9th and 18th of April never had any force, as it was not in the power of the supervisors to nullify the action of the people at the polls; but it is further contended, that the power of the supervisors to make the subscription was exhausted at their first meeting, when a majority were present and they failed then to make the subscription. That is not my construction of the statute (§ 65, ch. 61, Code 1873). The object of the statute would rather seem to be to require a majority of the supervisors to be present whenever the subscription is made, and not to limit their power to act to the first meeting at which a majority may be present.

If such limitation had been intended, it would doubtless have been plainly declared. Nor is there anything in the statute indicating the purpose to confine the exercise of the power to make the subscription to the supervisors in office at the time of the election.

Nor do I think there is any just ground for the complaint, that the supervisors delayed, as they did, in making the subscription. In less than three months after the election they entered on record their readiness and purpose to make the subscription as soon as the town of Danville should make a subscription of \$50,000. This would seem to have been wise and reasonable, and as soon as the subscription was made by Danville, the supervisors made the subscription for the county of Henry.

Having disposed of the objections raised by the assignments of error contained in the petition for appeal, several other assignments, made at the bar, remain to be noticed.

One of them, based on the ground of the alleged want of power in the supervisors in office in 1878 to make the
 707 *subscription ordered in 1875, need not be further noticed after what has been already said in answering an objection in the petition of a somewhat similar character.

The other three assignments are founded on the assumption that the maximum amount of the subscription fixed by the order of the county court, of the 9th of August, 1875, exceeds the amount allowed by the statute, § 62, ch. 61, Code of 1873. The language of the statute is as follows: "The said order shall state the maximum amount proposed to be subscribed, which shall in no case exceed one-fifth of the total capital stock of said company, or an amount, the interest upon which, at the rate authorized by the council, or board of trustees, of any city or town, or board of supervisors of any county, or township board of any township shall (not*) require the imposition of an annual tax in excess of twenty cents on the one hundred dollars.
 * * * * *

It is alleged that the interest on the maximum amount fixed by the order of court would require the imposition of an annual tax in excess of twenty cents on the one hundred dollars of the taxable property of Henry county, and that therefore the order and all the proceedings based thereon are void.

Certainly, if the fact alleged were true, and that fact appeared by the record in this case, the conclusion that the proceedings are void would necessarily follow. It is not pretended that the record discloses any such fact, but it is contended that the orders of the county court should show that the fact was otherwise—that is, that the amount to be subscribed would not require an annual tax greater than twenty cents on the hundred dollars of taxable values in the county. There is no doubt of the correctness of the general proposition, that where courts are invested with a

*This word "not" is evidently inadvertently inserted in the statute. It should be omitted in the reading.

special and limited jurisdiction the
 708 *facts necessary to give jurisdiction of the subject matter should appear by their records. Such was the case of *Pulaski County v. Stuart, Buchanan & Co.*, 28 Gratt. 872. By statute the county court, composed of justices of the peace, was empowered to provide for the purchase and distribution of salt among the people, and it was required, before the court could act, that a majority of the acting justices should be present, or that all should have been summoned to attend; and it was held that to give validity to the orders of the court it was necessary that the record of the court should show, when the court acted, either that a majority of the justices were present or that all had been summoned. Without these facts appearing, it would not appear that the court had jurisdiction of the matter with which it was charged. So, in the present case, while the general law invests the county court with jurisdiction to order, without special application from any source, an election to determine whether there shall be a subscription to the capital stock of a railroad company, yet the special act incorporating the Danville and New River railroad company makes it the duty of the county court, in its discretion, to cause a vote of the qualified voters to be taken at such time as the president and directors of the company may ask. To authorize the action of the court as provided, it would seem to be necessary that it should be taken on the application of the president and directors of the company, and probably it might be considered essential to the jurisdiction of the court that that fact should appear by the records of the court. The fact does so appear, and, if that be necessary, it would seem to be all that need appear by the record to show that the court had jurisdiction of the subject matter.

But if the order of the court is not to be considered invalid for the reasons already assigned, we are asked to go a step further,

and decide that it is invalid by reason
 709 *of alleged extrinsic facts—facts not appearing by the record. To ascertain

these facts, we are asked to take judicial notice of the auditor's reports, and of the books showing the assessments of property and the contents of those books. When it is said that the court will take judicial notice of any fact, the meaning is that such facts need not be proved in the ordinary manner. They may be noticed without being proved in the case. Can such notice be taken by this court of the books referred to and of their contents? I think not. I can find no precedent to justify it. There are many facts of which courts will take judicial notice, and they are specified in the approved elementary works on evidence. 1 Greenleaf's Ev. § 6 and notes; 1 Phillips' Ev. 619, 620 (marg. pp.) and notes. Among other things they will take notice, without proof, of the public laws of the state; of the sittings of the legislature, and its established and usual course of proceeding; the privileges of its members, but not the transactions on its journals; of historical facts, and generally, it is said, of whatever ought

to be generally known within the limits of their jurisdiction. The assessments of property are made for the purposes of taxation, and the books containing them may be and are resorted to for that purpose by the authorities charged with the duty of levying taxes. But, when a judicial proceeding, it becomes necessary to resort to those books to establish any fact arising in the cause, such fact, I apprehend, must be established in the ordinary way by producing the books as evidence in the cause.

CHIEF JUSTICE MARSHALL, in a case where one of the questions was whether the court would take judicial notice of a pardon, observed that "it is a constituent part of the judicial system that the judge sees only with judicial eyes, and knows nothing respecting any particular case of which he is not informed judicially. A private deed not
 710 communicated to him, whatever *may be its character, whether a pardon or a release, is totally unknown and cannot be acted on. The looseness which would be introduced into judicial proceedings would prove fatal to the great principles of justice if the judge might notice and act upon facts not brought regularly into the cause. Such a proceeding, in ordinary cases, would subvert the best established principles, and overturn those rules which have been settled by the wisdom of ages." *United States v. Wilson*, 7 Peters' R. 150, 161. And in a very recent case decided by the supreme court of the United States, MR. JUSTICE SWAYNE, in the opinion of the court delivered by him, speaking of notorious facts of which the court will take judicial notice, said: "This power is to be exercised by courts with great caution. Care must be taken that the requisite notoriety exists. Every reasonable doubt upon the subject should be resolved promptly in the negative." *Brown & others v. Piper*, 91 U. S. R. (1 Otto) 37, 42, 43.

But the assignment of error relied on requires us to go still further. We are asked not only to take notice of certain facts which we cannot know judicially, but of facts which are not in issue in the cause, nor relevant to any issue made. It is nowhere in the record made a question whether the maximum amount of the subscription fixed by the county court of Henry exceeds the amount allowed by the statute. Although the bill states with great particularity and minuteness of detail numerous objections to the proceedings complained of, and the grounds of those objections, it does not allege, directly or indirectly, or even insinuate that the maximum amount of the subscription was in excess of the amount allowed by law. No allusion is made to it in the bill, answer, or in the proofs. If intended to be relied on it should have been put in issue. It was

matter of fact susceptible of proof or
 711 disproof. *Under these circumstances it would be an anomaly for an appellate court to reverse a decree for the causes alleged. We can only review the case made, and as made by the parties in the court below. We cannot go outside of the record and decide a case upon facts *dehors*. This

would, in my judgment, be a palpable and flagrant abuse of appellate jurisdiction.

Since the foregoing opinion was written, it has come to my knowledge that the governor of the commonwealth has approved an act passed by the general assembly authorizing the supervisors of Henry county to carry out the wishes of the majority of the voters of Henry county, as expressed by the vote taken on the 11th day September, 1875, and to assess and levy such annual tax as may be necessary to pay the subscription of one hundred thousand dollars, notwithstanding the limitations prescribed by the 62d section of chapter 61 of the Code.

The conclusions which I have reached in this case are independent of the special act referred to, but it may be as well to say that if there were any defects or irregularities in the proceedings reviewed in this opinion, which might offset the subscription made by the supervisors, they are cured by this legislation. That such legislation is valid seems to be well settled. Defective subscriptions may in all cases be ratified where the legislature could have originally conferred the power. Mistakes and irregularities are of frequent occurrence in municipal elections, and the state legislatures have often had occasion to pass laws to obviate such difficulties. Such laws, when they do not impair any contract, or injuriously affect the rights of third persons, are never regarded as objectionable, and certainly are within the competency of the legislative authority. *St. Joseph Township v. Rogers*, 16 Wall. U. S. R. 644, 663, 664. Authorities to the same effect are numerous.

Among them are the following: *Ritchie v. Franklin County*, 22 Wall. *U. S. R. 867; *Thompson v. Lee County*, 3 Wall. U. S. R. 327; *Campbell v. City of Kenosha*, 5 Wall. U. S. R. 194; *City v. Lamson*, 9 Wall. U. S. R. 477, 485; *Brewster v. City of Syracuse*, 19 N. Y. R. 116; *Gould v. Town of Sterling*, 23 N. Y. R. 457; *City of Bridgeport v. R. Road Company*, 15 Conn. R. 475, 495; *McMillen v. County Judge, &c.*, 6 Iowa R. 391; *Cooley on Con. Lim.* 225, *et seq.*; 1 Dillon on Mun. Corp. (2 ed.), § 424, note 1.

Upon the whole case, I am of opinion to affirm the decree of the circuit court.

The other judges concurred in the opinion of BURKS, J.

DECREE AFFIRMED.

713 *City of Richmond v. A. Y. Stokes & Co.

March Term, 1879, Richmond.

1. Municipal Corporations—Dedication of Streets.—In this case there may be a valid acceptance of an easement in a town without any distinct act of recognition by the corporate authorities of such town. The mere user, however, by the public of the *locus in quo* will not of itself constitute an acceptance, without regard to the character of the use and the circumstances and length of time under which it is claimed and enjoyed. But where

See *Talbott v. Railroad Co.*, 31 Gratt. 685 and note.

property in a town is set apart for public use, and is enjoyed as such, and public and private rights acquired with reference to it and to its enjoyment, the law presumes such an acceptance on the part of the public as will operate an estoppel *in pais*, and preclude the owner from revoking the dedication.

2. Same—Same—Presumption.—A street of the city having been used according to a certain line from 1817 to 1847, and having been graded and paved by the city authorities, without any objection or claim by the owners of the soil on which a part of the street was laid, and public and private rights having been acquired with reference to it and its enjoyment, its dedication to the public will be presumed, and the owner of the soil cannot revoke it

This was an action of trespass *quare clausum fregit* in the circuit court of the city of Richmond, brought in July, 1876, by A. Y. Stokes and two other partners, under the name and style of A. Y. Stokes & Co., against the City of Richmond. The subject of the action was a parcel of ground extending from Cary street to Basin street forty feet, and twenty-one feet wide, which was covered by a part of Twelfth street, as then used. This piece of ground had been a subject of controversy for years between the parties under whom the plaintiffs claimed and the City of Richmond; the claimants insisting *that Twelfth street properly laid down did not cover it, and the city resisting the claim. In 1858 or 1859 Warwick & Barksdale, under whom the plaintiffs derived title, recovered the ground in an action of ejectment, and enclosed it; but the enclosure was removed, upon an agreement with the council of the city that this was not to affect the rights of either party. The question in the cause was whether the public had acquired an easement over the ground.

On the trial, after the evidence had been introduced, both the plaintiffs and the defendant asked for a number of instructions, which the court refused to give, and gave the following:

"The jury are instructed that they cannot, from the evidence in this cause, find that Warwick & Barksdale, or any parties claiming under them, have dedicated the premises in question to the public, or that by any omissions or laches they have lost the rights they had as against the city at the date of their first communication to the city council, in September, 1847.

"But the jury are farther instructed that if prior thereto the City of Richmond had, with the knowledge and consent of the then owners of the property, assumed control of the premises in question, claiming the same as a part of Twelfth street, and had with such knowledge and consent continuously and notoriously occupied the same as a part of the public highway up to the time of the assertion of the claim of Warwick & Barksdale before the common council September 13th, 1847, and that such use had continued so long that private rights and public convenience would have been materially affected by an interruption of the enjoyment of such part of the highway, they should find for the defendant.

"To which action of the court in rejecting the instructions asked by the defendant, and in giving said instructions of the court, the defendant excepted, and prayed
715 *that this bill of exceptions might be signed, sealed, and made a part of this record; which is accordingly done."

This bill contained all the evidence.

The jury found a verdict for the plaintiffs, and assessed their damages at five hundred dollars; and the City of Richmond moved the court to set aside the verdict on the ground that it was contrary to the evidence; but the court overruled the motion, and entered a judgment in accordance with the verdict; and the city again excepted. And the court certified that all the facts proved on the trial appear in the first bill of exceptions, which was made a part of this, there being no conflict in the evidence. And thereupon the City of Richmond applied to a judge of this court for a writ of error and *supersedeas*; which was awarded. The facts are stated by JUDGE ANDERSON in his opinion.

Keiley, for the appellant.

Kean & Davis and Ould & Carrington, for the appellees.

ANDERSON, J., delivered the opinion of the court.

The dedication of a street or public highway may be made either with or without writing, by any act of the owner, such as throwing open the land to the public travel, or an acquiescence in the use of his land as a highway. Angell on Highways, § 142. Where streets and alleys have been opened by the owner of the soil, and used by the public, with his assent, as a public thoroughfare for years, a dedication of the easement may be presumed, and the continued and uninterrupted use, with the knowledge and acquiescence of the owner, will justify the presumption of a dedication to the public, provided the use has continued so long
716 that private *rights and the public convenience might be materially affected by an interruption of the enjoyment. But any acts of ownership by the owner of the soil would repel the presumption. ALLEN, J., in *Skeen v. Lynch, &c.*, 1 Rob. R. 202. But there must be not only a dedication, but acceptance by the public.

In England it is held that the presumption of the dedication by the owner from his acquiescence in the use of the land as a highway by the public is sufficient. But in this state it was held by the general court in *Kelly's case*, 8 Gratt. 632, that this doctrine, as applied in England, is inapplicable to county roads in this country, and that in this state there must be not only a dedication presumable from the user, but an acceptance by the county court, evidenced by some act of record. But JUDGE LEIGH, who delivered the opinion of the court, excepted expressly streets and alleys in towns from the operation of this principle. As to them the acts of corporation officers may have the same effect as the acts of the county courts.

In *Harris' case*, 20 Gratt. 833, the doctrines on this subject were considered, and JUDGE

STAPLES, in whose opinion all the judges concurred, states the doctrine as held by this court with as much clearness and precision as can well be done. He says: "It is well settled there must be not only a dedication by the owner, but an acceptance by the public. Whether some act on the part of the authorities charged with the control or repair of the highway is necessary to constitute an acceptance, or whether it may be effected by a mere user of the property, is a question upon which the authorities are not agreed." After a brief notice of *Kelly's case*, he says: "It may be safely assumed that in this state there may be a valid acceptance of an easement in a town without any distinct act of recognition by the corporate authorities of such town. The mere user, however, by the public of the *locus in quo* will not of
717 itself constitute an acceptance, *without regard to the character of the use and the circumstances, and length of time under which it was claimed and enjoyed." And he concludes that "when property in a town is set apart for public use and is enjoyed as such, and public and private rights are acquired with reference to it and to its enjoyment, the law presumes such an acceptance on the part of the public as will operate an estoppel *in pais*, and preclude the owner from revoking the dedication. Numerous other cases than those which he had cited, he says, maintain the principle that the owner is estopped to assert there has been no formal acceptance, where the public, relying upon the manifest interest of the party to dedicate the property, have entered into the occupation of it, in such a manner as renders it improper and unjust to reclaim it." And cites *State v. Trash*, 6 Verm. R. 355; *Badeau v. Mead & al.*, 14 Barb. R. 328; and *City of Cincinnati v. White, lessee*, 6 Peters' U. S. R. 431.

This is an action of trespass *quare clausum fregit*, brought by A. Y. Stokes & Co., defendants in error here, against the City of Richmond, and involves the right of the city to a section of Twelfth street which is embraced by parallel lines twenty-one feet east of the western line of Twelfth street, and forty feet south of the southern line of Cary street. There is also another suit depending, in which the Gallego Mills were plaintiffs below and are defendants here, which involves the right of the city to another section of said Twelfth street, lying between the intersections of Twelfth street with Basin street, and a street thirty feet wide south of the basin in parallel lines with Cary street and a line parallel with the western line of Twelfth street, and twenty-five feet east of it. Precisely the same questions are involved in both suits.

Twelfth street is thirty-two feet six inches in width, crosses Main and Cary streets at right angles, and now extends in a direct line and uniform width in a southward
718 *direction, crossing Cary street to Canal street, and embracing both of the sections now in dispute.

The following are established as facts in the cause: That seventy years ago, or more,

one Bullock erected buildings on the east line of Twelfth street as now used, which buildings extended southwardly from Cary street to an alley about half way between Cary and Canal streets. This alley is a little south of the entrance of the street south of the basin before referred to into Twelfth street. These buildings were substantial brick stores, three stories high, and there was a narrow sidewalk some five feet wide in front of them, but which extended no further south than the said alley.

The property adjoining Bullock's buildings on the south, extending on the eastern line of Twelfth street to Canal street, was owned by Randolph Harrison, and upon it was a warehouse erected for tobacco, formerly owned by William I. Morris; and the property opposite Harrison's, on the west side of Twelfth street, was used as a coal-yard, on which Peter Chevallie built his mill in 1833, where the Gallego mills now stand. Twelfth street was not open further south than the aforesaid alley. Between Harrison's lot and Chevallie's mill no street had been opened, but there was a ravine between them, and Harrison's property was approached by Thirteenth street. But at least as far back as 1817 Twelfth street was open in front of the Bullock buildings, which extended to the said alley, as it was then used, and has been ever since, except for the short time it was obstructed (in 1858 or 1859) by the grantors of the plaintiffs below erecting a fence on a part of it. It is true that the whole space west of the aforesaid sidewalk of Twelfth street was an open space as far as the basin—a distance of about one hundred yards—and was used by the James River company, the then owner of the soil, for receiving and delivering goods;

719 but it is a fair inference *from the evidence that the street, the eastern limit of which was indicated by the Bullock storehouses and the sidewalk, was also used by them and their customers in conveying goods to or from the basin, and by the public in general who had dealings with them or the occupants of the Bullock storehouses, as far back as the year 1817; and since the opening of the southern section of Twelfth street in 1834 it must have been the great thoroughfare of transit and transportation to and from the Chevallie or Gallego mills and the Harrison tobacco warehouse, and for the freights of the James River and Kanawha canal brought to or carried from the city of Richmond, and which were conveyed to or from Twelfth street along Basin street to or from the boats in the basin.

In 1833 the subject of opening the southern section of Twelfth street, which had become an important thoroughfare, and connecting it with Canal street engaged the earnest attention of the city fathers. A difficulty met them at the threshold. Twelfth street as then used had been used since 1817, and probably for many years before. As Bullock had erected costly brick buildings along its eastern margin, it must have been the eastern line of the street then, and for years before, as it cannot be presumed that he would have erected such buildings in the middle of

a public street. And in fact there is no evidence in this record that there ever had been a street in use there upon any other location; but it appeared from the report of their surveyor that as Twelfth street was designated in the original plan of the town, its eastern limit along the southern line of Cary street was twenty-one feet east of its location as then used; so that Bullock's buildings occupied twenty-one feet of the street as designated in the plan of the town, and Harrison's warehouse considerably more. If the

720 report of the *surveyor was correct, the city could not open and extend Twelfth street through to Canal street upon its present line without acquiring the right from the owner of the soil on which it would be located. All difficulty was removed, and the way made clear by the proposition of Mr. Harrison to purchase from Chevallie the land upon which the extension of Twelfth street would be located, and to convey it to the city to be used for this purpose, if the city would release to him any claim it might have to the land, or right of way over it, upon which his buildings were erected. This proposition was accepted by the city, and Twelfth street was opened and graded and extended through to Canal street, on the line of its location and used in front of the Bullock buildings, and the whole street, from its intersection with Cary to its intersection with Canal street, was graded and paved its whole width of thirty-two feet and six inches. This was done openly, with the knowledge and in the presence of the owner of the soil, and so far as appears without objection or question as to the right of the city to do what she did. We think it is fair to presume that the city counsel would not have accepted the proposition of Mr. Harrison, and incurred the expense of filling the ravine, and opening and grading the street between his buildings and Chevallie's mill, and of grading and paving the whole street from Cary to Canal, if any question had been raised by the owner of the soil to its right to the street in front of the Bullock buildings until such question was definitely settled, or if its counsel had any doubt as to its right. And it being done in the presence and with the knowledge of the canal company, or its agents, who stood by and allowed the city to lay out and incur the expense of grading and paving this street, as and for a public street, without objection, it is estopped thereby *afterwards to set up a claim to it; and its grantees can have no better right.

721 They claim under a deed of conveyance from John A. Lancaster and S. S. Baxter, as trustees of the James River and Kanawha company, bearing date the 2d of June, 1845, which describes the first lot conveyed, which embraces the section which is involved in this suit, as bounded on one side by Cary street, on another side by Twelfth street, and on a third side by a street thirty feet wide, called Basin street, running along the northern margin of the basin, and extended eastwardly until it meets Twelfth street, and describes the other lot which is involved in the other suit, depending in this court upon

a writ of error, hereinbefore referred to, as bounded on one side by Basin street, on another side by Twelfth street, and on a third side by a street thirty feet in width, to be laid out between the ground then sold, as now designated, and the buildings belonging to the grantees, Warwick & Barksdale, called the Gallego mills, sometimes called Chevallie's mills.

This deed was made to the parties who were the owners of the Gallego or Chevallie mills, which bordered on Twelfth street as it was laid off, graded and paved by the city to the exact width of Twelfth street eleven years before, of which they must be presumed to have had cognizance, and the part of which street lying west of the Bullock buildings, to sections of which they set up claim under said deed, had been used by the said city as a continuation of Twelfth street south of Cary at least for twenty-eight years prior to the date of said conveyance to them with the acquiescence of their grantors. They purchased, therefore, with the knowledge that the city claimed thirty-two feet six inches west of the Bullock buildings, as shown by the paving of that width, as
 722 *a continuation of Twelfth street south of Cary; and by enquiry they might have known that it had been used as Twelfth street south of Cary for more than twenty-eight years prior to the date of said deed of conveyance to them, and that there was not, and most probably never had been, any other Twelfth street in use south of Cary street, and, consequently, that in purchasing they purchased subject to the city's easement; and such, indeed, is the import of the deed read in the light of the surrounding circumstances, of which they must have been cognizant; that if it was designed to convey any part of the street, the conveyance was intended to be subject to the easement; and, without looking to the map, the deed upon its face does not import a conveyance of any part of the street, the location of which was then well defined and understood by all the parties; and the map referred to seems to have been carelessly and imperfectly prepared, for, among other errors, it lays down Twelfth street as having a width of thirty-six feet six inches, when its width is only thirty-two feet six inches—adding about one-eighth to its actual width. Angell, § 142, *supra*, says that the platting of land by the owner, and selling lots bounded by streets designated by the plat, thereby indicates a clear intention to dedicate, or an acquiescence in the use of his land as a highway. The deed to Warwick & Barksdale not only describes the lots sold to them as bounded on one side by Twelfth street, but also on another side by an existing street, called Basin street, which it describes as thirty feet wide and running along the northern margin of the basin, and extending eastwardly until it meets Twelfth street. Now, this street is described as an existing street, and as then extending eastwardly until it meets Twelfth street. This language could apply only to Twelfth street as it then existed and was in use. It could not apply to any other

Twelfth street, for there was no other,
 723 and never had been, except *that which was designated on paper, it is said, in Byrd's original plan of the town, and never had been an actual street, never had been opened, and could not have been meant in this conveyance, as Basin street did not extend eastwardly to meet it, but only to meet Twelfth street as it was then used and paved and well defined; and beyond it eastwardly there was no street, but a block of the Bullock buildings.

And so as to the boundaries of the other lot conveyed. It was bounded on one side by Basin street, on another by Twelfth street, and on a third side by another street thirty feet, which it was agreed by the parties was to be opened, and the location of which was described, and which must necessarily connect with Twelfth street. This was a recognition of the existing Twelfth street. The parties to this deed could hardly be understood to have covenanted to open a new street, the necessary outlet to which would be by Twelfth street, upon the haphazard that another Twelfth street would be opened by the removal of the Bullock buildings, and which, if it were done, could not then be extended through Harrison's lot to Canal street, as the city, eleven years before, had solemnly released to him any claim it might have to a right of way through his lot. If we turn to the map, we think it plainly shows, by the shaded or black lines, the actual eastern terminus of each of the streets on the margin of the basin to be the western line of Twelfth street as then established and in use. It is true that the boundaries of the lots sold are indicated by dotted lines running into Twelfth street, which may indicate that the fee in the soil is embraced in the conveyance, though subject to the easement. How else can the change from a solid to a dotted line be accounted for?

In *Denning v. Roon*, 6 Wend. R. 651, cited by Angell on Highways, § 143, it was held that if a street has been used and built up along a particular line, and the adjoining
 724 owners have acquiesced in the line so built upon, and treated it as the true line of the street for forty or fifty years, they will not be permitted to deny the effect of their acts as a dedication, and to contract the lines of the street, on the ground that by so doing they make them conform to the original survey and lay-out of the street. But the fact of an acquiescence of the owner in the free use and enjoyment of the way as a public road for the period of twenty years would undoubtedly be sufficient evidence in any case, though there were no further proof of an intention to dedicate. Angell, § 143, citing Kent's Com. 451, and decisions of New Jersey, New York, North Carolina, Wisconsin and Kentucky. But time, though it is often a very material ingredient, is not indispensable in the act of dedication.

Where a street in the city of New York was widened from forty to sixty feet and used by the public for nineteen years, with the acquiescence of the owner, who paid an assessment for paving it to its full width, it

valid. The court does not set aside an award merely because it may differ with an arbitrator as to the law of the case.

3. Same—When Court Will Open Award.

—Where the merits in law and in fact are referred to an arbitrator of competent knowledge, and there is not any question reserved by him, the court will not open the award unless

728 something can be alleged amounting to a perverse misconstruction of the law, or misconduct on the part of the arbitrator.

4. Same—Doubtful Point of Law.—Where

arbitrators mean to decide according to law, and they mistake the law in a palpable material point, the award will be set aside. But their decision, upon a doubtful point of law, or in a case where the question of law is designedly left to their judgment, will generally be held conclusive. It must appear they grossly mistook the law; and the court will not interfere merely because it would have given a different decision in the particular case.

5. Same—Decision in This Case.—It does

not appear that the arbitrators have committed any very material or palpable errors in the various points decided by them.

In March, 1877, the City of Portsmouth and the County of Norfolk entered into an agreement, which, reciting that certain questions and disputes between these parties have arisen, and are now depending, they agree to submit them all to arbitration, except one pending suit named, and they proceed to set out these disputed subjects under fourteen separate heads, the fourteenth of which is as follows: "Fourteenth. And all other questions of accounts or rights or title to real estate (with the exception before mentioned), including all matters and questions in dispute between the said city and county, and all cases which are now pending in the circuit court of Norfolk county and the hustings court for said city, and all matters that are in dispute in any way, together with all other matters which either party may deem proper to submit to the arbitrators, shall be and are referred and submitted to the final award and determination of R. H. Baker, of the city of Norfolk, and John R. Kilby, of the county of Nansemond, * * * so as the said arbitrators do make their award or determination of and concerning the premises in writing under their hands and seals."

And they waived the plea of the statute 729 of limitations, and all other technical pleas which would interfere in any manner with the award of the arbitrators, except upon the very right and justice of the

case as to all matters and questions in controversy. And the award was to be entered of record in the circuit court of Norfolk county and the court of hustings for the city of Portsmouth.

In June, 1877, the arbitrators made their award, passing upon each of the subjects submitted to them, and with their award they returned to the circuit court of Norfolk county various statements of accounts made to show the basis on which they fixed the results of the several claims submitted to them.

It appears that when the arbitrators had made out their award they addressed a communication to the board of supervisors of Norfolk county and the council of the city of Portsmouth, in which they say: "In announcing the conclusions to which we have come on the various questions submitted to our arbitrament, * * * it seems to be proper that we should state briefly the reasons which have led us to those conclusions." And they proceed to give the reasons for their award upon the different questions. This paper was not returned by them with their award.

Upon the return of the award to the circuit court of Norfolk county, on motion of the County of Norfolk, a summons was issued to the City of Portsmouth to show cause why the court should not proceed to give judgment in accordance with the award. And at the next term of the court the City of Portsmouth appeared and filed her answer, setting out numerous objections to the award, and insisting that the communication of the arbitrators to the supervisors of the county of Norfolk and the council of the city of Portsmouth, which is called the report

730 of the arbitrators, should be treated as part and parcel of the award. But the court refused to admit the paper as part of the award; but permitted it to be offered as evidence, and duly considered the same. And to the refusal of the court to admit the paper as a part of the award, the City of Portsmouth excepted.

The court being of opinion that the objections filed by the City of Portsmouth to the award were not valid, overruled them, and adjudged that the award be affirmed as a judgment of the court. And thereupon the City of Portsmouth applied to a judge of this court for a writ of error; which was awarded. The case is sufficiently stated by JUDGE STAPLES in his opinion.

Holladay & Gayle, for the appellant.

J. Alfred Jones and John Goode, for the appellee.

STAPLES, J., delivered the opinion of the court.

The City of Portsmouth was incorporated by an act of the legislature passed March 1, 1858. Another act, supplementary to the first, was passed 25th March, to provide for the disposition of the common property of the County of Norfolk and the City of Portsmouth. Subsequent to the passage of these acts, and the acceptance of the act of incorporation by the City of Portsmouth, a con-

408; *Pollock v. Sutherlin*, 25 Gratt. 95; *Moore v. Luckess*, 23 Gratt. 160; *Ross v. Overton*, 3 Call. 309; *Mathews v. Miller*, 25 W. Va. 818.

Same—Mistake of Fact—Setting Aside Award.—The general rule is that a mistake of fact for which an award will be set aside must be apparent on its face, in some material point and extremely prejudicial to the losing party. *Morris v. Ross*, 2 Hen. & M. 408; *Ross v. Overton*, 3 Call. 309; *Polard v. Lumpkin*, 6 Gratt. 398; *Shermer v. Beale*, 1 Wash. 11; *Pleasants v. Ross*, 1 Wash. 156; *Lee v. Patillo*, 4 Leigh 436; 2 Am. & Eng. Enc. Law 782.

troverſy aroſe between that city and the County of Norfolk, involving many troubleſome queſtions as well as a large amount of property and money. Suits were inſtituted both at law and in equity, which promiſed to be very protracted and expensive. Whiſt they were pending, the parties agreed to refer all their matters of controverſy to arbitration, and Richard H. Baker, of Norfolk city, and John R. Kilby, of Nanſemond

731 county, *were choſen as the arbitrators. And it was mutually agreed that their award ſhould be entered of record in the circuit court of Norfolk county and the huſtings court of Portſmouth. The arbitrators completed their award on the 29th of June, 1877, after a long and patient investigation of all the matters ſubmitted to them.

The City of Portſmouth, not being ſatisfied with the deciſion, reſuſed to abide by it. Thereupon a rule was iſſued againſt the city, at the inſtance of Norfolk County, to ſhow cauſe why the award ſhould not be entered up as the judgment of the circuit court. The City of Portſmouth appeared in anſwer to the rule, and objected to the award on numerous grounds; all of which were overruled by the court, and judgment was entered in conformity with the finding of the arbitrators.

The caſe is now before this court upon a writ of error to that judgment. No complaint is made of any miſconduct on the part of the arbitrators. The ſole grounds of objection conſiſt of certain alleged errors of law and fact in the award—errors not apparent on the face of the award, but as plainly appearing by the report of the arbitrators and certain exhibits accompanying it, which, it is inſiſted, muſt be conſidered as a part of the award. On the other hand, it is claimed that theſe papers conſtitute no part of the award, and cannot be looked to for any purpoſe. In the view we take of the caſe, it is not deemed neceſſary to decide which of theſe pretenſions is correct. For all the purpoſes of this deciſion, it may be conceded that the report and exhibits are a part of the award. With this concession we are to enquire whether the award can be invalidated on all or any of the grounds ſtated by the appellant.

It is impoſſible to look through this record without being ſtruck with the number and variety of difficult queſtions ſubmitted to the arbitrators; queſtions relating to the indebtedneſs of the County of Norfolk,

732 *and the amount properly chargeable to the City of Portſmouth; queſtions relating to the Norfolk county ferries, to the docks in that county and in the city of Portſmouth, and the receipts and profits derived from theſe ſeveral ſources for many years; queſtions relating to the proper diſpoſition and diſviſion of other real and perſonal property, and numerous other matters of controverſy not neceſſary to be mentioned here. If ever there was a controverſy peculiarly proper for arbitration it was this. The real parties litigant were the people of Norfolk county on one ſide and the people of Portſmouth on the other—citizens of the ſame community, bound together by the ties of blood and affection. A proper underſtand-

ing and ſettlement of the numerous points of controverſy required not only patient investigation and reſearch, knowledge of local affairs and hiſtory, and repeated references to documents and records, but conſtant intercourse with witneſſes and counſel. The perſons ſelected as arbitrators were peculiarly fitted for the taſk; they were men of high ſtanding, perſonally and professionally, and from their education, aſſociation and general information might fairly be preſumed to be better qualified to arrive at correct conclusions than any judicial tribunal in the ſtate. It was, therefore, very properly agreed that all ſuits pending in the circuit and huſtings court, and that all other matters and queſtions in diſpute, together with all other matters which either party might prefer, ſhould be ſubmitted to and finally decided by the arbitrators; and, further, that the parties would waive all technical pleas which would interfere in any manner with the award of the arbitrators, except upon the very right and juſtice of the caſe as to all matters and queſtions in controverſy. Theſe

733 conſiderations all ſerve to ſhow that the deciſions of the arbitrators *was not to be according to ſtrict technical rules of law, but agreeable to the principles of juſtice and equity, and that the deciſion was to be final and concluſive upon the parties.

It is ſaid, however, that as the arbitrators have ſet forth the grounds of their award in the report accompanying it, they muſt have intended to ſubmit their conclusions as a matter of law to the court; and where that is the caſe, the court will reverse their action and ſet aſide the award, if not according to law. The report is, however, not addreſſed to the court, but to the parties, and obviously was intended for them excluſively, that they might ſee the grounds of the award. The arbitrators very properly ſay, in announcing the conclusions to which they have come, it would ſeem to be proper that they ſhould ſtate briefly the reaſons which led them to theſe conclusions. There is nothing in the report, or in the award, from which it can be inferred that the arbitrators deſigned to refer any matter to the court, or that they intended to decide according to the ſtrict technical rules of law. On the contrary, it is manifeſt throughout their purpoſe was to baſe their deciſion upon an equitable conſtruction of the act of the legiſlature, and to ſettle the matters in controverſy upon the very right and juſtice of the caſe.

But, conceding that they intended to decide according to law, and that they have not done ſo in every inſtance, it does not, therefore, follow that the award is invalid. The court does not ſet aſide an award merely becauſe it may differ with an arbitrator as to the law of the caſe. In *Underhill v. Van Cortlandt*, 2 John. Ch. R. 339-361, CHANCELLOR KENT very juſtly ſaid: "If every award muſt be made conformable to what would have been the judgment of this court in the caſe, it would render arbitration uſeleſs and vexatious, and a ſource of great litigation; for it very rarely happens that both

734 parties are ſatisfied. *The deciſion by

arbitration is the decision of a tribunal of the parties' own choice and election. It is a popular, cheap, convenient and domestic mode of trial, which the courts have always regarded with indulgence."

In *Bassett's adm'r v. Cunningham*, 9 Gratt. 684, this court lays marked stress on the fact that the arbitrators were the counsel of the parties, and the umpire a learned and distinguished member of the legal profession. And JUDGE ALLEN quotes, with approbation, what LORD ELLENBOROUGH said in *Sharsman v. Bell et al.*, 5 Maule & Sel. 504: "Where the merits in law and in fact are referred to an arbitrator of competent knowledge, as we must presume a gentleman of the bar to be, and there is not any question reserved by him, the court will not open the award unless something can be alleged amounting to a perverse misconstruction of the law, or misconduct on the part of the arbitrator." The doctrine laid down in most of the cases is, that if the arbitrators refer any matter to judicial enquiry by spreading it on the face of their award, or if they mean to decide according to law, and they mistake the law in a palpable material point, the award will be set aside. But their decision upon a doubtful point of law, or in a case where the question of law is designedly left to their judgment, will generally be held conclusive. 2 Story's Eq. Juris. § 1455, and cases cited in note. It must appear they grossly mistook the law, and the court will not interfere merely because it would have given a different decision in the particular case. *Smith v. Smith*, 4 Rand. 95; *Herrick v. Blaine*, 1 John. Ch. R. 101; *Moore v. Luckess' next of kin*, 23 Gratt. 160.

In the light of these well-settled principles it can scarcely be supposed that this court will enter into a critical examination of the alleged errors in the cause *before us, as in the case of an appeal from the decree of an inferior court.

In a decision involving so many interesting and novel points, it is not difficult for ingenious and able counsel to suggest mistakes, both of law and fact, in respect to which this court possibly might have come to a different conclusion from that reached by the arbitrators. We have, however, none of the evidence before us upon which their award is based, except what is incidentally embodied in the report in explanation of the conclusions reached.

After a careful examination of the record, we are not prepared to say that the arbitrators have committed any very material or palpable errors in the various points decided by them. It is impossible in this opinion even to advert to all of them. Two or three may be mentioned. For example, complaint is made that the City of Portsmouth is charged with \$1,200—one-half the salary of the treasurer of Norfolk County from 1858 to 1859—and this is alleged to be a plain and palpable error. The propriety of this charge was discussed by the counsel before the arbitrators, and the latter, in their report, gave their reasons for allowing it.

Under the act of 1858, already cited, the proceeds of the "Norfolk county ferries" were directed to be paid to the "treasurer of Norfolk county," and by him to be disbursed in the manner prescribed in the act; and for the faithful discharge of these duties he was made responsible under his official bond. The arbitrators decided that for his services in receiving and disbursing this fund the treasurer was entitled to his compensation, to be paid out of the fund itself, as any other agent or fiduciary; and inasmuch as the City of Portsmouth and Norfolk County were equally entitled under the law to the proceeds of the ferries, they should bear equally the expense of compensating the treasurer.

736 We are unable *to see anything wrong and unjust in this. On the contrary, the decision seems to be eminently just and proper. It is true that the arbitrators allowed the treasurer his salary during the years 1862, 1863, 1864 and 1865, when the ferries were under the control of the Federal authorities.

It does not appear that this point was raised in the progress of investigation before the arbitrators. The ground taken by the City of Portsmouth was that the city ought not to be charged with any part of the salary, but that Norfolk County ought to pay the whole of it. Whether the treasurer was entitled to his salary during the years mentioned depended upon the evidence before the arbitrators. It is easy to imagine good and satisfactory reasons for the allowance. As the evidence upon this point is not before us, it is impossible to say that there was any error in this particular.

Complaint is also made of the manner in which the accounts of the ferry funds were taken by the arbitrators. It is said that the receipts and disbursements were aggregated from 1858 to 1869, whereas the accounts ought to have been annually stated as required by the act of 1858, and interest allowed the City of Portsmouth upon the balances found due. In the first place, there is nothing in the act of 1858 prescribing the mode in which the accounts shall be stated. No good could result from annual statements and annual balances, unless it appeared the parties were entitled to interest thereon. Whether either of them was so entitled depended upon the evidence before the arbitrators, which is not in the record. They, doubtless, had good reasons for disallowing it. It may be that the funds remained unproductive in the treasury, or that the arbitrators were satisfied that the case was not one for the application of a rigid rule between the

737 *city and county. If this were a commissioner's account this court could not correct it for an alleged error, with respect to interest, unless the evidence was before it. Surely an award should be viewed with equal favor and respect. As a matter of fact, however, the City of Portsmouth was credited with a considerable sum for the loss of interest arising out of the failure to apply the balances due her in the years 1858, 1859, and 1861 to the outstanding indebtedness.

Complaint is also made of that portion of

the award relating to the county docks. The arbitrators decided that the title to the land, or the land covered by water, comprehended by the designation of "the county dock of Norfolk" as contradistinguished from the "ferry franchise," was and is in the county of Norfolk; but that this title or ownership in fee is subject to the joint right of the county and city to the ferry landing and right of way over the soil or land, and that the rights and interests of the city in the landing as now used, or as it may be hereafter used, are commensurate and coequal with those of the county. This decision is said to be palpably erroneous, because under the act of 1858 Portsmouth is entitled to one-half the fee in the soil. The act provides that all real estate accumulated by said county during the union of said city and county shall belong jointly and equally to said county and city. The arbitrators, in construing this provision, were of the opinion it referred only to such property as was acquired after Portsmouth became a town, in 1752, by act of the colonial legislature, and not to property belonging to the county of Norfolk before that time; and as the property in question was acquired by the county prior to 1752, it did not come within the purview of the act of the legislature. We are not prepared to say this is not a proper construction of the act. Certainly it is an equitable interpretation;

738 *for the City of Portsmouth could have no just claim to property which belonged to the County of Norfolk long before the city was in existence. At all events, it cannot be said that the meaning of the legislature is free from all doubt or difficulty. It was a fair subject for arbitration; it was decided by judges of the parties' own selection, and they must be held to be bound by that decision.

These three alleged errors in the award have been selected out of many others, because they are said to be the most palpable and injurious. Others might be taken up and considered in this same connection, but their examination would fail to show any such errors as would warrant this court in setting aside the award. If it is our duty to go over the whole ground and reverse wherever we think there is error in the award, it is obvious the parties might just as well have left their difficulties to be settled by the courts without the expense and trouble of an arbitration. On entering into the submission they well knew that questions of great difficulty would be passed upon by the arbitrators; that valuable interests in real and personal property would be adjudicated, and large amounts of money decreed. The submission was made with direct reference to these matters. If the City of Portsmouth has been made the sufferer, it is the result of her own deliberate action, and the courts have no power to interfere.

Upon the whole case, we are of opinion the circuit court did not err in refusing to disturb the award, and its judgment must be affirmed.

JUDGMENT AFFIRMED.

739 *Southern Mutual Ins. Co. v. Kloeber, for, &c.

March Term, 1879, Richmond.

1. **Fire Insurance—Ownership of Property—Condition in Policy.**—If the application for a policy is made a part of the policy, and is a warranty and covers the applicant's interest in and title to the property, and his answer to the question "What is your title to or interest in the property to be insured?" is "fee simple"—HOLD: The fact that the wife of a former owner of the property who is still alive, has a contingent right of dower in it, does not affect the applicant's interest in or title to the property. Nor is it such an incumbrance as, not being mentioned in his answer, will be a breach of the warranty.
2. **Same—Warranty—Misrepresentations.**—If in such case the application is not a warranty, the failure to mention the existence of such a contingent right of dower, is not such a misrepresentation as will avoid the policy.
3. **Same—Excessive Damages—Question for Jury.**—Where the case is submitted to the court, and the evidence as to the value of the property insured is conflicting, the appellate court cannot interfere with the judgment of the court below on the ground that the judgment is excessive.

This was an action of *assumpsit*, in the circuit court of the city of Richmond, brought in June, 1873, by Charles E. Kloeber, for the benefit of B. Green, trustee, against the Southern Mutual Insurance Company, to recover the amount of the insurance by the defendant of the dwelling-house of said Kloeber, situated in or near Chatham, in the county of Pittsylvania. The defendant pleaded *non assumpsit*, and it was agreed to dispense with a jury, and that the whole matter of law and fact should be submitted to the court. And the court having heard the evidence, rendered a judgment in favor of the plaintiff for \$3,000, the amount of the policy, with interest from the 1st of April, 1873; and the defendant excepted, all

740 *the evidence being set out in the exception; and obtained a writ of error and *supersedeas*.

It appears that in April, 1869, George W. Hall was the owner of the property insured, and by deed of that date he conveyed it with several other parcels of real estate, and also personal property, to Coleman D. Bennett, to secure the sum of \$10,000 to Smithsonian H. Holland. Bennett having died, at the June term of the county court of Pittsylvania Berryman Green was appointed trustee in the deed; and in September, 1871, Green sold this house and the grounds at public auction, when the plaintiff Kloeber became the purchaser at the price of \$4,060, and executed his bonds for the purchase-money payable at six, twelve, eighteen and twenty-four months, the trustee retaining the title. At the time of the issue of the policy, which is dated the 21st of September, 1872, Kloeber had paid but \$534 of the purchase-money.

The other facts on which the opinion of

See *Woody v. Old Dominion Ins. Co.*, 31 Gratt. 362 and *note*.

of the fund in the receiver's hands which is the property of the Alexandria and Fredericksburg Railway Company, and is liable to the lien of said execution. And like decrees were made in favor of the other two companies for their shares of the said fund. And thereupon Bacon and Kneass applied to a judge of this court for an appeal; which was allowed. The facts in relation to the deed of trust are stated in the opinion of JUDGE MONCURE.

F. L. Smith, Jr., Wayne McVeigh and S. F. Beach, for the appellants.

Cloughton and Stuart, for the appellee.

MONCURE, P., delivered the opinion of the court.

The subject of controversy in this case is the sum of \$1,636.06, due by John S. Barbour, receiver of the Washington City, Virginia Midland and Great Southern railroad company, to the Alexandria and Fredericksburg Railway Company for trackage; that is to say, for the passage of trains of cars by said John S. Barbour, receiver as aforesaid, over that portion of the said Alexandria and Fredericksburg railway, which lies between the city of Alexandria and the southern end of the Long bridge, in the county of Alexandria.

The conflicting claimants of this fund are the appellants, Josiah Bacon and Strickland Kneass, substituted trustees under a deed of trust dated the 1st day of June, 1866, between the Alexandria and Fredericksburg Railway Company, a body corporate, chartered and organized by authority of the legislature of Virginia, of the first part, and D. Randolph Martin and Robert Turner, of the city of New York, of the second part, of which

774 *deed (which was duly recorded) an official copy is a part of the record in this case; and the appellee, J. D. Faunce, who, in November, 1873, recovered a judgment in the circuit court of the city of Alexandria against the Alexandria and Fredericksburg Railway Company for the sum of \$3,400, with interest thereon from the 22d day of November, 1873, until paid, and \$87.29 costs, and thereupon sued out an execution of *fiери facias* on the said judgment, which was returned unsatisfied. On the 6th August, 1877, he caused an execution of *fiери facias* to be again issued upon said judgment and placed in the hands of the sergeant of the said city of Alexandria to be executed, and thereupon he caused a summons against the said receiver to be issued out of the clerk's office of said court upon the suggestion of the said Faunce that by reason of the lien of his execution aforesaid there was a liability upon the said receiver.

The question in controversy between these conflicting claimants depends entirely upon the question whether that portion of the line of the Alexandria and Fredericksburg Railway Company, lying between the city of Alexandria and the southern end of the Long bridge, in the county of Alexandria, is or is not embraced in the deed of trust aforesaid, dated the 1st day of June, 1866. If it be so embraced, then the fund in controversy be-

longs to the said appellants, to be disposed of by them as substituted trustees under the said deed of trust. But if the said portion of the said line of the said railway be not so embraced, then the said fund belongs to the said appellee, Faunce, to be applied to the part payment of his said execution.

The court below, upon consideration of the controversy, being of opinion that the portion of the road of said Alexandria and Fredericksburg Railway Company between the city of Alexandria and the southern end of the Long bridge as aforesaid, is not 775 embraced in the *said deed of 1866, decreed that John S. Barbour, receiver as aforesaid, pay over to the said Faunce, to be applied to the payment of his judgment aforesaid, the said sum of \$1,636.06, the same being liable to the lien of the said execution. From that decree this appeal was taken, and the question now to be considered is, whether the said decree be erroneous or not.

The original act of incorporation of the said Alexandria and Fredericksburg Railway Company was passed in the city of Alexandria by the general assembly of Virginia, February 3d, 1864, and is entitled "an act to incorporate a company to construct a railway from the city of Alexandria to connect with the Aquia Creek and Richmond railway." See "Virginia Acts of Assembly, 1861 to 1865."

By the first section of said act provision was made for opening books in the city of Alexandria for the purpose of receiving subscriptions to an amount not exceeding \$2,000.000 of capital stock, in shares of \$100 each, for the purpose of surveying, locating, constructing and operating a railway from the terminus of the Washington, Alexandria and Georgetown railroad, in the city of Alexandria, to the most eligible point on the present railroad from Acquia creek to the city of Fredericksburg.

By the second, third, fourth and fifth sections it was enacted as follows:

"§ 2. That whenever 2,000 shares of said stock shall have been subscribed, and ten *per cent.* thereon paid in good faith, the subscribers, their successors, executors and assignees shall be and are hereby declared and constituted a body politic and corporate under the name and style of "The Alexandria and Fredericksburg Railway Company," and shall be subject to all the provisions of the Code of Virginia applicable to such corporations: provided that the rates of 776 charge *for the transportation of persons and property upon the said railroad to or from the city of Alexandria shall not be ratably other or higher than upon persons or property destined to any point north of said city.

"§ 3. That it shall be lawful for said company, for the purpose of constructing, equipping and operating said railway, to sell their bonds, with coupons attached, at the rate of interest not exceeding seven *per centum per annum*, to be paid semi-annually, to the amount of one million dollars, and also to borrow money upon their promissory notes duly executed under the authority of its

board of directors, to an amount not exceeding \$500,000.

"§ 4. Provided, that said company shall commence the construction of said railway within two years, and complete the same within five years from the passage of this act.

"§ 5. This act shall be in force from its passage."

By deed of trust dated on the first day of June, 1866, between the Alexandria and Fredericksburg Railway Company, of the first part, and D. Randolph Martin and Robert Turner, of the city of New York, of the second part, and duly recorded in the several counties in which the said railroad is located, the said party of the first part convey to the said parties of the second part "all the railroad of the said party of the first part—that is to say, the said Alexandria and Fredericksburg railway, commencing at the terminus of the Washington, Alexandria and Georgetown railroad, in the city of Alexandria, state of Virginia, to the city of Fredericksburg, in said state, or to such point of junction with the Richmond, Fredericksburg and Potomac railroad, or the road leading from Aquia creek to the city of Fredericksburg, at or near Brook's station as now located, or to any other point of junction with the said Richmond, Fredericksburg and Potomac railroad which may in the future be adopted, including all and singular the franchises of said railroad as now granted and chartered, and any and all amendments, additions or modifications thereof, together with all and singular, the rights, interests, property and estate, real, personal and mixed, acquired, or which may hereafter be acquired, constructed, or to be constructed, of every species, nature and kind whatsoever." "In trust, nevertheless, for the use and purposes" declared in said deed, among which, mainly, is the security of the payment of the bonds to be executed and disposed of as therein provided for.

Broad as certainly are the terms of the said deed as to the subject intended to be conveyed, they do not embrace, and were obviously not intended to embrace, that part of the Alexandria and Fredericksburg railway now extending from Alexandria to the southern extremity of the Long bridge across the Potomac river opposite the city of Washington. That extension was not then made, and probably had not been thought of, and was not made nor authorized to be made for years thereafter. It was first authorized to be made four years thereafter, by an act approved June 4, 1870, entitled "an act to amend the charter of the Alexandria and Fredericksburg Railway Company." Acts of Assembly, 1869-70, p. 187.

By the first section of that act, the forfeiture of the charter of said company incurred by reason of its failure to complete said railway within the time specified in section 4 of its charter, is waived, and an extension of time for building said railway is granted, and the said company is "authorized to extend said railway to a point on the Potomac

river, between Alexandria and Washington city, or opposite Washington city, and to bridge said river so far as the state of Virginia can authorize the same, or to connect with the bridge of any railroad company that may have been, or may hereafter be chartered by the Congress of the United States, whose road passes or shall pass through the District of Columbia: provided that in the extension of said railway it shall in no way interfere with the chartered rights or franchises of any railroad extending between Alexandria and Washington; but this proviso shall not be construed as preventing said Alexandria and Fredericksburg railway from crossing any such railroad." By the second section of said act an option is given to the said railway company as to the point of connection of its road with the Richmond, Fredericksburg and Potomac railroad, north of Fredericksburg: "provided that the said railway shall be constructed from its junction with" said railroad "to Alexandria, before its construction shall be commenced north of Alexandria." By the third section, the second section of the said act of incorporation passed February 3, 1864, is amended, but the amendment need not be here set out.

Since the passage of the said act, approved June 4, 1870, it seems that the said railway has been connected with the said railroad as authorized by the said act, and has been constructed from its junction with said railroad to Alexandria, since which the extension of said railway beyond Alexandria to a point on the Potomac river, between Alexandria and Washington city, or opposite to Washington city, authorized by said act, has been accomplished.

Certainly the extension of the Alexandria and Fredericksburg railway from Alexandria to the southern end of the Long bridge across the Potomac river, opposite to Washington city, not having been made nor even contemplated at the time of the execution of the said deed of trust, dated the 1st day of June, 1866, was not embraced, nor intended to be embraced, as a part of the railway conveyed by that deed.

But it is contended for the appellants, that though not embraced as a part of the railway so conveyed, it is embraced in the broad terms of that deed, which include "all and singular the franchises of said railroad as now granted and chartered, and any and all amendments, additions or modifications thereof, together with all and singular the rights, interest, property and estate, real, personal or mixed, acquired, or which may be acquired, constructed, or to be constructed, of every species, nature and kind whatsoever."

These are certainly very broad terms, but they were obviously intended to be confined to the railway as it then existed between the termini, plainly described in the deed, and the lateral branches of said railway which might thereafter be constructed by authority of law, together with the appurtenances then or thereafter existing to said railway so limited and its lateral branches aforesaid. In regard to such lateral branches, the Code, ch.

may be made to this objection:

First. By the terms of the policy the omission or concealment which will void the policy must be of such facts as *are material to the risk or increases the hazard*. Evidence is abundant in the record, even the deposition of the president of the company, to show that the concealment of the fact of Mrs. Hall's contingent claim was not material, and could not possibly increase the risk.

Second. If, as already shown, the stipulations in this policy amount to a warranty, there has been no breach which voids the policy, it follows, *a fortiori*, that the mere concealment or omission to state the fact constituting the alleged breach cannot render the policy void.

The third and last assignment of error to be noticed is that the *damages were excessive*. It is to be noted that the facts are not certified, but only the evidence. The evidence is conflicting on the question of the value of the building; and whether we regard the certificate of evidence as a demurrer to evidence, or adopt the rule in *Mitchell v. Baratta*, it is difficult to see how this court can interfere with the judgment of the court below upon the question of the *quantum* of damages. The circuit court estimated the value of the buildings at \$9,000. The judgment in this case and the *Va. Fire Marine v. Same defendant in error*, *post* p. 749, was each \$3,000, being two-third of the value. There is certainly evidence in the record tending to show that at the time of the fire the building was worth \$9,000. In the first place it may be noted that the agent of the company personally inspected the building and wrote down its value as stated by the insured, at \$10,000. It was proved by the former owner that the actual cost of the building was \$7,500. It was further proved that the property had greatly enhanced in value between the date of its erection and the date of the fire. It was further proved by

748 an experienced architect *that to replace the building with similar materials, after the fire, would require at least twenty per cent. on the original cost, which would be exactly the amount fixed upon by the court as its true value. Upon this evidence this court could not, according to well-established principles, reverse the judgment, even though we might be of opinion that the damages were a larger amount than this court would have assessed them.

In a recent case (*Southern Mut. Ins. Co. v. Trear*, 29 Gratt. 255), when a similar question of excessive damages was raised, it was said: "The question before the jury upon the evidence was only as to the question of damages, and though the court, if on the jury, might have been for a much less amount of damages than was found by the jury, yet it was a question of fact for the jury, and there was evidence before them tending to show that the amount of damages actually sustained was at least equal to the amount found by the jury. Although there was also evidence before the jury, strongly tending to show that the building insured was actually of much less value than that at which it was fixed

by the agent of the defendant at the time of the insurance, and more than that at which it was estimated by the jury assessing the damage in the case, yet the verdict of the jury was legally warranted by the evidence, and cannot therefore be set aside by the court upon the ground that it was contrary to the evidence."

Upon the whole case, I am of opinion that there is no error in the judgment of the circuit court, and that the same should be affirmed.

ANDERSON, STAPLES and BURKS, J's, concurred in the opinion of CHRISTIAN, J.

MONCURE, P., dissented.

JUDGMENT AFFIRMED.

749 *Va. Fire & Marine Ins. Co. v. Kloeber, for, &c.

March Term, 1879, Richmond.

K purchased a house and lot near Chatham, in Pittsylvania county, for \$4,060, at a sale by a trustee under a deed executed by H. In September, 1872, he applied to the Virginia Fire and Marine Insurance Company for an insurance on the dwelling-house for \$3,000. He answered the interrogatories put to him, and to one of them he gave the value of the whole property at \$10,000, and to another that there was an incumbrance by the vendor's lien of \$3,500. The policy was issued, which provided, among other things, that any misrepresentation, or concealment, or omission, to make known any fact or feature in the risk that increases the hazard, should avoid the policy, and any interest in the property not absolute, or that is less than a perfect title, must be specifically stated and expressed in the policy, or the insurance should be void. The wife of H did not join in the deed to the trustee, and though she was alive when the policy was issued and suit brought upon it it did not certainly appear she was married to H when the deed was made—HELD:

1. **Fire Insurance—Ownership of Property.**—The contingent right of dower in the wife of the insured, if she was his wife at the date of the deed, was not such an interest as shows that the assured had less than a perfect title in the property insured.
2. **Same—Same—Condition in Policy.**—Nor was it such an incumbrance as was contemplated by the parties to the contract of insurance should be disclosed by the assured on the pain of forfeiting his contract for failing to make the disclosure.
3. **Same—Answers—Breach of Warranty.**—There is nothing in the answers of the assured which amounts to a breach of the warranty.
4. **Answers—Fraudulent Omissions—Avoidance of Policy.**—If the omission by K to state the fact of the contingent right of dower in the wife of H was fraudulent on the part of K, and it increased the hazard of the insurance, the omission would avoid the policy.
5. **Same—Same—Question for Jury.**—The question whether the omission by K to state the

See *Woody v. Old Dominion Ins. Co.*, 31 Gratt. 362 and *note*.

fact of the contingent right of dower in the wife of H was *fraudulent, was a question for the jury, upon all the evidence, and depends upon the *quo animo*, the intention with which the fact was not disclosed.

6. Same—Same—Good Faith.—But if K in good faith answered the interrogatories put to him at the time the policy of insurance was executed, respecting his title to the insured property, with substantial truth and accuracy, but failed, without fraudulent intent, to mention that there was probably an outstanding contingent right of dower in the wife of H, and K was not interrogated as to said contingent right of dower, and nothing occurred at the time of the contract of insurance to remind him of it, his failure to disclose it did not invalidate the contract, unless the contingent right of dower of the wife of H in the property was a fact which materially increased the actual risk of the company.

This was an action of *assumpsit* in the circuit court of the city of Richmond, brought in May, 1873, by Charles E. Kloeber, for the benefit of B. Green, trustee, against the Virginia Fire and Marine Insurance Company to recover the amount of the insurance by the defendant upon the dwelling-house of the said Kloeber, situated in or near Chatham, in the county of Pittsylvania. The defendant pleaded *non assumpsit*, and upon the trial the jury found a verdict for the plaintiff for \$3,000, the amount of the policy, with interest from the 1st of March, 1873, and there was a judgment according to the verdict; from which the defendant applied for and obtained a writ of error.

Although the defendant moved the court for a new trial, and the court overruled the motion, there was no exception on this ground; but there was an exception by the defendant to the refusal of the court to give certain instructions asked for, and to the giving an instruction asked for by the plaintiff, with an addition. These instructions are set out in the opinion of JUDGE ANDERSON.

The house insured by the policy which was the ground of action in this case, was the same which was insured *by the policy which was the ground of action in the next preceding case of the *Southern Mutual Ins. Co. v. Kloeber, for, &c., supra*, p. 739. The agent acting in both cases was the same, and the policies were issued at the same time. The facts on which the action of the court is founded, will appear from the opinion.

W. W. Crump, for the appellant.

Ould & Carrington, and *H. Robertson*, for the appellee.

ANDERSON, J., delivered the opinion of the court.

In this case there was a verdict for the plaintiff below—the defendant here—for \$3,000, with interest from the 1st day of March, 1873, till paid. The defendant, the plaintiff in error, moved the court to set aside the verdict and grant it a new trial; which motion the court overruled, and gave judgment

against the defendant for the amount of the verdict and costs. There was no exception to the ruling of the court overruling the motion for a new trial, and neither the evidence nor the facts proved are certified; and the case here depends upon the validity of the instructions moved by the defendant, and refused by the court, and the instructions given by the court.

The instructions tendered by the defendant are as follows:

Defendant's Instruction No. 1.

"If the jury shall believe from the evidence that at the time of the execution and delivery of the policy upon which this suit is brought, the wife of George W. Hall, the grantor in the deed under which the plaintiff claims the property in said policy mentioned, was alive and had not united in said deed, then she *was entitled to a contingent right of dower in said property, and the plaintiff had an interest less than a perfect title in said property, which rendered said policy void, and the jury must find for the defendant."

Defendant's Instruction No. 1.

"If the jury shall believe from the evidence that at the time of the execution and delivery of said policy, the wife of George W. Hall, the grantor in the deed under which the plaintiff claims the property in said policy mentioned, was alive and had not united in said deed, then she was entitled to a contingent right of dower in said property, which constituted an incumbrance on said property, and if the same was known to the plaintiff and was not disclosed by him to the defendant before the execution and delivery of said policy, then the policy is void and the jury must find for the defendant."

Defendant's Instruction No. 3.

"If the jury shall believe from the evidence that at the time of the execution and delivery of said policy, the wife of George W. Hall was alive and had not united in the deed, and that this was known to the plaintiff and was not disclosed by him to the defendant, and that if it had been known to the defendant the rate of insurance would have been increased on the policy issued by the defendant, then the jury must find for the defendant."

Defendant's Instruction No. 4.

"If the jury shall believe from the evidence that at the time the said policy was executed and delivered, *the wife of George W. Hall, the grantor in the deed under which the plaintiff claims the property mentioned, was alive and had not united in said deed, and that the same was known to the plaintiff and was not communicated by him to the defendant, then such concealment is a fraud on the part of the plaintiff, which renders the policy void, and the jury must find for the defendant."

Defendant's Instruction No. 5.

"If the jury shall believe that the plaintiff purchased the property mentioned in the policy

at a public sale made by the trustee under a deed of trust, made by George W. Hall, for the sum of \$4,060, for which he executed four bonds; at the time the policy was issued had paid \$351 on one of his bonds, and that the balance of said bond and one other bond was then due, and had no deed or contract in writing for said land; that the wife of said Hall was alive and had not united in said deed, which was known to the plaintiff and that when the plaintiff applied for insurance he was interrogated as to his title to said property, and the incumbrances thereon, and he did not disclose the true character of his title, the amount of the purchase paid, and the amount due, and the interest of the wife of said Hall in said property, but concealed the same, then such concealment is a fraud on the part of the plaintiff, which renders the policy void, and the jury must find for the defendant."

It is not predicated in either of the first, second, third or fourth of the foregoing instructions that she who was the wife of Hall at the time of the execution and delivery of the policy, and was then alive, was
 754 *the wife of Hall at the time the deed of trust was executed by him to Bennett, under which the plaintiff claimed. It is not a conclusion from the fact that she was his wife at the time of the execution and delivery of the policy, that she was his wife at the date of the execution of said deed of trust; and it is not a logical or legal conclusion that she had a contingent right of dower in the property conveyed by the deed of trust, in which she did not unite, from the fact that she was living and was the wife of the grantor at the date of the insurance.

But if it can be implied and understood from the language of the instructions, that she was the wife of the grantor at the date of the deed, it does not necessarily follow that she had at the date of the insurance a contingent right of dower in the property proposed to be insured, as there are other modes by which her right of dower might be barred, or fail to attach, besides the one mentioned in the instructions—the uniting with her husband in the conveyance.

But on broader grounds we think the defendant's instructions were properly rejected. Conceding that there was an outstanding contingent right of dower in Hall's wife at the date of the insurance, we are of opinion upon the authority of *Woody v. Old Dominion Insurance Co.*, *supra*, p. 362, decided at the present session of this court, that it was not such an interest as shows that the assured was invested with less than a perfect title in the property insured as is assumed by the first instruction; or that it was such an incumbrance as "was contemplated by the parties to the contract of insurance should be disclosed by the assured on the pain of forfeiting his contract for failing to make the disclosure," as is assumed in the second instruction proposed by defendant. We deem it unnecessary to repeat what was so well

said by JUDGE BURKS, who delivered the
 755 opinion in *that case, in which the whole court concurred, or to reargue the questions. The decision is fully sustained by *Hough v. City Fire Ins. Co.*, 29 Conn. R. 10, and numerous other authorities which might be cited.

But there is, we think, a fatal objection to all these instructions that they do not aver the materiality to the hazard of the facts misrepresented, concealed or omitted. By the terms of the policy the misrepresentation, concealment or omission of any fact by the applicant for insurance, will only render the policy void and of no effect when such misrepresentation, concealment or omission *increases the hazard*. It also declares that "if this policy is made and issued upon or refers to an application, survey, plan or description of the property herein insured, such application, survey, plan or description, shall be considered a part of this contract, and a warranty of the assured." The bill of exceptions states that evidence was offered tending to show that when the plaintiff applied for insurance, he had been interrogated upon various matters respecting the property by the agent of the defendant, and had answered said interrogatories substantially as set forth in the written application which he made and signed at the same time for the insurance of a further sum of \$3,000 upon the same property in the Southern Mutual Insurance Company. It also states that the application to the Southern Mutual Insurance Company was made in a printed form, a copy of which is set out in the bill of exceptions. But it is not certified that a similar application was made in this case, but only that the plaintiff had answered the interrogatories substantially as set forth in that application. And it also appears that in that case the assured signed a written covenant of agreement, and it is not shown that he made or signed any such agreement in this case.

But if it sufficiently appears from the
 756 foregoing that *this policy was made and issued upon, or refers to any application or description of the property therein insured, so as to make the answers to the interrogatories propounded to the plaintiff the warranty of the assured, we think it does not appear that there was anything in those answers which amounts to a breach of the warranty.

In support of this conclusion I need only refer to the authorities cited by JUDGE CHRISTIAN in the *Southern Insurance Co.* against the same defendant in error, *supra*, p. 739.

The averment in the third instruction, that if it had been known to the defendant, the rate of insurance would have been increased on the policy issued by the defendant, is not an averment that the misrepresentation, concealment or omission, would have increased the hazard. It is only tantamount to saying that the insurer would have so regarded it. But the question is not how the insurer might regard it, but whether the fact misrepresented, concealed or omitted, did increase the hazard.

It is conceded, however, that if the misrepresentations or concealments, or omissions were fraudulent they would vitiate and avoid the policy. The question whether they were fraudulent or not, was a question for the jury, to be determined upon the facts and circumstances as proved. But the fourth instruction asks the court to decide that question for the jury, and to instruct them that the non-disclosure of the fact that the wife of Hall did not unite with him in the said deed of trust, which was known to the plaintiff and not known to the defendant, was a fraud. If it were within the province of the court to decide that question, and to instruct the jury, the fact of concealment, of itself, was not conclusive of fraud. It might have been the result of the honest belief of the assured that it was immaterial to the risk, or

that it was not suggested to his mind
 757 that it was at all *material to the risk, or have resulted innocently from inattention. Whether it was fraudulent or not, depended on the *quo animo*, the intention with which the fact was not disclosed.

The same objection applies to the fifth instruction. The circumstances detailed in this instruction may tend to show fraud, and were proper to be considered and weighed by the jury, in connection with all the other evidence in the cause bearing upon the question, if there was such other evidence, and upon the whole to determine whether the concealment attributed to the plaintiff was fraudulent or not. And such enquiry is submitted to the jury by the second instruction asked for by the plaintiff, and which was given by the court with an addition, and which is as follows:

"If the jury believed from the evidence that the plaintiff in good faith answered the interrogatories put to him by the defendant's agent, at the time the policy of insurance was executed and delivered, respecting his title to the insured property with substantial truth and accuracy, but failed without fraudulent intent to mention that there was probably an outstanding contingent right of dower in the property in favor of the wife of one G. W. Hall, who had been the owner of the property, and conveyed it in trust to Coleman D. Bennett, for whom the plaintiff's vendor, Green, was substituted as trustee, the wife of said Hall not having joined in the deed of trust, and that the plaintiff was not interrogated as to said contingent right of dower, and nothing occurred at the time of the contract of insurance to remind the plaintiff of said contingent right of dower, his failure to disclose it to said agent did not invalidate the said policy of insurance."

By this instruction, as far as we have recited it, the jury is put directly on the
 758 enquiry of fraud, and are told *that if they believe that the answers made by the assured to the interrogatories of the insurer's agent were made in good faith, and the non-disclosure of the contingent right of dower in the property by Mrs. Hall was without fraudulent intent, the policy of insurance is valid. The court properly refused to give

this instruction to the jury without qualification, because however material the representations or omissions were to the risk, if not with fraudulent intent, but were made or omitted in good faith, it would require the jury to find that the policy of insurance was valid, and therefore the court would only give the instruction upon the case stated, that the failure of the assured to disclose the fact did not invalidate the policy of insurance, "unless the jury shall believe from the evidence that George W. Hall was married at the time of the execution of the deed to Coleman Bennett"—(thus supplying the defect noticed in the defendant's instructions)—"and that his then wife was, at the time of the application of the plaintiff, actually alive, and that her contingent interest in the property was a fact which materially increased the actual risk of the defendant."

The instruction as thus amended and given to the jury covered the whole ground, both as to fraud and as to the materiality of the representations, or concealments, or omissions, as increasing the hazard according to the stipulation in the policy, and we do not perceive that there is any error in it. And the doctrine of the instruction is not altered or affected by the concluding clause, which is perfectly consistent with the clause which has been recited. It affirms that the non-disclosure of the fact by the plaintiff, without fraudulent intent, that the wife of Hall had not joined in the deed, did not invalidate the policy, even if the jury should also believe that some months prior to the date of the policy the

plaintiff had had his attention called to
 759 the fact. It seems *to have been inserted with the view of negating a conclusion of law contained in some of the instructions tendered by the defendant; and only to assert that if the fact be as stated it could not invalidate the policy, if the jury believe from the evidence that it was without fraudulent intent; which, as we have seen, was a conclusion not warranted without the qualification added by the court, which is therefore made applicable to this clause, as well as to the preceding, and the closing sentence, "And that said Hall and his wife were believed to be both still alive and residing in the state of Georgia, and nothing to the contrary had been learned by plaintiff after that time up to the time the policy was executed." This might have been, and more properly, erased from the instruction, and the first clause in the court's *addenda* put in the place of it. But that was immaterial, as by the court's addition it was made necessary, not only that it should appear that Hall and his wife were believed to be still living at the time the insurance was effected, but that his wife was then *actually* alive, and that she was the wife of Hall at the time of the execution of the deed of trust aforesaid. We are of opinion that the court did not err in refusing the instructions tendered by the defendant, and in giving the second instruction offered by the plaintiff with the qualification.

They were questions for the jury, upon the evidence before them, under these instructions, whether the plaintiff had been guilty of mis-

representations, concealments or omissions which were fraudulent, or whether they were such as increased the hazard of insurance, and if in favor of the plaintiff, to assess his damages. By their verdict they found for the plaintiff, and have assessed his damages. Whether they have decided right or wrong, we have not the means of determining. Their verdict was sanctioned by the judge who 760 presided at the trial, *and who overruled a motion for a new trial, and to which ruling the defendant took no exception.

Upon the whole, we are of opinion to affirm the judgment of the circuit, with costs.

MONCURE, P., dissented.

JUDGMENT AFFIRMED.

761 *Alex. & Fred. Railway Co. v. Faunce.

March Term, 1879, Richmond.

F leased from Mrs. O the land and a fishery in the Potomac river, where the tide ebbed and flowed, with all the privileges attached thereto, for five years, at a rent of \$500 a year. He built the necessary buildings, and cleaned out the fish-berth, and was largely engaged in carrying on the fishery. Pending the lease the Alexandria and Fredericksburg Railway Company, upon proceedings against O, had the land for their roadbed condemned, and paid into court the damages assessed. In building the road the company made embankments along the line of the river, pulling down some of F's buildings, throwing obstructions into the fish-berth, and materially damaging the fishery. In an action by F against the company to recover damages for the injury done to him—Held:

1. Riparian Owners—Fisheries on the Potomac.—The legislature has frequently recognized the rights of owners in their respective fisheries on the Potomac, and by various statutes has protected them in their rights, and the company could not in making their road injure the fishery of F without making just compensation for the injury.

2. Same—Rights of Lessee.*—The assessment and payment of the damages into court does not preclude F from the recovery of damages for the injury he has sustained as lessee of the fishery.

***Riparian Owners—Right to Water Frontage.**—In *Groner v. Foster*, 94 Va. 651, the principal case is cited to sustain the following proposition: "Every riparian owner has the right to the water frontage belonging by nature to his land. This right includes, among others, the right to the navigable part of the water course, and also the right to the soil under the water between his land and the navigable line of the water course wherein he may erect wharves, piers, or bulkheads for his own use, or the use of the public, subject to such rules and regulations as the legislature may see proper to impose for the protection of the public;" citing also *Norfolk City v. Cooke*, 27 Gratt. 430; *Dutton v. Strong*, 1 Black U. S. 23; *Yates v. Milwaukee*, 10 Wall. 497; *Gould on Waters*, sec. 149. See *Gilbert v. Railroad Co.*, 33 Gratt. 586 and *note*.

3. Excessive Damages—Conflicting Evidence—Appeal.—The court below certified the evidence in relation to the lease and what had been done by F under his lease, but certified that as to whether the road was built upon the strip of land condemned the evidence was conflicting, and the whole of that evidence is not given. The appellate court cannot set aside the judgment and verdict, though the court may not be entirely satisfied that the damages are not excessive.

762 *This was an action of trespass on the case in the circuit court of the city of Alexandria, brought in September, 1871, by Jacob D. Faunce against the Alexandria and Fredericksburg Railway Company to recover damages incurred by him as lessee of land and a fishery attached, in the Potomac river, in the county of Prince William, by the erection and construction of certain embankments and obstructions, whereby the said landing was entirely destroyed for the purposes of fishing the same, by the pulling down and destruction of buildings he had erected, and placing obstructions in the berth attached to said fishing landing, &c.

The defendants pleaded not guilty, and also filed a special plea that under the authority of the acts of the general assembly they proceeded regularly to have the land for the bed of their road condemned; that notice was given to Sarah Otterback, the lessor of the plaintiff, and tenant of the freehold; that the commissioners appointed by the county court had ascertained and reported that \$3,353 was a just compensation to the tenant of the freehold of the lands in the declaration mentioned for the portion of lands proposed to be taken by the defendants for their purposes and for damage to the residue of the said lands, &c.; that the defendants had paid this sum of \$3,353 into the said county court, and that afterwards they proceeded to construct the embankment and did the other acts complained of, &c.

The cause came on to be tried in November, 1873, when there was a verdict and judgment in favor of the plaintiff for \$3,400; and a motion to stay judgment, on the grounds that the fishing-shore being an appurtenant to the tract of land condemned for the purposes of the road, and that money paid, no separate action could be maintained on behalf of

Faunce for damages to said fishing-shore 763 resulting from the construction *of the defendant's railway through the land of Sarah Otterback. And that for any portion of the said sum of \$3,353 to which Faunce may show himself entitled, his remedy, if any, is under § 16 of ch. 56 of the Code of Virginia; and the damage to the fishing-shore, if any, having been embraced in said sum of \$3,353 allowed by the commissioners and paid into court, Faunce cannot maintain a separate action for any alleged damage to the fishing-shore.

But the court overruled the motion and ordered judgment to be entered on the verdict; and the defendants excepted.

The defendants then moved the court to set aside the verdict on the ground that the damages were excessive; but the court over-

ruled the motion, and they again excepted. The parol evidence is sufficiently stated by JUDGE STAPLES in his opinion.

It appeared that by deed dated the 25th of September, 1869, Sarah Otterback leased to the plaintiff Faunce all that fishing land called the Opossum-Nose Fishing Landing on the Virginia side of the Potomac river, in Prince William county, together with all the rights and privileges belonging to said fishing landing, from the 1st day of January, 1870, for five years, at the annual rent of \$500; and in lieu of the rent for the first year of said term Faunce was to clear out the fishing-berth of said landing.

The defendants applied to this court for a writ of error and *supersedeas*; which was awarded.

F. L. Smith, Jr., and *S. F. Beach*, for the appellants.

Cloughton and Stuart, for the appellee.

STAPLES, J., delivered the opinion of the court.

The plaintiff in the court below was the lessee of a fishery on the Potomac river, 764 on a point where the tide *ebbs and flows, and the stream is navigable for the largest vessels.

The value of this landing was greatly impaired by the construction of the Alexandria and Fredericksburg railroad along the line of the river, and the plaintiff brought his action to recover damages for the injury. One of the questions raised in the case is whether the owners of property on navigable waters are entitled to compensation for injuries of this character. It is insisted by defendant's counsel that the Potomac, being a navigable river at the point in question where the tide ebbs and flows, the state owns the bed of the stream to high-water mark; and that the privilege of fishing in its waters is a mere license which may be revoked at any time; and, further, that the legislature may lawfully authorize the construction of a railroad along the water front, and the owner can claim no compensation for any injury which he may sustain; it is *damnum absque injuria*.

It is a sufficient answer to this view to say that the legislature has frequently recognized the rights of owners in their respective fisheries on the Potomac, and by various statutes has protected them in the enjoyment of these rights.

The 18th, 19th and 20th sections of chapter 100, Code of 1873, contain very explicit provisions on the subject. When, under the faith of these enactments, the owner has expended money in improving his landing and fishing beds, in erecting buildings and the necessary fixtures for carrying on his operations, he has acquired valuable rights of property which cannot be disturbed for the benefit of any corporation or private person without making just compensation. It has been held in numerous cases that the owner of land bounded on a navigable stream has certain riparian rights, whether his title extends to the middle of the stream or not. Among these are free access to the navigable part of

765 the stream, and *the right to make a landing, wharf or pier for his own use, or for the use of the public. These rights are valuable, and are property, and can be taken for the public good only upon due compensation made. They are to be enjoyed, subject to such general rules and laws as the legislature may pass for the protection of the public right in the river as a navigable stream. This is the doctrine of the supreme court of the United States in *Dutton v. Strong*, 1 Black's U. S. R. 23; *Railroad Company v. Morgan*, 7 Wall. U. S. R. 256, 272; *Yates v. Milwaukee*, 10 Wall. U. S. R. 497; and by this court in *Norfolk County v. Cooke*, 27 Gratt. 430.

It is difficult to see why the same principle does not apply to a fishery and landing improved by the labor and money of the owner. But if it be considered that the privilege of fishing, as ever used by riparian owners in navigable waters, is a mere license which the legislature may revoke in favor of a railroad company, it is not to be supposed it would exercise this power without requiring compensation to be made for private property, taken or destroyed, or other specific injury to the owner, resulting from the appropriation. Nothing short of an express legislative declaration to that effect, or implication equally strong, should be so construed.

In the present case the act of incorporation authorizes the company, as in other cases of public improvements, to require land for the purposes of the road along its line, upon making compensation to the owner. There is nothing in the act giving this company peculiar privileges, or distinguishing it from other corporations.

Another question arising in this case is, whether the defendants have made due compensation for all damages to the land in question, and the fishery, arising from the construction of the road. The defendants claimed in the court below that commissioners appointed for the purpose had assessed the damages at \$3,353, and that this 766 *amount had been paid to the tenant of the freehold, as just compensation for the land taken, and for damages to the residue of the tract, beyond the peculiar benefits derived from the improvement.

On the other hand, the plaintiff claimed that the company did not pursue the line as shown to the commissioners, but in fact constructed the road in an entirely different line.

Now, if this allegation is true; if the company departed from the route for which the damages were assessed, it is clear that this assessment cannot preclude the plaintiff from maintaining his action for any injury he has sustained. Upon this issue the parties went before the jury. To this point their evidence was directed, and upon it a verdict was rendered for the plaintiff. The circuit judge was satisfied with the finding, and refused to disturb it. He declined to certify the evidence upon the ground that it was conflicting. This would seem to settle the question, unless we are to set aside a verdict upon mere con-
 jec-

ture that the jury ought to have decided otherwise.

The next question is as to the *quantum* of damages given by the jury. Some of the judges are inclined to think the damages excessive, and none of us are entirely satisfied with the finding. But here again a difficulty occurs in the fact there is nothing in the record which would warrant an appellate court in disturbing the verdict. The only witness examined on this point was the plaintiff, who was confronted with the jury, and whose testimony was uncontradicted. He proved that he had leased the fishery for five years, at an annual rent of \$500; that he expended seven or eight thousand dollars in putting up the necessary buildings and in cleaning out the fishing-berth and carrying on the fishery; that he had employed during the season of 1871 fifty or sixty hands, whose average wages **767** were \$1.25 per day; that the removal of his capstans involved an expense of a hundred and fifty dollars; that one of the fish buildings was removed by the defendants, and in the work of grading the road mud and brush were thrown into the fish-berth, damaging his seine to the extent of two or three hundred dollars, and that this occurred on several occasions. The jury and the presiding judge believed these statements. Upon what ground is this court to discredit them? Certainly there is nothing in the record to warrant us in so doing. Had this action been brought after the termination of the lease, and it had appeared the plaintiff had lost the benefit of the fishery entirely by reason of the construction of the road, no one would think of questioning or disturbing the verdict.

But the action was in fact instituted before two years of the lease had expired, and the defendant's counsel, laying hold of a single expression used by the plaintiff in giving his testimony, deduces the conclusion that the damages are excessive. The plaintiff said that the general result of the interruptions by the location and construction of the road was the loss of the fishing season of 1871, and the counsel insists that this loss was greatly less than the amount of the verdict according to the plaintiff's own showing.

The expression referred to must be taken in connection with all that was said by the witness. The plaintiff having described to the jury the manner in which his operations were interrupted, proceeded to say that the general result of these interruptions was the loss of the fishing season. He did not mean to state that this was his entire damage. The declaration is framed with a view to a recovery of compensation, not only for the loss of the season of 1871, but for all other injuries arising from the construction of the road, and the testimony was directed to all the grounds mentioned. The plaintiff proved that he was liable to his lessee for the four years' rent, amounting to two **768** thousand dollars. He proved a fair rental of the fishery was from one thousand to fifteen hundred dollars, besides the other damages sustained, and that he had

never used the fishery after the company took possession of the ground. If these statements were not true, it was easy for the defendants to show the fact; or if the fishery was not permanently injured by the location of the road, the matter was susceptible of the clearest proof, for the case was not tried till the November of 1873.

The defendants did not prove or attempt to prove anything relating to the damages. Either the testimony of the plaintiff was true, or the defendants were guilty of the grossest negligence in failing to meet it with counteracting evidence. In neither aspect of the case can this court interpose to relieve them. While the right to set aside a verdict for excessive damages is now almost universally conceded, it is a right to be cautiously exercised by the trying court. The appellate court, of course, will not do so unless it can plainly see that injustice has been done. The cases on this subject are too familiar to require citation or comment.

Upon the whole, we are of opinion there is no error in the judgment, and the same must be affirmed.

JUDGMENT AFFIRMED.

769 *Alex. & Fred. Railway Co.'s Trustees v. Graham & als.

March Term, 1879, Richmond.

The Alexandria and Fredericksburg Railway Company was chartered in February, 1864, with authority to construct and operate a railroad from the terminus of the Washington, Alexandria and Georgetown railroad, in the city of Alexandria, to the most eligible point on the road from Aquia creek to Fredericksburg; and the company when organized as provided had authority to borrow \$1,000,000. The bonds were issued, and by deed, dated June 1, 1866, which was duly recorded, the company conveyed all its franchises and property acquired, or which might be acquired, to trustees in trust to secure the payment of these bonds, principal and interest. By an amendment of the charter in June, 1870, the company was authorized to extend their railway to some point on the Potomac, and to bridge said river; and under this authority they extended the railway to the Long bridge. In September, 1873, F recovered a judgment against the company, and issued a *fiery facias* thereon—H2L2: In a contest between the trustees in said deed and F, as to a sum of money in the hands of the court derived from the use of the road between Alexandria and the Long bridge, by another railroad company, this part of the road is not embraced in the deed, and F is entitled to it under the lien of his *fiery facias*.

In a cause depending in the circuit court of the city of Alexandria, in the name of John C. Graham against the Washington City, Virginia Midland and Great Southern Railroad Company, in September, 1877, Jacob D. Faunce filed his petition, in which he set out that at the November term, 1873, he had recovered a judgment against the Alexandria and Fredericksburg Railway

Company for the sum of \$3,400, with interest thereon from the 22d of November, 1873, and \$87.29 costs; that an execution 770 *of *fiery facias* had been sued out thereon and returned unsatisfied; that on the 6th of August, 1877, he had caused another execution of *fiery facias* to be issued on said judgment, and placed the same in the hands of the sergeant of the city of Alexandria, and that he had thereupon caused a summons against John S. Barbour, receiver of the Washington City, Va. Midland and Great Southern Railroad Company, to be issued out of said clerk's office, upon the suggestion of petitioner that by reason of the lien of his execution of *fiery facias* as aforesaid, there was a liability upon the said John S. Barbour, as receiver; that this summons has been served on said Barbour, receiver, and that there is a large sum of money in his hands due to the said Alexandria and Fredericksburg Railway Company, subject to the lien of petitioner's execution; that said Barbour, as receiver, is an officer of the court and subject to its control, and he therefore prays that the court will require the said Barbour to answer; and if any money or other property of the said Alexandria and Fredericksburg railway company shall be found in his possession which is subject to the lien of petitioner's execution, that the said Barbour, receiver, may be ordered to pay over the same, to be applied, so far as it will go, to the satisfaction of petitioner's judgment.

Permission was granted said Faunce to file his petition in the said cause, and Barbour was required to answer the same; and permission was granted to any person claiming the fund, or any portion thereof, which said Faunce alleges is liable to the lien of his writ of *fiery facias*, to file his or their petition in the cause. And the cause was referred to H. Shepherd, special commissioner in this cause, to ascertain and report: First. How much money, if any, is in the possession of said receiver, subject to the lien of the *fiery facias* of said J. D. Faunce. Second.

If any other claimants than said Faunce 771 are *entitled to the fund, if any, in the hands of Barbour, receiver, which Faunce claims is liable to the lien of his *fiery facias*, the names of the parties entitled to it, and in what proportions.

Barbour filed his answer to the petition, in which he stated that previous to his appointment as receiver a contract had been entered into between the Washington City, Virginia Midland and Great Southern Railroad Company and the Baltimore and Potomac Railroad Company and the Alexandria and Fredericksburg Railway Company, by and through J. Bacon and S. Kneass, trustees of the said Alexandria and Fredericksburg Railway Company, whereby it was agreed that the first-named Company should have the privilege of passing its passenger and freight trains over the sections of road controlled by the other two companies between Alexandria and Washington over the Long bridge and Benning's station, on the line of the Baltimore and Potomac Railroad Company, upon the terms

therein stipulated; that after his appointment as receiver this contract was continued in force and acted on. And he says that on the 24th of September, 1877, he had in his hands, due to the Baltimore and Potomac Railroad and the Alexandria and Fredericksburg Railway Company, for the use of the sections of the tracks, as above designated, the sum of \$6,688.10, and that he still holds this sum subject to the order of the court.

Bacon and Kneass, trustees, under a deed of the Alexandria and Fredericksburg Railway Company, and the Baltimore and Potomac railroad company, filed their petitions in the cause. The said trustees set out that they claim under the deed of the Alexandria and Fredericksburg Railway Company, bearing date the 1st day of June, 1866, which they filed with their petition. They say that the said sum of \$6,688.10 has arisen from the transaction of a connection business be- 772 tween themselves, *operating the Alexandria and Fredericksburg Railway Company, the Alexandria and Washington Railroad Company, and the Baltimore and Potomac Railroad Company, with John S. Barbour as receiver. And after setting out the lines of these respective railroad companies embraced in the agreement, showing that it only includes that part of the road of the Alexandria and Fredericksburg Railway Company which lies between said city of Alexandria and the southern end of the Long bridge, they state that of this sum of \$6,688.10, \$3,813.58 is due and belongs to the Baltimore and Potomac railroad company, and \$1,238.46 is due and belongs to the Alexandria and Washington railroad company; and that the balance of said sum of \$6,688.10, viz: the sum of \$1,636.06, is due to the petitioners as trustees.

The Baltimore and Potomac railroad company in their petition referred to that of the said trustees, and put their claim upon the fund in the hands of the receiver at the same amount, viz: \$3,813.58.

The commissioner made his report, showing the debt of Faunce as he stated it, and he expressed the opinion that the deed of trust under which Bacon and Kneass claimed did embrace the portion of the railroad track between Alexandria and the Long bridge, which constitutes a part of the property of the Alexandria and Fredericksburg Railway Company; and to this Faunce excepted. There were other matters embraced in the report and other matters excepted to by Faunce, but they are not material to the case as it was before this court.

The cause came on to be heard on the 26th of September, 1878, when the court sustained the exception of Faunce to the report, and held that that portion of the road of the Alexandria and Fredericksburg Railway Company, from the city of Alexandria to the southern end of the Long bridge, was not embraced in the deed of 1866. And it was decreed that Barbour, receiver, &c., 773 do forthwith *pay over to the said Faunce, to apply to his judgment, the sum of \$1,636.06, that being the proportion

of the fund in the receiver's hands which is the property of the Alexandria and Fredericksburg Railway Company, and is liable to the lien of said execution. And like decrees were made in favor of the other two companies for their shares of the said fund. And thereupon Bacon and Kneass applied to a judge of this court for an appeal; which was allowed. The facts in relation to the deed of trust are stated in the opinion of JUDGE MONCURE.

F. L. Smith, Jr., Wayne McVeigh and S. F. Beach, for the appellants.

Cloughton and Stuart, for the appellee.

MONCURE, P., delivered the opinion of the court.

The subject of controversy in this case is the sum of \$1,636.06, due by John S. Barbour, receiver of the Washington City, Virginia Midland and Great Southern railroad company, to the Alexandria and Fredericksburg Railway Company for trackage; that is to say, for the passage of trains of cars by said John S. Barbour, receiver as aforesaid, over that portion of the said Alexandria and Fredericksburg railway, which lies between the city of Alexandria and the southern end of the Long bridge, in the county of Alexandria.

The conflicting claimants of this fund are the appellants, Josiah Bacon and Strickland Kneass, substituted trustees under a deed of trust dated the 1st day of June, 1866, between the Alexandria and Fredericksburg Railway Company, a body corporate, chartered and organized by authority of the legislature of Virginia, of the first part, and D. Randolph Martin and Robert Turner, of the city of New York, of the second part, of which

774 *deed (which was duly recorded) an official copy is a part of the record in this case; and the appellee, J. D. Faunce, who, in November, 1873, recovered a judgment in the circuit court of the city of Alexandria against the Alexandria and Fredericksburg Railway Company for the sum of \$3,400, with interest thereon from the 22d day of November, 1873, until paid, and \$87.29 costs, and thereupon sued out an execution of *fiери facias* on the said judgment, which was returned unsatisfied. On the 6th August, 1877, he caused an execution of *fiери facias* to be again issued upon said judgment and placed in the hands of the sergeant of the said city of Alexandria to be executed, and thereupon he caused a summons against the said receiver to be issued out of the clerk's office of said court upon the suggestion of the said Faunce that by reason of the lien of his execution aforesaid there was a liability upon the said receiver.

The question in controversy between these conflicting claimants depends entirely upon the question whether that portion of the line of the Alexandria and Fredericksburg Railway Company, lying between the city of Alexandria and the southern end of the Long bridge, in the county of Alexandria, is or is not embraced in the deed of trust aforesaid, dated the 1st day of June, 1866. If it be so embraced, then the fund in controversy be-

longs to the said appellants, to be disposed of by them as substituted trustees under the said deed of trust. But if the said portion of the said line of the said railway be not so embraced, then the said fund belongs to the said appellee, Faunce, to be applied to the part payment of his said execution.

The court below, upon consideration of the controversy, being of opinion that the portion of the road of said Alexandria and Fredericksburg Railway Company between the city of Alexandria and the southern end of the Long bridge as aforesaid, is not 775 embraced in the *said deed of 1866, decreed that John S. Barbour, receiver as aforesaid, pay over to the said Faunce, to be applied to the payment of his judgment aforesaid, the said sum of \$1,636.06, the same being liable to the lien of the said execution. From that decree this appeal was taken, and the question now to be considered is, whether the said decree be erroneous or not.

The original act of incorporation of the said Alexandria and Fredericksburg Railway Company was passed in the city of Alexandria by the general assembly of Virginia, February 3d, 1864, and is entitled "an act to incorporate a company to construct a railway from the city of Alexandria to connect with the Aquia Creek and Richmond railway." See "Virginia Acts of Assembly, 1861 to 1865."

By the first section of said act provision was made for opening books in the city of Alexandria for the purpose of receiving subscriptions to an amount not exceeding \$2,000,000 of capital stock, in shares of \$100 each, for the purpose of surveying, locating, constructing and operating a railway from the terminus of the Washington, Alexandria and Georgetown railroad, in the city of Alexandria, to the most eligible point on the present railroad from Acquia creek to the city of Fredericksburg.

By the second, third, fourth and fifth sections it was enacted as follows:

"§ 2. That whenever 2,000 shares of said stock shall have been subscribed, and ten *per cent.* thereon paid in good faith, the subscribers, their successors, executors and assignees shall be and are hereby declared and constituted a body politic and corporate under the name and style of "The Alexandria and Fredericksburg Railway Company," and shall be subject to all the provisions of the Code of Virginia applicable to such corporations: provided that the rates of 776 charge *for the transportation of persons and property upon the said railroad to or from the city of Alexandria shall not be ratably other or higher than upon persons or property destined to any point north of said city.

"§ 3. That it shall be lawful for said company, for the purpose of constructing, equipping and operating said railway, to sell their bonds, with coupons attached, at the rate of interest not exceeding seven *per centum per annum*, to be paid semi-annually, to the amount of one million dollars, and also to borrow money upon their promissory notes duly executed under the authority of its

board of directors, to an amount not exceeding \$500,000.

"§ 4. Provided, that said company shall commence the construction of said railway within two years, and complete the same within five years from the passage of this act.

"§ 5. This act shall be in force from its passage."

By deed of trust dated on the first day of June, 1866, between the Alexandria and Fredericksburg Railway Company, of the first part, and D. Randolph Martin and Robert Turner, of the city of New York, of the second part, and duly recorded in the several counties in which the said railroad is located, the said party of the first part convey to the said parties of the second part "all the railroad of the said party of the first part—that is to say, the said Alexandria and Fredericksburg railway, commencing at the terminus of the Washington, Alexandria and Georgetown railroad, in the city of Alexandria, state of Virginia, to the city of Fredericksburg, in said state, or to such point of junction with the Richmond, Fredericksburg and Potomac railroad, or the road leading from Aquia creek to the city of Fredericksburg, at or near Brook's station as now located, or to any other point of junction with the said Richmond, Fredericksburg and Potomac railroad which may in the future be adopted, including all and singular the franchises of said railroad as now granted and chartered, and any and all amendments, additions or modifications thereof, together with all and singular, the rights, interests, property and estate, real, personal and mixed, acquired, or which may hereafter be acquired, constructed, or to be constructed, of every species, nature and kind whatsoever." "In trust, nevertheless, for the use and purposes" declared in said deed, among which, mainly, is the security of the payment of the bonds to be executed and disposed of as therein provided for.

Broad as certainly are the terms of the said deed as to the subject intended to be conveyed, they do not embrace, and were obviously not intended to embrace, that part of the Alexandria and Fredericksburg railway now extending from Alexandria to the southern extremity of the Long bridge across the Potomac river opposite the city of Washington. That extension was not then made, and probably had not been thought of, and was not made nor authorized to be made for years thereafter. It was first authorized to be made four years thereafter, by an act approved June 4, 1870, entitled "an act to amend the charter of the Alexandria and Fredericksburg Railway Company." Acts of Assembly, 1869-70, p. 187.

By the first section of that act, the forfeiture of the charter of said company incurred by reason of its failure to complete said railway within the time specified in section 4 of its charter, is waived, and an extension of time for building said railway is granted, and the said company is "authorized to extend said railway to a point on the Potomac

river, between Alexandria and Washington city, or opposite Washington city, and to bridge said river so far as the state of Virginia can authorize the same, or to connect with the bridge of any railroad company that may have been, or may hereafter be chartered by the congress of the United States, whose road passes or shall pass through the District of Columbia: provided that in the extension of said railway it shall in no way interfere with the chartered rights or franchises of any railroad extending between Alexandria and Washington; but this proviso shall not be construed as preventing said Alexandria and Fredericksburg railway from crossing any such railroad." By the second section of said act an option is given to the said railway company as to the point of connection of its road with the Richmond, Fredericksburg and Potomac railroad, north of Fredericksburg: "provided that the said railway shall be constructed from its junction with" said railroad "to Alexandria, before its construction shall be commenced north of Alexandria." By the third section, the second section of the said act of incorporation passed February 3, 1864, is amended, but the amendment need not be here set out.

Since the passage of the said act, approved June 4, 1870, it seems that the said railway has been connected with the said railroad as authorized by the said act, and has been constructed from its junction with said railroad to Alexandria, since which the extension of said railway beyond Alexandria to a point on the Potomac river, between Alexandria and Washington city, or opposite to Washington city, authorized by said act, has been accomplished.

Certainly the extension of the Alexandria and Fredericksburg railway from Alexandria to the southern end of the Long bridge across the Potomac river, opposite to Washington city, not having been made nor even contemplated at the time of the execution of the said deed of trust, dated the 1st day of June, 1866, was not embraced, nor intended to be embraced, as a part of the railway conveyed by that deed.

But it is contended for the appellants, that though not embraced as a part of the railway so conveyed, it is embraced in the broad terms of that deed, which include "all and singular the franchises of said railroad as now granted and chartered, and any and all amendments, additions or modifications thereof, together with all and singular the rights, interest, property and estate, real, personal or mixed, acquired, or which may be acquired, constructed, or to be constructed, of every species, nature and kind whatsoever."

These are certainly very broad terms, but they were obviously intended to be confined to the railway as it then existed between the termini, plainly described in the deed, and the lateral branches of said railway which might thereafter be constructed by authority of law, together with the appurtenances then or thereafter existing to said railway so limited and its lateral branches aforesaid. In regard to such lateral branches, the Code, ch.

61, § 5, p. 573, declares that "the president and directors of any company incorporated to construct a railroad or other work of internal improvement, may cause to be made in connection therewith branch railroads or lateral works not exceeding two miles each in length; and under a resolution adopted in general meeting by two-thirds of all the votes of all the stockholders, may cause to be made branch railroads or lateral works not exceeding ten miles each in length."

But, it is argued for the appellants, that under the power thus conferred to construct these lateral branches, this extension of the said railway from its terminus at Alexandria to the Long bridge as aforesaid, might have been, if it was not actually, constructed, and whether it was, in fact, so or not, the deed of trust aforesaid must be construed as if the said extension had been so constructed.

Certainly the said extension was not intended to be so constructed even if it

780 had been lawful so to construct *it.

The act approved June 4th, 1870, amending the charter of the Alexandria and Fredericksburg Railway Company as aforesaid, expressly authorized the said extension to be made, and it was, in fact, made under that act, and not under the general provision in the Code in regard to branch railroads and lateral works as aforesaid. It is not pretended that there was ever any resolution or vote of the stockholders, or even of the directors of the said railway company, to make any such extension, and it being more than two miles in length, even if it had been a branch or lateral road of the railway conveyed by said deed of trust, it could only have been authorized to be constructed as such "under a resolution adopted in general meeting by two-thirds of all the votes of all the stockholders" of said railway company. Code, p. 574, § 5.

But it was not a mere branch or lateral road of the said railway within the meaning of the said section of the Code, and could only have been authorized by another act of assembly, as it was by the act of June 4th, 1870, aforesaid. It was an extension of the said railway from its northern terminus at Alexandria to the southern end of the Long bridge across the Potomac river, opposite Washington city, which point thereafter became the northern terminus of the said railway, just as if it had been so named in the original charter, though such operation was prospective only, and not retrospective.

Suppose that the said railway company had effected the said extension of its railway from Alexandria to the Long bridge by borrowing money from a third person for that purpose and securing its repayment by a deed of trust on such extended road, could the validity of such an arrangement have been questioned? Could it have been said that the said deed of trust of the 1st of June,

1866, was a prior lien on the said extension, in the face *of the express terms of that deed limiting the road thereby intended to be conveyed and actually conveyed, to Alexandria as its northern terminus?

But it is said that the extension was made,

not with money specially borrowed for the purpose and secured by a specific lien, but with money derived from the bondholders secured by the said deed of trust of the 1st of June, 1866. There is no evidence in the record of any such fact; and even if there had been, it would have given to the said bondholders no specific lien on the said extended road for the security of the money expended in such extension. If they desired such security they ought to have required it, and had a deed of trust or mortgage on the said extended road executed and duly recorded for that purpose. Not having done so, and no deed of trust or mortgage on said extended road having been executed in their favor, they stand in regard to such extension merely as general creditors, without any specific lien thereon, and the appellee, Faunce, who was also a general creditor of the said railway company, having acquired a specific lien on and claim to the fund in controversy arising from the use of the said extended road, is entitled to the said fund in preference to the appellants.

Reliance is placed by the counsel for the appellants on ch. 61, § 44, page 585, of the Code, which is in these words: "If a sale be made under a deed of trust or mortgage executed by a company on all its works and property, and there be a conveyance pursuant thereto, such sale and conveyance shall pass to the purchaser at the sale, not only the works and property of the company as they were at the time of making the deed of trust or mortgage, but any works which the company may, after that time and before the sale, have constructed, and all other property of which it may be possessed 782 at the time of the sale, other than debts due to it. Upon such conveyance to the purchaser, the said company shall *ipso facto* be dissolved. And the said purchaser shall forthwith be a corporation by any name which may be set forth in the said conveyance, or in any writing signed by him and recorded in the court in which the conveyance shall be recorded."

This section applies expressly and only to a sale under a deed of trust or mortgage by a company on *all* its works and property, and not merely on a specific part thereof; and the reference therein made to "any works which the company may, after that time and before the sale have constructed, and all other property of which it may be possessed at the time of the sale other than debts due to it," applies only to "works" and "other property" appurtenant to the said "works and property" conveyed by the said deed of trust or mortgage and acquired according to law since its execution. The section, therefore, does not apply to a portion of the road not constructed nor authorized by law to be constructed until several years after the execution of the said deed of trust or mortgage.

As the portion of the road extending from Alexandria to the Long bridge constitutes, comparatively, a small portion of the whole railway, it seems that the trustees of the residue of said railway under the deed of

trust aforesaid, have charge of the entire railway, and represent the company in regard to the same in this suit and otherwise. But that fact alone does not give them, nor is there anything else, so far as the record shows, which gives them any right to the money in controversy to be applied to the purposes of the said deed of trust.

This case has been argued with very great ability by the counsel on both sides, who cited many books in support of their respective views, which books, however, in 783 *our opinion, contain nothing in conflict with the views we have expressed.

The court is therefore of opinion that there is no error in the decree appealed from, and that the same ought to be affirmed.

DECREE AFFIRMED.

784 *Whitehead's Adm'r v. Coleman's Ex'ors.

March Term, 1879, Richmond.

1. Garnishment—Personal Representatives.*—In an attachment at law by W's administrator against J, the executors of C are summoned as garnishees, and the plaintiff in the attachment seeks to subject a legacy left by C to J to the payment of his debt. A common law court has not jurisdiction to compel the executors to pay the legacy.

2. Appeal—Setting Aside Verdict—Reserving Plaintiff's Rights.—The court below having taken jurisdiction of the case, and a verdict and judgment having been rendered in favor of the defendants, on appeal this court will reverse the judgment and set aside the verdict, and direct that the proceedings on the garnishee summons be dismissed, but without prejudice to the right of the plaintiff to assert his claim in a court of chancery.

This was a proceeding by garnishment in the circuit court of Pittsylvania county instituted in August, 1873, by John D. Glenn, administrator of A. J. Whitehead, deceased, who, in his lifetime, had recovered a judgment against Thomas S. Jones and others against George W. Coleman and Thomas G. Coleman, executors of Stephen Coleman, deceased, as debtors to or having effects of said Thomas S. Jones in their hands. There was a verdict and judgment in favor of the defendants, and the plaintiff applied to this court for a writ of error; which was awarded. The case is fully stated in the opinion of JUDGE STAPLES.

Jno. A. Meredith, E. Barksdale, Jr., and Wm. Tredway, Jr., for the appellant.

Ould & Carrington, for the appellees.

785 *STAPLES, J., delivered the opinion of the court.

***Garnishment—Personal Representatives.**—In *Bickle v. Chrisman*, 76 Va. 678, the court said: "It is well settled that process of garnishment at law will not lie against personal representatives." Compare *Vance v. McLaughlin*, 8 Gratt. 289. See also *Parker v. Donnally*, 4 W. Va. 648; *Brewer v. Hutton*, 45 W. Va. 106; 14 Am. & Eng. Enc. Law (2nd Ed.) 828

The plaintiff in error caused to be issued from the clerk's offices of Pittsylvania county a summons in the nature of a process of garnishment against the executors of Stephen Coleman, deceased. The object of the proceeding was to ascertain whether there was a liability on the part of the executors to Thomas S. Jones, who was debtor to the plaintiff, a grand-son of Stephen Coleman, and a devisee under his will. One of the executors appeared, and in behalf of his co-executor and himself, denied that there was any money or effects in his hands belonging to Thomas S. Jones. The plaintiff, suggesting the executor had not made a full disclosure, a jury was impanelled to enquire into the matter. The plaintiff in support of the issue on his part, relied upon a settlement of the executorial accounts in the county court, from which it appeared that Thomas S. Jones was entitled to a legacy of \$1,800 as of the 19th of February, 1874, from the estate of Stephen Coleman, and this fund the plaintiff sought to subject to the payment of his debt.

The executor was examined as a witness, and upon his examination he exhibited four bonds executed in 1858 and 1859, by Thomas S. Jones, to the testator, amounting in the aggregate to nearly \$2,500, which he insisted was more than sufficient to absorb the legacy. He proved that these bonds have been inventoried as a part of the estate of Stephen Coleman, and since the death of the latter payment had been several times demanded of Jones. No other effort, however, had been made to collect the bonds. They had not been reported to either of the commissioners who settled the executorial accounts, nor had the executors accounted for them or their proceeds to the estate.

786 *Whether Thomas S. Jones was properly chargeable with the bonds depended to some extent upon a clause in the testator's will, which provided that his children should not be "accountable for any advancement for education or any other accounts whatever."

Thomas S. Jones was the only descendant of a daughter of the testator, and upon her death was adopted, raised, and educated by the testator as a child, and so provided for in his will. And it was contended by the plaintiff that he was entitled to the benefit of this provision.

Another question arising was, whether the money for which the bonds were executed was to be considered an advancement to Thomas S. Jones, or as a loan for which he was liable to the estate. Upon this point evidence was adduced in the trial before the jury. It also appeared in the progress of the trial that the testator had been the guardian of Thomas S. Jones, and that his account, settled as far back as 1854 by a commissioner of the county court, showed a balance due the ward of more than \$10,000. What had become of this debt the executor could not tell. He had no papers or vouchers showing it had been paid. It did not appear that Thomas S. Jones had ever asserted any claim to it. Whether the bequests in the will were to be regarded as a satisfaction of this claim,

if it really existed; whether the money secured by the bonds was to be regarded as an advancement or a subsisting debt; and whether the provision in the will could properly apply to a grandchild, were questions necessary to be passed upon and finally decided before it could be determined whether the plaintiff could subject the legacy to the payment of his debt. They were questions in which Thomas S. Jones and the other legatees were directly interested, and which in the nature of things could not finally be decided in their absence. It is too plain for argument that a court of law is not a proper tribunal for settling such questions; 787 and it is a *matter of surprise that the circuit judge, upon the disclosure of these facts, did not at once arrest the entire proceeding, and require the plaintiff to proceed by bill in equity. But nothing of the kind was done—the case was proceeded in to a verdict in favor of the executors.

The question now arises, what is to be done by this court? If we reverse the judgment and remand the case for a new trial, the result will be practically an attempted settlement of the executorial accounts before a jury in the absence of parties interested.

If we affirm, and it should hereafter appear, as it may, that Thomas S. Jones is entitled to the legacy, the plaintiff may be estopped to claim any part of it, notwithstanding he is a creditor whose debt is not questioned, whilst the debtor or his assignee in bankruptcy may appropriate the whole of the legacy. Possibly we might affirm the judgment without prejudice to the plaintiff. But the difficulty is that in so doing we necessarily decide that Thomas S. Jones, being a grand-child, is not included in the provisions contained in the will with respect to the advancements. The decision, of course, will not bind him, and this court may be hereafter called on to revise and reverse its own decision upon that very question.

Let it be conceded that the circuit court has correctly construed the clause of the will already referred to. We are not entirely satisfied of the correctness of the decision with respect to the bonds executed by Thomas S. Jones to the testator.

It is somewhat remarkable that the executor in crediting him (Thomas S. Jones) with the legacy should not have charged him with the bonds. At the time of the death of the testator, in 1865, Jones was perfectly solvent, and so continued for several years thereafter; and no effort was made to collect the money beyond a mere demand of payment. The

amount of the bonds considerably 788 *exceeded the amount of the legacy, and there was no valid reason, so far as appears, for failing to collect the excess. In none of the settlements made by the executors are the bonds charged or even referred to, and nothing is ever heard of them until they were produced on the trial in 1874, and claimed as a satisfaction of the legacy. Upon this record it is difficult satisfactorily to determine how this matter stands, and it is most apparent that a court of equity is the

only proper forum to close this controversy, where the necessary parties may be convened, the accounts settled, and the rights of all finally adjudicated. The learned counsel for the defendant insists, however, that the plaintiff having elected his remedy must be held to it, and if the mode adopted of testing the liability of the executors was improper, it was a matter of objection for them, and not for the plaintiff who instituted and prosecuted it. The rule which holds a party concluded by the decision of the tribunal whose jurisdiction he invokes, is of course a just one, but it is obvious that this rule cannot apply where the tribunal thus invoked is precluded by its forms of proceeding from affording an adequate remedy. An illustration of this may be found in the case of *Great Falls Manufacturing Co. v. Henry's adm'r*, 25 Gratt. 575, and in the case of *Staples v. Turner, adm'r*, 29 Gratt. 330, where the party being erroneously advised by his counsel his defence could only be made in a court of equity, confessed a judgment at law. Having been dismissed from the equity forum for want of jurisdiction, he was permitted, notwithstanding the judgment, to make the defence at law. In the present case it is plain the plaintiff was not entitled to succeed in any event; he was asserting a claim to a legacy in the name of his debtor, and could occupy no higher ground than the latter.

It is well settled that no action can be maintained at law for a legacy against 789 the executor without an *express promise to pay. No admission of assets or mere acknowledgment will be sufficient; for without such promise the executor has a right to require a refunding bond, which a court of law cannot compel the creditor to give or the executor to receive. *Kayser, ex'or, v. Desher*, 9 Leigh, 357. The intention to waive the refunding bond must be clear. It will not be inferred from a mere assent to the legacy, because the executor may be willing to assent to a legacy, and even to hold it for the benefit of the legatee, and still not willing to part with the possession of it without a refunding bond. *Nelson's adm'r v. Cornwell*, 11 Gratt. 724; *Drake on Attachments*, § 499; *Daniel on Attachments*, §§ 63, 226.

Throwing out of view all other difficulties in the way of settling fiduciary accounts in a court of law, the consideration just alluded to is sufficient to show that the plaintiff must have encountered an insuperable obstacle in maintaining this proceeding. If he had prevailed in the court below, this court would have reversed the decision without hesitation. The suggestion is simply a means by which the creditor enforces a lien of his execution, and if his counsel advise him that a court of law is a proper tribunal for the assertion of his remedy, and if this court can see that the advice was palpably erroneous, its highest duty is so to make its judgment that the plaintiff may resort to a forum competent to administer proper relief. This can be effectually done in the present case by reversing the judgment of the court "below, setting aside the verdict and dismissing the proceeding at the cost of the plaintiff." The defend-

ant, as the party substantially prevailing, is entitled to his costs in this court. So that he gains all that he would have by an affirmance of the judgment, and the plaintiff is permitted, *without prejudice, to prosecute his remedies elsewhere.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the judgment of the said circuit court is erroneous. It is, therefore, considered that the judgment aforesaid be reversed and annulled, and that the plaintiff in error, out of the estate of his intestate in his hands to be administered, pay to the defendant in error, as the party substantially prevailing, his costs by him expended in his defence here and in the said circuit court. And this court proceeding to render such judgment as the said circuit court ought to have rendered, it is further considered that the verdict of the jury be set aside, and that the proceedings upon the garnishee summons be dismissed, but without prejudice to the right of the plaintiff to assert his claim, if so advised, in a court of chancery, in accordance with the views expressed in said opinion.

DECREE REVERSED.

791 *Summers v. Darne & als.

March Term, 1879, Richmond.

I. **Trust Deed — Conveyance — One in Equity.***—In January, 1856, N. sold and conveyed to J. W. and R. H. Darne a tract of land, and at the same time they conveyed the land to trustees to secure the purchase-money. In 1866 the trustees and R. H. Darne and wife released and conveyed the land to J. W. Darne. This deed bears date August 1st, 1866, and was acknowledged before justices on the 2d of November, 1866, and was received at the clerk's office for record on the 14th of the same month. By deed bearing date on 31st of October, 1866, J. W. Darne and wife conveyed the land to a trustee to secure a debt to N. This deed was acknowledged by J. W. Darne on the 2d of November, and by his wife on the 7th, and was received at the clerk's office on the 14th of November. In 1860 S. recovered judgments against J. W. Darne, which were docketed in 1865. On a suit in equity by S. to subject the said land to satisfy his judgments—**Held:** That though the deeds bear different dates, yet as they were acknowledged on the same day and received for record on the same day, it is fairly to be presumed that the two deeds were delivered on the same day, and that they were intended to take effect at the same time.

II. The second deed of trust does not show that the debt secured thereby is the same as that secured by the first deed, but it is proved by parol evidence that all of the principal money secured by the first deed and a considerable amount of interest remained unpaid in 1866, and R. H. Darne being of

See Nutt v. Summers, 78 Va. 164, sequel to principal case.

***Equity — Conveyance — Trust Deed.**—On the question of where deeds of conveyance and deeds of trust executed on the same day will be considered one in equity, see Hurst v. Dulancy, 87 Va. 444; Straus v. Bodeker, 86 Va. 543; Roush v. Miller, 39 W. Va. 638.

opinion that he could not pay his part of it, at the request of said R. H. and J. W. Darne, N. agreed that the whole land might be conveyed to J. W. and he should give his notes for the amount, principal and interest, to be paid in two and three years, and give a deed of trust to secure them; and to carry out this arrangement the deed from the trustees and R. H. Darne and wife to J. W. Darne and his deed of trust to secure the debt was executed—**Held:**

1. **Deeds—Enquiry into Consideration.***

—Parol evidence is competent to prove the consideration on which these deeds were made.

792 *2. **Mortgages—Debt—Novation.†**—The facts stated do not constitute a novation of the debt; but it is still a debt due for the purchase-money of the land, and has priority over the judgments.

III. **Practice — Objectionable Questions — How Taken Advantage of.**—Though an exception is taken and entered at the time, that a question asked of a witness is leading, the exceptant should bring it to the attention of the court and obtain an order for the suppression of the objectionable testimony; and if he fails to do this, the exception will not be regarded in the appellate court.

IV. The county court having made a decree in the cause, holding that the second deed released the first deed of trust, and giving priority to the judgments, N. appealed to the circuit court, and that court affirmed the decree of the county court. At the same term N. filed his petition for a rehearing of the decree of the county court, which was allowed. About the same time the parol evidence was filed—**Held:**

1. If the deeds alone are to be considered it was a proper case for the rehearing of the decree.

2. **Interlocutory Decree—New Evidence.**

—There is no rule of law which precludes the party from taking new evidence after an interlocutory decree, even before a rehearing is obtained. The introduction of such evidence depends on the sound discretion of the court, and all the circumstances of the particular case. Looking to this evidence certainly the rehearing was proper.

V. **Same—Decision in Present Case.**—The decree of the county court, after declaring that the judgment liens have priority over the deed of trust,

***Deeds—Enquiry into Consideration.**—In Click v. Green, 77 Va. 838, the principal case is cited as authority for the rule that the consideration named in a deed may be looked into.

†**Mortgages—Discharge — Novation.**—For discussion of the discharge of mortgages and novation, see Stimpson v. Bishop, 82 Va. 190; Coles v. Withers, 33 Gratt. 186 and note.

Equity—Judgment Creditor—Not a Purchaser.—The principal case is cited in Sinclair v. Sinclair, 79 Va. 42, and in Cowardin v. Anderson, 78 Va. 88, as authority for the proposition that a judgment creditor is in no just sense treated as a purchaser and has no equity whatever besides what belongs to the debtor.

Depositions Taken after Interlocutory Decree—Admissibility.—In regard to the reading of depositions taken after there has been an interlocutory decree in a chancery cause, see Richardson v. Duple, 33 Gratt. 730 and note, where the principal case is discussed and distinguished. See also Rawlings v. Rawlings, 75 Va. 91.

directs the sale of the land at public auction or at private sale, on credits stated, and that the commissioners should report their proceedings; and that a commissioner should ascertain and report the several liens on the land and their priorities. This is an interlocutory decree.

VI. Statute—Application to Pending Causes.

—Under the act, Code of 1873, ch. 178, § 25, so soon as the appeal from the decree of the county court was allowed and perfected, the cause was at once transferred to the circuit court, and became a pending cause in that court. It was therefore not affected by the act of March 3, 1873, which applied only to causes then pending in the county court.

VII. Decree—Power of Court.—The petition for a rehearing of the decree of the county court having been presented and allowed to be filed at the same term at which that decree was affirmed

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by the circuit court, that court had complete control during that term of its decree, and might modify or review it at its pleasure.

VIII. Same—Construction.—Though the petition was for a rehearing of the decree of the county court, and the order for a rehearing was confined to that decree, the circuit court acted upon the idea that the whole case was before it, in the exercise of its original jurisdiction, and that it had the same control of all the decrees and proceedings as the county court would have had if the cause had remained in that court. The circuit judge, in giving leave to file the petition, must necessarily have intended to suspend the operation of the decree affirming the decision of the county court, and the petition and order was intended to apply to both decrees.

This was a creditor's bill in the county court of Loudoun, brought in June, 1870, by Richard H. Summers against James W. Darne and Emily F. Darne, his wife, William D. Nutt and others, to subject two tracts of land once held by James W. Darne to satisfy four judgments recovered by Summers against James W. Darne in 1861, and docketed in 1865. The bill, after setting out the judgments, alleged that at or after the time of the rendition of the judgments, James W. Darne was seized of a tract of 213 acres and 29 poles in the county of Loudoun, which, by two deeds, dated respectively on the 31st of October, 1866, and the 13th of January, 1869, was conveyed by said Darne and wife to Frederick P. Maguire, in trust for the benefit of William D. Nutt; also a tract of 255 acres, two roods, which said Darne and wife, by deed dated the 22d of December, 1866, conveyed to said Maguire in trust to secure to said Nutt the payment of \$1,800, due the 22d of December, 1871 and 1873, and which tract by another deed, dated the 27th of January, 1869, Darne and wife conveyed to George W. F. Hummer in trust for the benefit of Mrs. S. Darne. That on the 23d of May, 1870, Maguire, under the two deeds of October, 1866, and January, 1869, sold in the city of Washington

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*the tract of 213 acres and 29 poles, and it was purchased by William D. Nutt at the price of \$2,800. The plaintiff objected to this sale on various grounds; he prayed that an enquiry be made as to what lands Darne has had at any time since the first day of the June term, 1861, of the county court of Loudoun, at which said judgments were ren-

dered, and also what were the liens thereon and their priorities; and that the court would decree that the purchase-money of \$2,800, with interest thereon, be applied to pay said liens is sufficient for the purpose; and if not sufficient, that the sale should be set aside, and the said land and any other realty of said Darne subject to said liens be sold, and the proceeds applied to the payment of the said liens, and for general relief.

At the October term, 1870, of the court, the cause came on to be heard upon the bill taken for confessed as to all the defendants, when the court made a decree directing a commissioner to ascertain and report what real estate James W. Darne is now or has been seized or possessed of on or since the first day of the terms at which the judgments of complainant, were rendered, and all the liens thereon and their priorities, and the value and annual value of the said realty, with any other matter, &c.

On the 14th of February, 1871, Commissioner F. M. Henderson returned his report. He reported the liens upon the real estate by judgments at \$3,018.49, and Nutt's second deed of trust at \$808.50; the deed of trust of October 31, 1866, as released, and therefore not a lien.

The cause came on again to be heard at the February term of the court upon the papers formerly read and the report of the commissioner, when the court recommitted the report with instructions to the commissioner to enquire and report for what price William D. Nutt bought the tract of 213 acres sold to him by the trustee, Maguire, *and also what interest James W. Darne has in the tract of 225 acres mentioned in the bill, its value and annual value, with any other matters, &c.

At the March term of the court Wm. D. Nutt filed his answer in the cause. He admitted the plaintiff's judgments, but denied they were a lien on the land superior to that of respondent. He states that in January, 1856, he sold to James W. Darne and Richard H. Darne a tract of land in Loudoun county containing 213 acres and 29 perches for \$400 cash, and the residue of the purchase-money, \$1,900, to be paid in four equal annual instalments, the interest thereon to be paid semi-annually and for the security thereof the said parties executed a deed of trust to Wm. B. Randolph and Anthony McLean; the deed and deed of trust were both delivered at the same time, and both entered of record at the same date. The purchasers failed to pay the deferred payments or the interest accruing thereupon, and Richard H. Darne being of opinion that he would be unable to comply with his contract, applied to respondent to be relieved. James W. Darne, however, thought that if the time of payment was extended he would be able to meet the payment for said land. Accordingly, at their earnest request, respondent consented that if they would pay him \$242—his debt and interest amounting on the 1st of September, 1866, to \$2,242—and pay him the residue in gold or its equivalent in currency, in two and three years, interest thereon half yearly, he would agree to their proposition. To effect this ar-

rangement it was then agreed, in order to divest any title that Richard H. Darne might have in the land, that Randolph and McLean, the trustees in the deed from James W. and Richard H. Darne should unite in a deed to James W. Darne for the said land; and that James W. Darne should then execute his bonds with another deed of trust to secure them in lieu of the original bonds for

796 the purchase by Richard and *James W. Darne. And accordingly the deeds were prepared and executed at the same time, and admitted to record on the same day; and copies are filed with the answer. And he insists that by this last deed James W. Darne secures to him the same debt secured in the original deed, and agrees to pay the same in gold, or its equivalent, that being the currency in which the original debt was contracted.

The defendant insists that the proceeding to sell under the deed of trust was regular, and the sale was fairly conducted; and that as the highest bidder at the sale he became the purchaser, and the price paid for the land did not pay his debt by the sum of \$197.45.

As to the tract of 255 acres and two roods, he sold it to James W. Darne, and that there is now due to him the sum of \$1,800; that the deed therefor and the deed of trust to secure its payment were executed at the same time, and admitted to record at the same time.

In July, 1871, Commissioner Henderson returned his second report. He states the sale by Nutt to James W. and Richard H. Darne in January, 1856; that after sundry payments the amount due thereon on the 31st of October, 1866, was \$2,242; that Richard H. Darne wished to be relieved, and Wm. D. Nutt did release him on certain terms, as follows: James W. Darne was to pay \$242, which was done, and the amount reduced to \$2,000, payable in gold or its premium at maturity, provided the same should be paid in currency. The sale by the trustee was made June 20th, 1870, and the purchaser was Wm. D. Nutt.

The commissioner then makes a statement of the debt secured by the deed of 1866 and the expenses of sale, making \$2,894.45; and after deducting the purchase-money, \$2,700, shows a deficiency of \$194.45. He 797 *also makes a statement of the original debt due October 31st, 1866, \$2,242, and makes the excess of the notes secured by the last deed over the debt due \$191.54. He refers to the court the question whether there has been a novation of the original contract. He states that the tract of 255 acres is assessed at \$2,555, and that the rents of the lands will not pay the debts in five years.

The commissioner returns with his report the deeds. The deed of trust from James W. and Richard H. Darne to Randolph and McLean to secure the purchase-money of the land to Nutt was dated the 1st of January, 1856; and was admitted to record on the 5th of January. The deed from Randolph and McLean and Richard H. Darne and wife to James W. Darne is dated the 1st of August,

1866. It is acknowledged before justices of the peace on the 2d of November, 1866, and admitted to record on the 14th of November. This deed refers to the deed of trust from J. W. and R. H. Darne, and recites that the purposes of said deed have been satisfied, and that R. H. Darne has, for a valuable consideration, sold all his interest in the land to J. W. Darne, and directs that the whole shall be released and conveyed to him.

The deed from James W. Darne and wife is dated the 31st October, 1866, is acknowledged before justices on the 2d and 7th of November, and admitted to record on the 14th of November, the same day that the deed from Randolph, &c., was admitted to record. The debt secured is evidenced by two notes payable in two and three years with interest.

The cause came on again to be heard on the 19th of March, 1872, when the court held that the deed from Randolph, &c., to James W. Darne, dated August 1st and acknowledged the 2d of November, 1866, fully released and extinguished the lien of the deed 798 of trust *from James W. Darne, &c., to said Randolph and McLean bearing date the 1st of January, 1856, and was a conveyance in fee of the tract of 213 acres and twenty-nine poles to James W. Darne; and that said deed of August 1st, 1866, was not simultaneous with but prior to the deed of trust from James W. Darne and wife to T. B. Maguire, trustee, bearing date on the 31st day of October, 1866; and that the judgments of the plaintiff and the other judgments existing at the time when the said deed of trust to Maguire was recorded, are liens on said 213 acres and 29 poles prior to the lien of the said deed of trust to Maguire of October 31st, 1866.

And it was decreed that the sale by Maguire be set aside and a sale be made upon the credits as prescribed in the decree. And it was further ordered that T. M. Henderson, or some other commissioner of the court, do ascertain and report what liens there are on the tract of 255 acres, and their priorities.

From this decree Nutt appealed to the circuit court of Loudoun.

On the 13th of October, 1873, two depositions, which had been taken by the defendant Nutt on the 7th of the same month, were received by the clerk of the circuit court and filed in the papers of the cause. These were the depositions of James W. and Richard H. Darne. James W. Darne was asked by Nutt's counsel:

2d question. Did you, in the year 1866, agree to take upon yourself the whole liability for said purchase, and was Richard H. Darne agreed to be released therefrom by W. D. Nutt, and state the circumstances and the mode by which said release of Richard from the purchase was effected? (Question excepted to by counsel for plaintiff.)

Answer. I did agree to take upon myself the liability of the whole of said purchase, the said Richard H. Darne feeling himself unable to comply with said purchase. 799 and *the deed for the said tract of land was made out and signed by Richard

and his wife, and the trustee in the deed of trust.

Question 3. Was the said deed of trust ever delivered to you?

Answer. It never was delivered to me, and I never have seen it. (Excepted to by plaintiff's counsel.)

Question 4. Was it, or not, understood that the deed aforesaid to you, by which Richard was released from his purchase, was to have no effect until the deed of trust was given, and was not that the reason why the deed was not delivered? (Excepted to by plaintiff's counsel.)

Answer. It was so understood and intended; that was the reason the deed was not delivered.

And in answer to another question, witness stated that he owed to Nutt the original purchase-money and more, and it was the same money contained in the deed of trust to Maguire.

Richard Darne stated that he did purchase the land in conjunction with his brother in the year 1856, and in 1866 he became dissatisfied, and did not think he could get through with the debt, and his brother James took the debt upon himself, provided William D. Nutt would release witness from the place and debt; which was done.

The justice who took these depositions, in his certificate stated that the counsel for the plaintiff, before the examination of the witnesses was entered upon, excepted to the taking of the depositions, because the case had been already submitted, heard and decided in the county court of Loudoun, and was then before the circuit court upon an appeal to be heard upon the record from the court below, and for all other causes.

At the October term, 1873, of the circuit court, the court affirmed the decree of the county court of March, 1872, with costs.

At the same term of the court James W. Darne filed his answer in the cause, in which he sustained the defendant Nutt in his account of the transaction of 1866; and also at the same term of the court leave was given the defendant Nutt to file a petition for a rehearing in this cause. In his petition he refers to the decree of March, 1872, of the county court, and prays that it may be reheard; and he proceeds to state the facts as to his sale and the two deeds of trust as he had before stated them in his answer.

On the 4th of May, 1875, the cause came on again to be heard upon the papers formerly read, and the petition for a rehearing of the decree entered by the county court of Loudoun at its March term, 1872, upon the depositions of the witnesses and the answer of the defendant Darne, and the court being of opinion that the said decree should be reheard, it was decreed that the cause be recommitted to Commissioner Henderson, with instructions to enquire and state the liens, with their priorities, after considering the evidence now in the record, or which the parties may hereafter adduce. And thereupon the plaintiff, Summers, applied to this court for an appeal; which was allowed.

John M. Orr, for the appellant.

H. W. Thomas and Wm. W. Crump, for the appellees.

STAPLES, J., delivered the opinion of the court.

This court has decided in numerous cases that where no statutory enactment intervenes, the judgment creditor can acquire no better right to his debtor's estate than the latter himself has. The creditor takes the property or applies it to the satisfaction of his lien in subordination to all the equities which exist at the time in favor of third persons, and a court of chancery will
801 *limit the lien of the judgment to the actual interest the debtor has. The creditor is in no just sense treated as a purchaser. He has no equity whatever beyond what justly belongs to the debtor. See *Floyd v. Harding* and *Borst v. Nalle*, reported in 28 Gratt. 401, 423.

When, therefore, land is conveyed and the purchaser at the same time gives back a mortgage or other incumbrance to secure the purchase-money, he does not thereby acquire any such *seisin* or interest as will entitle his wife to dower, or his creditor to subject the land to his debts discharged of the mortgage. In such cases the deed and mortgage are regarded as parts of the same contract, and constitute but a single transaction, investing the purchaser with *seisin* for a transitory instant only. In the same manner a deed of defeasance forms with the principal deed but one agreement, although it be by a separate and distinct instrument. *Gilliam v. Moore*, 4 Leigh, 32; *Wilson v. Davidson*, 2 Rob. R. 384, 398. If both instruments bear date the same day, it will be presumed they were executed at the same time in absence of proof to the contrary. And even though the mortgage bears date subsequent to the date of the deed of conveyance, if it appears they were acknowledged on the same day and recorded at the same time, it may be inferred they were executed together, and intended to take effect at the same time. *Pendleton and wife v. Pomeroy*, 4 Allen R. 570. If at the time of the sale and purchase, the purchaser on receiving a conveyance from the vendor, is at the same time to execute a mortgage of the property to secure the payment of the purchase-money, and the giving the mortgage is delayed owing to a difference between the parties as to the provisions to be inserted therein, but is subsequently executed in fulfilment of the original contract, the same principle
802 *applies, and the lien of the mortgage will take precedence of a mere judgment lien upon the property. *Wheatley's heirs v. Calhoun*, 12 Leigh, 264; 1 Scribner on Dower, and cases there cited.

The principle upon which this doctrine proceeds is that a court of equity looks upon that as done which ought to be done. That court considers all agreements as performed which are made for a valuable consideration in favor of those entitled to insist upon the performance, so that neither party will suffer prej-

udice or derive any undue advantage from a non-compliance with the contract.

A different rule would no doubt apply to the case of a *bona fide* purchaser for a valuable consideration acquiring title to the property before the execution of the mortgage and in ignorance of the arrangement. But with respect to creditors they stand on no higher ground than the debtor, and must take the estate as he holds it.

The deed of release executed by the appellees, W. D. Nutt and the trustees, bears date the 1st of August, 1866, and the deed of trust given by James W. Darne, for the benefit of W. D. Nutt, bears date 31st of October following. So that it would seem there was an interval of nearly three months between the execution of the two deeds. The appellant claims that in this interval James W. Darne was invested with both the legal and equitable title, and the lien of his appellant's judgment attached upon the land to the exclusion of the trust deed.

But if we examine the certificates of the justices of the peace, and of the notaries public appended to the deed of release, we find that deed was not acknowledged by either of the parties until the 2d November, 1866, nor admitted to record until the 14th of November.

803 *Looking at the deed of trust of the 31st of October we find that deed was acknowledged by the parties on the second of November, and admitted to record on the same day as the deed of release. It is therefore fairly to be presumed that the two deeds were delivered on the same day, and that they were intended to take effect at the same time.

It was so held in the Massachusetts case already referred to, and in the absence of proof to the contrary, such a presumption is reasonable and just. But this is not all, the recitals in the deed show their connection with each other. The deed of release refers to the deed of trust given by Richard H. Darne and James W. Darne on the first day of January, 1856, to secure the payment of the purchase-money for the land sold them by the appellee, and the deed of trust of the 31st of October, 1866, refers to the deed of conveyance executed by the appellee to Richard H. and James W. Darne the 1st day of January, 1856. It is impossible to resist the conclusion that these four deeds are connected, and constitute parts of the same transaction. The only difficulty in the way is there is nothing on the face of the deeds to show that the debt secured by the second deed of trust is the same debt provided for in the deed of trust of 1856. But this is fully supplied by the parol testimony. It appears from the evidence that Richard H. and James W. Darne purchased the land of the appellee in 1856, and received a conveyance therefor, and at the same time executed a deed of trust to secure the unpaid purchase-money. Considerable time elapsed and no part of the debt was paid. It became apparent that Richard H. Darne could not comply with his part of the contract, and in 1866 it was agreed that James W. Darne should become the sole

purchaser; that a deed of release of the trust deed should be executed to him, **804** and *simultaneously therewith he should execute a trust deed to secure the purchase-money still due the appellee. Accordingly the deed of release of the 1st of August, 1866, was prepared and signed. Why the trust deed was not prepared at the same time is not explained; but although the trust deed was not signed until the 31st day of October, 1866, as has been seen, both deeds were acknowledged on the same day, and the parol testimony shows that the deed of release was in fact not acknowledged and delivered until the deed of trust was also acknowledged and delivered. It is impossible on reading this record to entertain a doubt that this is a true version of the transaction, precisely what the parties intended, and what was actually done by them.

The learned counsel has argued that parol testimony is inadmissible to contradict or vary the recitals in the deeds, or to show that the deed of August 1st, 1866, was not delivered on the day of its date. No rule is perhaps now more firmly established than that the parties are not concluded by the date of the deed or the recital of the consideration therein. It is competent always to show by any relevant evidence that the delivery was in fact on a day different from the date, and to show the real nature and character of the consideration. 15 John. R. 463; *Mabery v. Brien*, 15 Peters R. 21.

If, as contended by the counsel, the questions propounded to the witness were leading, it was incumbent upon the appellant not merely to except at the time, but to bring the matter to the attention of the court below and obtain an order for the suppression of the objectionable answers. This not having been done, this court is precluded from considering the exceptions to the interrogatories for the alleged reason that they are leading. But the objection mainly relied on is that the testimony comes too late; **805** it was taken after *the decree settling the rights of the parties, and no sufficient reason or excuse is assigned for not having produced it earlier.

Whether a rehearing shall or shall not be granted in any case is a matter within the sound discretion of the court. If the application is based solely on the ground of after-discovered evidence, the party must of course bring himself within the rule which requires he should show due diligence.

A rehearing may, however, be granted on other grounds. It may be granted on the merits of the case as they stood at the former hearing, if the chancellor has reason to doubt the correctness of his former opinion. The practice of granting rehearings where justice has not been done is favored by the courts. It tends to lessen litigation and the expense of appeals to this court. 2 Rob. Prac. 389. In the present case it does not distinctly appear whether the depositions were or were not brought into the cause before the petition for a rehearing was filed. It does not matter, because if we exclude the depositions from our consideration, and look alone to the deeds,

it was plainly a case proper for a rehearing upon the merits. If, on the other hand, we look to the parol evidence, there cannot be a doubt that the circuit judge wisely exercised his discretion in granting a rehearing. There is no rule of practice or of law which precludes the party from taking new evidence upon a question of fact passed upon by an interlocutory decree, even before a rehearing is obtained.

The introduction of such evidence depends on the sound discretion of the court and all the circumstances of the particular case. *Dunbar's ex'or v. Wood's ex'or*, 10 Leigh, 628; *Moore v. Hilton*, 12 Leigh, 1.

From what has been said, it is manifest this discretion has been wisely exercised in this particular case.

It is further insisted that the dealings 806 between the *appellee and the purchasers of the land have resulted in a novation of the debt and an entire extinguishment of the lien given to secure its payment. The unpaid purchase-money secured by the first deed of trust amounted to \$1,900, payable in three instalments, with interest thereon, payable semi-annually.

By the new arrangement, Richard H. Darne was released, and James W. Darne executed his two bonds to the appellee, secured by the trust deed bearing date 1st September, 1866, each, for the sum of \$1,000 in gold coin, one payable in two and the other in three years, bearing semi-annual interest, and another note for \$242, with interest from date. The parties, it seems, considered the original debt as payable in gold, and in 1866, when the new arrangement was made, the Federal currency was not only greatly depreciated, but subject to constant fluctuations. They, therefore, stipulated that as the debt was originally a specie debt, it should retain that character throughout. The only substantial change made was in the release of one of the parties and in the agreement to give still further indulgence. It is easy to see, however, that it is the same debt due for the purchase of the land, never paid or extinguished. And it has been so treated throughout.

In *Knisely v. Williams*, 3 Gratt. 265, the vendor took a bond for the purchase-money. He afterwards agreed to take from the vendor an order on a third person, payable at a distant day, for the amount of the bond. The order was given and the bond surrendered; but when the order was presented the drawee refused to accept it. It was held that the new arrangement did not affect the lien for the purchase-money, and the vendor was at liberty to resort to it and enforce it upon the failure to collect the order.

In *Yancy v. Mauck*, 15 Gratt. 300, after 807 the purchaser *had given his bonds for the purchase-money, a new arrangement was made, by which those bonds were surrendered and other bonds were given with new parties to third persons; and it was held that this change of the contract did not affect the lien for the purchase-money. JUDGE ALLEN, in delivering the opinion of the court, quotes, with approbation,

what is said in *Watts v. Kinney*, 3 Leigh, 272, 295, on the same subject: That a court of equity looks to substance, not to form; it looks to the debt which is to be paid, not to the hand which may happen to hold it; that the fund charged with its payment (the land here) shall be so applied whosoever may be the person entitled, and it considers a debt as never discharged until it is discharged by payment to the proper person and by the proper person. These authorities are decisive of the question.

It is argued that the deed of trust of October, 1866, secures to the appellee advantages to which he is not justly entitled under the original contract. By the new arrangement it is said the interest is compounded to make the accrued interest an interest-bearing fund, and this new interest-bearing fund is further augmented by an enormous gold premium, the effect of all which is to give to the appellee \$2,780 in currency, against a principal of \$1,900 in currency, and this large excess is interposed against the appellant after his judgment lien had attached.

We do not deem it necessary to enquire whether or not this point is well taken; the question does not properly arise at this stage of the controversy. This is an appeal from a decree granting a rehearing, and all we have to do is to determine whether the rehearing is proper. When the case goes back to the lower court for further proceedings that court will then ascertain the 808 *amount justly due the appellee. If the deed of trust includes more than he is entitled to as against the appellant, the deed can be reformed in that particular. In the absence of fraud, and nothing of the kind is pretended here, the deed of trust will be held good for whatever the appellee may justly claim.

Before leaving this branch of the case it is necessary to enquire whether the decree of which the rehearing was allowed is an interlocutory or final decree. The learned counsel for the appellant maintains it is final. We are of opinion this is an entire misconstruction of the decree. After declaring that the judgment liens have priority over the trust deed, the decree directs the sale made by the trustee be set aside, and the land sold again at public auction, or at private sale, as the commissioners might deem best, upon a credit of one, two, three and four years, and the commissioners are directed to report their proceedings to the court. It was further provided that one of the commissioners of the court shall ascertain and report the several liens on the land, and their priorities. That a decree of this character is interlocutory and not final is settled by numerous decisions of this and other courts. See *Cocke's adm'r v. Gilpin*, 1 Rob. R. 20; *Ambrous' heirs v. Keller*, 22 Gratt. 769, where the whole subject is fully discussed. See *Craighead v. Wilson*, 18 How. U. S. R. 199; *Beebe v. Russell*, 19 How. U. S. R. 283.

After all, perhaps, the enquiry is not very material, for if the decree is to be regarded as final, the petition for a rehearing may be treated as a bill of review, and such pro-

ceedings had thereunder as are appropriate to that mode of proceeding. Several other points are made in the petition for an appeal, but what has been said disposes of the most material.

Thus far the case has been considered on its merits. *Another question, however, arises, and that is whether the appellee is not barred of his remedy by the previous decrees and proceedings in the cause.

It is insisted that the circuit court having affirmed the decree of the county court, the decree of affirmance is conclusive until reversed by this court. In such a case, it is said, a petition for a rehearing or a bill of review would not lie in the circuit court, the only remedy being an appeal. In support of this view the act of March 3d, 1873, is relied on.

It is sufficient to say that act has not the slightest application to the case. It applies only to causes pending in the county court at the time of its passage, and provides for their removal into the circuit court, where they are to be proceeded in as if they had been originally commenced in that court. The appeal was allowed in the case before us in April, 1872, and was perfected long before the act of March, 1873, was passed. See Code 1873, p. 1029.

The twenty-fifth section of chapter 178, Code of 1873, provides that when any judgment, decree or order of a county court is reversed or affirmed, the cause shall be retained in the circuit court and there proceeded in, unless by consent of parties, or for good cause shown the appellate court otherwise directs. Under the operation of this statute, so soon as the appeal was allowed and perfected, the cause was at once transferred to the circuit court, and became a pending cause in that court. It was, therefore, not affected by the act of March 3, 1873, which, as has been seen, applied only to causes pending in the county court.

The county court, by its decree of March, 1872, held that the lien of the appellee under his deed of trust was subordinate to the judgment lien. The appellee here appealed to the circuit court, and that court, at the October *term of 1873, affirmed the decree of the county court; but during the same term the appellee applied for and obtained leave to file his petition for a rehearing. The question arises whether, after an affirmance of a decree of a county court, it is competent for the circuit court to grant a rehearing. Whatever difficulty there may be in the exercise of such a power after the term is ended, there certainly can be none when the application is made during the same term the decree of affirmance is entered.

Every court, whether appellate or original, has during the term complete control of its decrees and proceedings, and may review or modify them at its pleasure. This court, in a proper case, never fails to exercise the power. The effect of granting leave to file the petition for a rehearing is to suspend the

decree of affirmance, and to reserve to the court complete control of the case. If, upon the rehearing, the decree of the county court is reversed, the cause proceeds in the circuit court precisely as if the suit had been originally brought in that court. It is very true that in this case the application was to rehear, not the decree of affirmance, but the decree from which the appeal was taken, and the order for a rehearing is confined to the latter decree.

The circuit court no doubt acted upon the idea that the whole case was before it, in the exercise of its original jurisdiction, and that it had the same control of all the decrees and proceedings as the county court would have had if the cause had remained in that court. The circuit judge in giving leave to file the petition must necessarily have intended to suspend the operation of the decree affirming the decision of the county court. It can hardly be supposed that he would be guilty of the inconsistency of granting a rehearing of the decree appealed from, and at the same time leaving the decree of affirmance in full force and effect.

*Every consideration of justice and every rule of interpretation requires that we should construe the acts of the circuit court as they were manifestly designed, and apply the petition and the orders thereon to the whole case as it was presented in that court. So construing them, we are of opinion that there is no error in the decree of May term, 1875, and the same ought to be affirmed. A question has been made whether an appeal lies from a decree merely granting a rehearing. We have not deemed it necessary to consider that question, because the appellee made no objection on that ground, and both parties are desirous that this court shall put an end to the controversy by a decision on the merits.

DECREE AFFIRMED.

812 *Richmond & Danville R. R. Co. v. Anderson's Adm'r.

March Term, 1879, Richmond.

1. Contributory Negligence—General Rule.

—The plaintiff, in an action for negligence, cannot succeed if it is found by the jury that he has been guilty of any negligence or want of ordinary care which contributed to cause the accident.

2. Same—Modification of General Rule.*—

But though the plaintiff may have been guilty of

*Contributory Negligence—General Rule

—Modification.—The modification of the general doctrine that contributory negligence is fatal to the plaintiff's cause of action contained in the second headnote to the effect that even if the plaintiff has been guilty of negligence contributing to the accident yet he may recover if the defendant by the exercise of ordinary care and diligence could have avoided the mishap, is generally affirmed by many Virginia cases. The following cases affirm this doctrine and cite the principal case: *Railroad Co. v. White*, 84 Va. 504; *Gordon v. Richmond*, 83 Va. 440; *Railroad Co. v. Moore*, 83 Va. 831. In *Railroad Co. v. White*,

negligence, and although that negligence may, in fact, have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him.

3. Pleading—Demurrer to Evidence—Effect.†—On a demurrer to evidence, the demurrant must be considered as admitting the truth of his adversary's evidence, and all just inferences which

84 Va 504, it was proved that the only outlet from the house whence decedent came was, by way of company's tracks, that had long been with company's acquiescence, the common pathway to and from the house and its vicinity; that decedent stepped off side track onto main track to avoid a material train, and was killed by a yard engine and tender not visible when he came on the track, being around a bluff, but was backing rapidly within city limits, and against its ordinances, in the direction decedent was walking; and that the engineer failed to look out, blow the whistle or give any warning. *Held*, plaintiff was entitled to recover, though decedent may not have been entirely free from fault. The court said: "It was the duty of the engineer to use ordinary care, not only *after* discovering the dangerous position of the deceased, but in keeping a lookout to warn him of the approaching danger." In *Dun v. R. R. Co.*, 78 Va. 645, the rule is laid down in the following terms: "One who is injured by the mere negligence of another cannot recover any compensation for his injury if he, by his own ordinary negligence or wilful wrong contributed to produce the injury of which he complains; so that but for his concurring and co-operating fault the injury would not have happened to him except where the direct cause of the injury is the omission of the other party, *after becoming aware of the injured party's negligence*, to use a proper degree of care to avoid the consequences of such negligence." In *R. R. Co. v. Yeamans*, 86 Va. 860, it was held error to modify an instruction as to the effect of plaintiff's contributory negligence upon his right of recovery by inserting the words, "*or by use of ordinary diligence could have been known*" in the following clause, "unless the perilous position of the plaintiff was known to defendant's employees and by use of ordinary care after knowledge thereof, the accident could have been avoided." See also *R. R. Co. v. Kellam*, 83 Va. 855; *Moore v. R. R. Co.*, 87 Va. 494; *R. R. Co. v. Barksdale*, 82 Va. 330; *R. R. Co. v. Boswell*, 82 Va. 932; *R. R. Co. v. Joyner*, 92 Va. 354; *Carrico v. Railroad Co.*, 39 W. Va. 98; *Eastburn v. R. R. Co.*, 34 W. Va. 681.

†**Pleading—Demurrer to Evidence—Effect.**—In *Creekmur v. Creekmur*, 75 Va. 430, the court citing the principal case says: "The decisions of this court have established a wide distinction between the effect of a demurrer to evidence and a motion for a new trial, founded upon a certificate of the evidence. In the latter case, the exceptor waives all his own testimony, which is merely oral, and must succeed if at all, by showing that the verdict of the jury is erroneous upon the testimony of the successful party. Upon a demurrer to the evidence, the demurrer is considered as admitting the truth of his adversary's evidence and all just inferences which might properly be drawn therefrom by a jury. He is also considered as waiving all his own evidence which conflicts with that of his adversary, and all inferences from such evidence which do not necessarily result therefrom." Other cases citing the principal case

can be drawn therefrom by a jury, and as waiving all of his own evidence which conflicts with that of his adversary, and all inferences, it *would seem*, from his own evidence (though not in conflict with his adversary's) which do not necessarily result therefrom.

4. Railroad Companies—Injuries to Persons on Tracks.‡—For circumstances under which a railroad company will not be held liable for the killing, by one of its trains, of a person on its track, see opinion of BURKS, J.

This was an action on the case in the circuit court of Prince Edward county, brought by the administrator of W. W. Anderson, Sr., against the Richmond and Danville Railroad Company to recover damages for injury, resulting in death alleged to have been occasioned by the negligence of said railroad company. On the trial there was a verdict and judgment for the plaintiff for \$6,000; and the defendant applied for and obtained a writ of error and *supersedeas*. The case is stated by JUDGE BURKS in his opinion.

813 *H. H. Marshall and W. W. Henry, for the appellant.

Irving & McKinney, Fitzgerald, and Guy & Gilliam, for the appellee.

BURKS, J. An action was brought in the court below, under the statute (Code of 1873, ch. 145, §§ 7, 8, 9, 10), by the personal representative of W. W. Anderson, Sr., deceased, against the Richmond and Danville Railroad Company, to recover damages resulting from the death of said decedent, caused, as alleged, by the negligence of the said railroad company.

The plea was "not guilty." On the trial of the issue joined on that plea, the defendant demurred to the evidence. Upon the demurrer, the court rendered judgment in behalf of the plaintiff for the amount of damages conditionally assessed by the verdict of the jury. The judgment is to be now reviewed on a writ of error awarded by one of

and affirming the general rule laid down therein are *Rudd v. Railroad Co.*, 80 Va. 546; *Johnson v. Railroad Co.*, 91 Va. 175; *Fowler v. Railroad Co.*, 18 W. Va. 579; *Allen v. Bartlett*, 20 W. Va. 52. See also *Trout v. Railroad Co.*, 23 Gratt. 619; *Whittington v. Christian*, 2 Rand. 353; *Ware v. Stevenson*, 10 Leigh 155; *Miller v. Ins. Co.*, 8 W. Va. 515; *Webb v. Dye*, 18 W. Va. 376; *Hansbrough v. Thom*, 3 Leigh 147; *Horner v. Speed*, 2 Pat. & H. 616.

‡**Railroad Companies—Injury to Persons on Tracks.**—For cases deciding the liability of a railroad company for injuries inflicted on persons on its tracks, see *Railroad Co. v. Sherman*, 30 Gratt. 602 and *note*.

Railroad Companies—Negligence—Burden of Proof.—In *Sherman v. Railroad Co.*, 81 Va. 200, and in *Railroad Co. v. Ferguson*, 79 Va. 249, the principal case is cited as authority for the proposition that "Where negligence is the gravamen of the action and no negligence is proved on the part of the railroad company or by any of its agents or employees, the law does not impute it. It lies on the party alleging it to prove it. See also *Railroad Co. v. Whittington*, 30 Gratt. 805.

the judges of this court on the application of the defendant.

Negligence is the gist of this action. If the injury which resulted in the death of the plaintiff's intestate, was occasioned by the negligence of the defendant, and solely by such negligence, there can be no doubt of the plaintiff's right to recover damages for the injury; but if there was negligence on the part of the defendant, and also on the part of the deceased, and the negligence of the latter contributed to the injury, the right of recovery depends upon the circumstances.

The *Richmond and Danville R. R. Co. v. Morris*, recently decided by this court, was a case in which the plaintiff and defendant were mutually in fault, and the combined or concurring negligence of the parties was the proximate cause of the injury for which the action was brought. The negligence of each party was proximate to the injury, both in the order of time and causation.

814 *The negligence of the conductor in putting the train in motion immediately after he had awakened Morris the last time and told him to get off, and before he had time to get off, concurring with the negligence of Morris, after he had received the direction from the conductor, in walking to the rear of the train and jumping off while the train was backing, instead of stepping out upon the platform, as he might have done safely and conveniently, caused the injury complained of. This court did not undertake, in that case, to lay down the law on the subject of contributory negligence further than was applicable to the particular case, as will appear by the following extract from the opinion of the court: "The reports are filled with cases expounding and illustrating the doctrine of contributory negligence, and there is more or less conflict in the decisions, under the diversity of circumstances in the cases. Attempt to reconcile them would be labor to no useful purpose. We shall make no such attempt. We think the law on the subject applicable to such a state of facts as we have to deal with is correctly laid down by the supreme court of the United States in the recent case of *Railroad Company v. Jones*. 95 U. S. R. (5 Otto), 439."

The rule stated by MR. JUSTICE SWAYNE in the case in 5 Otto (which was approved by this court), so far as it relates to contributory negligence, is certainly the correct rule, if limited in its application to cases like the one then under consideration by this court, of mutual or concurring negligence. This rule, in its restricted form, is stated by CHIEF JUSTICE BLACK in the extract which was taken from his opinion in *Railroad Company v. Aspell*, 23 Penn. St. 147, 149. "It has been a rule of law from time immemorial," he said, "and is not likely to be changed in all time to come, that there can be no recovery for an injury caused by the mutual fault of both parties. When it can be shown

815 that it would not have *happened except for the culpable negligence of the party injured concurring with that of the other party no action can be maintained."

While it is true, however, that where the negligence of each party concurring with that of the other is the proximate cause of an injury, neither can maintain an action against the other for such injury, because, among other reasons, the damages resulting from the injury cannot be apportioned, yet it is equally true that a plaintiff may, under certain circumstances, be entitled to recover damages for an injury although he may by his own negligence have contributed to produce it.

The rule as stated by MR. JUSTICE SWAYNE in *Railroad Co. v. Jones*, *supra*, approved by this court in *Railroad Co. v. Morris*, is taken almost literally from the opinion of MR. JUSTICE WIGHTMAN in *Tuff v. Warman*, 5 Q. B. N. S. (94 E. C. L. R.) 573. So much only was quoted from the opinion in the English case as was deemed applicable by the supreme court, and afterwards by this court, to the facts in the cases respectively to which the rule was applied.

Reference to the case of *Tuff v. Warman* will show the rule as extracted by the supreme court, and also a qualification of that rule, which was not noticed.

MR. JUSTICE WIGHTMAN, delivering the judgment of the court in the exchequer chamber, on an appeal from a decision of the court of common pleas, said: "It appears to us that the proper question for the jury in this case, and indeed in all others of the like kind, is whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary and common care and caution that but for such negligence or want of ordinary care and caution on his part the misfortune would not have happened. In the first 816 case, the plaintiff would be *entitled to recover; in the latter, not; as, but for his own fault, the misfortune would not have happened."

The foregoing is what was quoted in *Railroad Co. v. Jones* and *Railroad Co. v. Morris*, and was all-sufficient for the purposes of these cases under the facts. But the English judge, in his opinion, adds this important qualification to what he had said: "Mere negligence or want of ordinary care or caution would not, however, disentitle him (the plaintiff) to recover, unless it were such that but for that negligence or want of ordinary care and caution the misfortune could not have happened; nor, if the defendant might, by exercise of care on his part, have avoided the consequence of the neglect or carelessness of the plaintiff."

"This," he says, "appears to be the result deducible from the opinion of the judges in *Butterfield v. Forrester*, 11 East, 60; *Bridge v. The Grand Junction Railway Co.*, 3 M. & W. 244; *Davies v. Mann*, 10. M. & W. 545; *Dowell v. The General Steam Navigation Co.*, 5 E. & B. 194, E. C. L. R. vol. 85.

Such is the English rule; and it is said by JUDGE COOLEY, in his recent treatise on Torts, that it has been accepted by the courts in this country with few exceptions. See Cooley

on Torts, 675, and the great multitude of American cases cited in a note as following the English rule.

In a case decided by the House of Lords very recently (1876), on appeal from the exchequer chamber, the rule, in substantially the same form, or to the same effect, has been reiterated. LORD PENZANCE, in delivering the judgment, which was concurred in, said: "The first proposition is a general one, to this effect: that the plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care, which contributed to cause the accident."

817 *But there is another proposition equally well established, and it is a qualification upon the first, namely, that though the plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet, if the defendant could, in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him." And his Lordship adds: "This proposition, as one of law, cannot be questioned. It was decided in the case of *Davies v. Mann* (10 M. & W. 545), supported in that of *Tuff v. Warman* (5 C. B. N. S. 573) and other cases, and has been universally applied in cases of this character without question." *Radley v. London and Northwestern Railway Co.*, 1 Appeal Cases (Law Reports, 1875-6) 754, 759.

Although there is some conflict in the American decisions, the weight of authority seems to be very decidedly in favor of the English rule, and the rule itself appears to me to be a just and reasonable one. It cannot be expected that the numerous American decisions on this subject could be examined within the limits of this opinion. I refer again to the cases cited in the note in Cooley on Torts, *ubi supra*, and content myself with a notice of a few cases cited in argument by the learned counsel for the defendant in error.

In the opinion of the court, delivered by ISHAM, J., in *Trow v. Vt. Central R. R. Co.*, 24 Verm. R. 487, 495, which seems to be a well considered case, and has been often cited with approbation in other cases, it is said, that when there has been mutual negligence, and the negligence of each party was the proximate cause of the injury, no action whatever can be sustained; the words "proximate cause" being used in the opinion as indicating negligence occurring at time the injury happened. In such case no action can be

818 sustained by *either, for the reason that as there can be no apportionment of damages, there can be no recovery. So, where the negligence of the plaintiff is proximate, and that of the defendant remote, or consisting of some other matter than what occurred at the time of the injury, in such case no action can be maintained, for the same reason that the immediate cause was the act of the plaintiff. Under this rule falls that class of cases where the injury arose from the want of ordinary or proper care on the part

of the plaintiff at the time of its commission. On the other hand, when the negligence of the defendant is proximate, and that of the plaintiff remote, the action can then well be sustained, although the plaintiff is not entirely without fault. This seems to be now settled, says the judge, in England and in this country. Therefore, if there be negligence on the part of the plaintiff, yet if at the time when the injury was committed it might have been avoided by the defendant in the exercise of reasonable care and prudence, an action will lie for the injury. In support of these propositions the following English authorities were cited: *Davies v. Mann*, 10 M. & W. 545; *Mayor of Colchester v. Brooke*, 53 Eng. C. L. 339; 3 M. & W. 244, and other cases.

In the case often cited of *Kerwhaher v. The Cleveland, Columbus and Cincinnati R. Co.*, 3 Ohio St. R. 172, it is said, that the liability to make reparation for an injury by negligence is founded upon an original moral duty, enjoined upon every person, so to conduct himself or exercise his own rights as not to injure another; that the mere fact that one person is in the wrong does not necessarily discharge another from the due observance of proper care towards him, or the duty of so exercising his own rights as not to do him an unnecessary injury; and that the doctrine, that in the case of an injury by negligence, where the parties are mutually in fault, the injured party is not

entitled to redress, is subject, as appears 819 from *a review of the decisions both in England and in this country, to material qualifications, among which are the following: First, the injured party, although in the fault to some extent at the time, may, notwithstanding this, be entitled to reparation in damages for an injury, which he has used ordinary care to avoid; second, when the negligence of the defendant in a suit upon such ground of action is the proximate cause of the injury, but that of the plaintiff only remote, consisting of some act or omission not occurring at the time of the injury, the action is maintainable.

To the same effect are the following cases: *Northern Central Railway Co. v. The State*, use of Price and others, 17 Mary. R. 8; *Baltimore and Ohio R. R. Co. v. State*, use of Trainer and others, 33 Md. R. 542; *Brown v. The Hannibal and St. Joseph R. R. Co.*, 50 Mo. R. 461 (decided in 1872); *Central R. R. and Banking Co. v. Davis*, 19 Geo. 437; *Isbell v. New York and New Haven R. R. Co.*, 25 Conn. 556; *Macon & W. R. R. Co. v. Davis, adm'r*, 18 Geo. 679; *Herring v. Wil. & Raleigh R. R. Co.*, 10 Iredell (Law) 402; *Balt. & Ohio R. R. Co. v. Sherman's adm'r*, 30 Gratt. 602; and *same plaintiff v. Whittington's adm'r*, 30 Gratt. 805, recent decisions by this court, have an important bearing on the case now under consideration, as illustrating the doctrine of negligence as applied to railroad companies. See also what is said in *Sherman & Redfield on Neg.*, §§ 25, 494 (3 ed.); *Wharton on Neg.*, § 388.

The judgment under review having been

rendered on a demurrer to evidence and in favor of the demurree, I am not unmindful of the familiar rule applicable to such a case. The party demurring is considered as admitting the truth of his adversary's evidence, and all just inferences which can properly be drawn therefrom by a jury, and as waiving all his own evidence which conflicts with that

of his adversary, and all inferences, it would seem, *from his own evidence (although not in conflict with his adversary's) which do not necessarily result therefrom. 4 Minor's Ins., part I, 749, and cases there cited. Most of the Virginia cases on the subject are referred to in the opinion delivered by the president of this court in *Trout v. Va. and Tenn. R. R. Co.*, 23 Gratt. 619.

JUDGE STANARD in his opinion delivered in *Ware v. Stephenson*, 10 Leigh, 155, 161, approved by this court in the case last above named, speaking of the inferences which the court should draw from the evidence on demurrer, observed that when the question is whether or no a fact ought to be taken as established by the evidence, either directly or inferentially, in favor of the demurree, he did not know a juster test than would be furnished by the inquiry. Would the court set aside the verdict had the jury on the evidence found the fact? If the verdict so finding the fact would not be set aside, such fact ought to be considered as established by the evidence demurred to.

The evidence demurred to in this case was introduced wholly by the plaintiff, except a brief statement made by a witness on being recalled by the defendant after he had testified in behalf of the plaintiff. This statement is material, but not at all in conflict with the evidence introduced by the plaintiff.

It appears from the evidence, that on the 3d day of October, 1874, the plaintiff's intestate, W. W. Anderson, Sr., received injuries by collision with a train of cars of the defendant, from the effects of which he died on the 5th of October (same month). The train by which he was struck was a passenger train, moving, at the time of the accident, westwardly, and approaching Greenbay station, in Prince Edward county. The point on the track at which he was struck was east of the station, and distant therefrom about a half mile. The schedule time for the arrival of the train at the station was 5 o'clock and 3 minutes P. M. The deceased

*resided about three miles from the station, which he visited frequently, and a mile and a half from the railroad track. There was a road which led from the station to the house where the deceased lived, but by going along the railroad track for about a mile and then diverging, the distance to his house would be from half mile to three-quarters of a mile nearer. The railroad track was the way usually travelled by deceased in returning home from the station, and it was the habit of people to walk along the track at this point. There was no proof, however, that the deceased or any other person had license from the defendant to walk along the

track at this place, or that the defendant had any knowledge that the track was so used.

On the day the accident occurred, the deceased was at the station. At what particular hour he arrived does not appear; but it does appear, very distinctly, that at ten minutes before 5 o'clock he left the station to return home. The time of his departure is accurately fixed by the testimony of the plaintiff, a son of the deceased. It is also sufficiently certain that he knew the schedule time for the arrival of the train at the station on that day. This would be inferred from the vicinity of his residence and the frequent visits to the station; but it is proved by two witnesses that when he was about leaving the station on that day the time for the arrival of the train was announced in his presence, or so near to him that he might have heard what was said. With a knowledge, then, that the train would be due at the station in thirteen minutes, he got upon the track at the station and walked along it eastwardly in the direction from which the expected train would come, and which, if he kept on the track, he would necessarily meet, the train being on time, before he could reach the point at

which he *would leave the track for his house. He was seen by a witness at the station to walk along the track until he entered a cut in the road, which prevented the witness, in the position he occupied, from observing him any further.

It appears that the road from the station to the point where the accident occurred, and for several hundred yards in that direction, is straight, the course being east and west, and that it runs mostly through cuts with banks on either side some four or five feet high, and that there are several intermediate crossings. There is no evidence that the deceased, after he entered the cut about ten steps from the station was seen by any person until he was discovered on the track by the engineer. The account given by the engineer is, that when the train was about half a mile distant from the station, and moving with a speed from twenty to twenty-five miles per hour, which was the usual speed, and, unimpeded, would have carried the train to the station at the exact time (5 o'clock and 3 minutes P. M.) fixed by the schedule for its arrival, he discovered a man lying on the track, with his back towards the advancing train, and about seventy-five or one hundred yards from it; that he did all in his power to stop the train—blew "down brakes," sounded the alarm-whistle, reversed the engine, and threw sand on the track; that he supposed he reduced the speed about one-half, but could not stop the train before it struck the man and knocked him from the track; that the sun was low and shone directly in his eyes; that when he first saw the man, the latter had his back towards him—his body, from the position in which it was lying, presenting the figure of the letter "U", so that he could see neither his hands nor his feet; that he (the engineer) raised up, and the top of the cab then protected his eyes from the sun, and he *could then see more distinctly what the object was; that when he blew "down

brakes," and also gave the alarm-whistle, the man raised up, reclining on his elbow, faced the train, and then stretched himself out on the middle of the track, with his head towards the engine; and after the alarm-whistle was given, the man had sufficient time to have gotten off the track before the engine reached the spot where he was lying.

It was further proved by the engineer, that reversing the engine is the last resort in stopping a train; that it injures the engine, and there is danger in upsetting the train; that the engine to which the cars were attached on that occasion was new—a good engine and in perfect order; that the train was not provided with the improved air-brakes; and that if it had been, he might have been able to stop the train a little quicker, but not soon enough to have prevented striking the man.

Several engineers were examined as witnesses to show the distance within which a train moving with the speed at which the train on that occasion was running might be stopped by the engineer in charge, and there is also evidence that the grade of the road at the point where the accident occurred is ascending; but it is perfectly manifest, and was not seriously questioned in argument, that the train, on the occasion when the accident occurred, could not have been stopped by the engineer, after he first saw the man on the track, before it came in contact with him.

If this were all the evidence in this case there could not even be a pretext for recovery of damages for the injury complained of; for, up to this point in the evidence, whatever may be said of the conduct of the plaintiff's intestate, no negligence is proved on the part

of the railroad company or any of its **824** agents or employees; *and, as before stated, negligence is the gravamen of the action. In such a case the law does not impute it. It lies on the party alleging it to prove it.

After the engineer saw the man on the track he used all the means in his power, hazarding even the safety of the passengers in suddenly reversing the engine to avoid injuring him. He used all the care, skill and diligence which the situation demanded, but it was then clearly not in his power to prevent the accident.

But it was argued with much earnestness that although it might be that the engineer did not see the deceased on the track until it was too late to avoid the collision, he might and ought to have seen him when it would have been in his power to stop the train and prevent the mischief, and that but for his negligence in not keeping a look-out he could and would have seen him in ample time to have checked the speed of the train, and, if need be, to have stopped it entirely.

It was "the duty of the engineer to have watched ahead for objects on the track." He admits that in his testimony. It was probably a regulation of the railroad company. Whether it was or not, the law imposed the duty on the company as a carrier of persons.

It was certainly a duty which the company owed to them, and if, from a negligent failure to observe and perform it, an accident had occurred by which a passenger sustained injury, the company would have been liable for the damage to such passenger. Whether a railroad company owes this duty, under all circumstances, to persons wrongfully on its road need not be decided in this case. Let it be conceded, however, that the defendant owed this duty to the deceased; the inquiry is, was there neglect of that duty by the defendant's agents and servants, and was the accident which happened a consequence of that neglect? The engineer testified that he was at his post, but that he did not and could not see the deceased

825 *on the track in time to prevent the collision because his vision was affected by the rays of the sun, which at that hour of the day shone directly in his face—the course of the road for some distance being east and west. On the other hand, several witnesses testified that the track at the point where the deceased was lying, and for several hundred yards eastward, within which distance there is no doubt the train could have been stopped by the engineer with convenience and safety, was shaded by the forest, and at that distance a man on the track could have been distinctly seen. All that may be true, and yet the statement of the engineer may also be true. It does not follow that because the track was shaded, as stated, the sun did not shine in the face of the engineer standing at his post. These witnesses did not pretend that they made their observations from every intermediate point in the road. Although the sun may not have shone in the engineer's face at one or more points, yet these would have been passed in an almost inconceivably short time, the train moving with a speed of twenty or twenty-five miles per hour, and thus the deceased, in the position he occupied, may have escaped the observation of the engineer, although on the look-out for objects on the track, and therefore without fault on his part.

It must be observed, too, that the imputing negligence to the engineer in not seeing the deceased sooner is based upon the assumption of the very important fact that the deceased was on the track when the train reached the first point from which an object on the track could be seen. But no witness proves this fact, so essential to the theory of the imputed negligence. It is impossible to determine from the evidence whether the deceased was on the track or not when the train reached the first point from which it is said he could have been seen. The place

where he was lying was near a cut in **826** the road, and *there was a ditch on either side of the track. According to the evidence, he could not have stood on either side and escaped all harm from the passing train. It may be that he tumbled upon the track just ahead of the advancing train. This is entirely consistent with the favorite theory of the counsel for the defendant in error, that he was neither drunk, nor insane, nor voluntarily remaining on the

track when the train came upon him, but that he had been suddenly smitten by some providential visitation, by which he was felled to the ground and rendered helpless. When he left the station he was seen walking upon the track; when first discovered by the engineer he was still upon the track, and in the situation which has already been described. Nothing further is known of his movements until he was seen by the engineer. His conduct when he was aroused by the alarm-whistle was certainly very strange. Unexplained, it certainly has the appearance of the conduct of a suicide or person of unsound mind. The evidence, however, would seem to forbid such a conclusion. He was a man advanced in life—sixty-one years of age, thrifty, possessed of a competent livelihood, free from debt, of good moral character, and happy in his family and social relations. He was never suspected of insanity by any who knew him.

It may be that he was intoxicated. It is true that no witness testified to having seen him drink any intoxicating liquor while he was at the station on the day the accident occurred, and his son says that he was sober when he left the station. But it was proved that there were two stores at the station, at both of which liquor was kept for sale. His son kept one of the stores. His father was not in his company during a part of the day. It may be that he procured liquor from the other store, or some other place, without his son's knowledge. It was in proof that, while not a man of dissipated habits, he had been known to drink too freely, and, in fact,

827 to *get drunk. Possibly he may have drunk too much before he left the station—the effects not being visible to others—and he may have been thus overcome while walking down the track and have become stupefied. He wore a pair of tight shoes, and when found, after the accident, he had on one shoe only. It was proved that on the preceding Sunday he walked in the same pair of shoes to a prayer-meeting, and on the way he took off his shoes and walked about three-quarters of a mile with his socks only on his feet. May it not be, that after walking a half-mile on the track he sat down, pulled off his shoe to relieve his foot, and while so situated became stupified and insensible to the dangers which threatened him? It must be confessed that these are all, more or less, conjectures. The real cause of his strange conduct will probably never be known with any degree of certainty; but there are two propositions which, in my judgment, are sufficiently established by the evidence.

First. But for the negligence or want of ordinary care and caution of the plaintiff's intestate the misfortune—the loss of his life—could not have happened.

He was in fault in going upon the track of the railroad. The defendant was the owner in fee simple of the road, and entitled to the full, free, exclusive and uninterrupted use of it. This the deceased knew. He had no right to use the track at all as a way to reach his home, but he entered upon it on this occa-

sion under circumstances which indicated that the use of it would be attended with rather more than ordinary peril. He did not attempt merely to cross the track when no train was near, nor to walk along it when no train was approaching; but, having the convenience of a road leading directly to his house, and with a full knowledge that the train would be due at the station in thirteen minutes according to the schedule time, he voluntarily and without license started upon the track in the direction from 828 *which the expected train was to come, and which, if it arrived at the usual time, he would almost necessarily meet before he reached the point at which he would leave the track for his home. But for this wrongful and incautious conduct on his part the misfortune which befell him could not have happened.

Second. The defendant exercised ordinary care and caution, and yet could not, by the exercise of such care and caution, avoid the mischief which happened.

It is not necessary to recapitulate the evidence which establishes this proposition. It is sufficient to say that the engineer did not see deceased on the track until it was too late, notwithstanding the prompt and energetic use of all the means in his power to avert the mischief which happened, and that he did not see him sooner was owing to causes from which no negligence in the defendant or its agents can be properly inferred.

If there had been no demurrer to the evidence in this case, and the jury had rendered a verdict for the plaintiff, it would have been the duty of the judge presiding at the trial to set aside the verdict, on the ground that the evidence was plainly insufficient to warrant it.

It follows that, in my opinion, the judgment of the circuit court is erroneous and should be reversed, and the final judgment should be rendered by this court on the demurrer to evidence in favor of the defendant (the plaintiff in error here).

The other judges concurred in the opinion of BURKS, J.

The judgment was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid, and the arguments of counsel, is of opinion, for reasons stated 829 in writing *and filed with the record, that the matter shown in evidence to the jury is not sufficient in law to maintain the issue on the part of the plaintiff (defendant in error here), and that the said judgment is therefore erroneous; it is therefore considered, adjudged and ordered, that the said judgment be reversed and annulled, and that the plaintiff in error recover against the defendant in error the costs by the plaintiff in error expended in the prosecution of the writ of *supersedeas* aforesaid here, to be levied of the goods and chattels of the intestate in the hands of the defendant in error to be administered.

And this court now proceeding to render such judgment as the said circuit court ought to have rendered, it is further considered, adjudged and ordered, that the plaintiff take nothing by his bill, and that the defendant go thereof without day, and recover against the plaintiff the costs by the defendant about its defence expended, to be levied of the goods and chattels of the intestate in the hands of the plaintiff to be administered; which is ordered to be certified to the said circuit court of the county of Prince Edward.

JUDGMENT REVERSED.

830 *Jones v. Commonwealth.

November Term, 1878, Richmond.

1. Criminal Law—Indictment—Verdict of Jury.*—J was indicted for the malicious stabbing, &c., of W, with intent to maim, &c. The jury found J "guilty of unlawful cutting, as charged in the within indictment," &c. The language, "as charged in the within indictment," has reference both to the cutting and the intent, and is a sufficient finding of the intent with which the unlawful act was done, to meet the requirement of the statute.

2. Same—Statute—Separation of Jury.—The statute having dispensed with the necessity of keeping the jury together in prosecutions where the penalty cannot be death or confinement in the penitentiary for ten years, if the jury, in a prosecution for malicious stabbing, &c., with intent to kill, &c., find a prisoner guilty of unlawful cutting with intent, &c. Upon a motion to set aside the verdict and grant a new trial on the ground of the separation of the jury before the verdict was rendered, the court is not bound to set aside the verdict for that cause, if it approved the verdict, and is satisfied it was fairly and honestly rendered, and that neither the commonwealth nor the prisoner had been damnified by the separation.

3. Pleading—Motion to Set Aside Verdict—Proofs.—Upon a motion to set aside the verdict on the ground of the separation of the jury, the prisoner must prove the separation by affidavits or proof in court, and the offer to prove, which the court refuses, under the circumstances, to hear, is not sufficient to enable the appellate court to act on the question. The exception should show the proof.

In April, 1878, the grand jury for the corporation court of the town of Danville found an indictment against James Jones; that he, on the 27th of March, 1878, in and upon one Henry Clay White did make an assault, and him, the said Henry Clay White, feloniously and maliciously did stab, cut and wound, 831 with *intent the said Henry Clay White then and there to maim, disfigure, disable and kill, &c.

***Criminal Law—Jury—Statute—Separation.**—In *Jones v. Commonwealth*, 79 Va. 213, the headnote reads, "where the offence tried is not punishable with death, or ten years confinement in the penitentiary an objection that the jury were allowed to separate has no merit, though the court may have ordered that they be boarded at a hotel during the trial."

In July, 1878, the prisoner was tried on this indictment, and the jury, not agreeing on their verdict on the first day, were committed to the custody of the sergeant of the town, who was directed to keep them together, without communication with any other person. On the next day they returned their verdict in the words following, to-wit: "We, the jury, find the prisoner, James Jones, guilty of unlawful cutting, as charged in the within indictment, and fix the term of his imprisonment at one year in the penitentiary."

The prisoner thereupon moved the court to set aside the verdict and grant him a new trial on the said indictment, on the ground that the verdict was contrary to the law and evidence; but the court overruled the motion. To which opinion of the court the prisoner excepted, and asked the court to certify the facts proven; but the evidence being conflicting, the court refused to certify the facts.

The prisoner then moved the court to set aside the verdict and grant him a new trial, upon the ground that the jury separated before rendering their verdict; but no witness having been introduced, and no evidence offered to show that the jury had separated, and the court deeming this to be a case in which malicious cutting was not shown, overruled the motion. And five days after the motion was made and after the court had delivered its judgment on such motion, the prisoner offered then to prove such separation; but the court refused to hear evidence after its judgment had been rendered. And the prisoner again excepted.

The prisoner then moved in arrest of judgment, on the ground that the verdict did not show the intent with which the unlawful 832 cutting was done, nor state *the name of the person cut. But the court overruled the motion; and the prisoner again excepted.

The court having sentenced the prisoner in accordance with the verdict, he applied to a judge of this court for a writ of error; which was allowed.

E. E. Bouldin, for the prisoner.

The Attorney-General, for the commonwealth.

ANDERSON, J., delivered the opinion of the court.

This is an indictment for an assault and felonious and malicious stabbing, cutting and wounding with intent to maim, disfigure, disable and kill. It was competent for the jury under this indictment not only to have acquitted the accused of maliciously doing the act charged, and to have convicted him of unlawfully doing it with intent as aforesaid, but it was also competent for them to acquit him of the felony and to convict him of a misdemeanor only. *Canada's case*, 22 Gratt. 899. The jury by their verdict found "the prisoner guilty of unlawful cutting, as charged in the within indictment, and fix his term of imprisonment at one year in the penitentiary."

It is assigned as error that the verdict does

not find the *intent* to maim, disfigure, &c., which is necessary to constitute felony. In *Canada's case, supra*, the verdict was. "We, the jury, find the prisoner not guilty of the malicious cutting and wounding, as charged in the indictment." That was construed to be a finding of not guilty of a felony; and therefore the words "as charged in the indictment" must have been understood, as used in that connection, with reference to the *intent* charged in the indictment and as negating it. They could not be understood as negating the act of wounding, for the verdict proceeds: "but guilty of an assault and

833 battery, as *charged in the indictment"—evidently having reference to the *act* of wounding, and not to the *intent*, in this connection; because the jury, by the clause just preceding, had negated the intent by finding that the act of wounding was not felonious; and it was so construed by the court.

We are of opinion that in this case the language "as charged in the within indictment" has reference both to the cutting and the intent, and that it is a sufficient finding of the intent with which the unlawful cutting was done to meet the requirement of the statute. *Randall's case*, 24 Gratt. 644, is not in point, as the verdict of the jury did not refer to the charge as made in the indictment at all.

But it is also assigned as error that the jury were not kept together, but separated before they rendered their verdict, and that the court overruled a motion for a new trial on that ground.

The act of assembly which provides for the suitable board and lodging of a jury, when in a criminal case they are kept together beyond the day on which they are impaneled, expressly declares that "where the punishment cannot be death, or confinement in the penitentiary ten years, the jury shall not be kept together, but shall be treated as jurors in civil cases, unless the court direct otherwise." (Matthews New Crim. Procedure, p. 91.) If the prisoner had been only indicted for unlawful cutting, with intent, &c., the offence of which he has been convicted by the verdict of the jury and the sentence of the court, the jury could not have been kept together under this law, unless the court otherwise directed, because for that offence he could not be punished with ten years' confinement in the penitentiary. And if the court directed that they should be kept together, and its order was not carried out, the court would not be bound to set aside the verdict for that cause, if it approved

834 *of the verdict, and was satisfied that it was fairly and honestly rendered, and that the commonwealth had received no detriment, and that the prisoner had not been damnified, by the separation of the jury; although it might deem it proper, to maintain the authority of the court, to impose a penalty upon the sergeant or the disobedient juror, whoever was in fault.

But in this case the prisoner was charged by the indictment with *malicious* cutting, and

for that offence he might have been punished with ten years' confinement in the penitentiary. The court, therefore, very properly charged the sergeant to keep the jury together, although the charge of malicious cutting included the charge of unlawful cutting, an offence for which the prisoner could not be punished with confinement in the penitentiary for ten years. *Canada's case*, 22 Gratt. 899. If that was not done, and the jury separated before they rendered their verdict convicting the prisoner with unlawful cutting, with intent, &c., an offence which cannot be punished with more than five years in the penitentiary, is the court bound to set aside the verdict for that cause, whatever may be the state of the case? And is it error if it does not, for which its judgment must be reversed? Has it no discretion? It may approve of the verdict; may be well satisfied that it is supported by the evidence that the acts charged to have been done were not done maliciously, but unlawfully, and that therefore the prisoner could not be punished by confinement in the penitentiary ten years; and that, therefore, the offence of which the prisoner was guilty was not an offence upon the trial of which the law required that the jury should be kept together. He is satisfied that the verdict does no injustice to the prisoner or to the commonwealth, but is according to the very right of the case, and that consequently the jury have acted fairly and honestly, and that if they separated they could not have been

subjected by reason thereof to any improper influence, *and were not more exposed to such influences than they would have been if the prisoner had been indicted for the offence only of which he is convicted—in which case they would have been permitted by the express terms of the law to separate. These are facts and circumstances under which the court overruled the prisoner's motion to set aside the verdict and grant him a new trial; and although the court might have deemed it proper, in the maintenance of its authority, to have imposed some penalty upon the sergeant or juror, if it appeared that they disobeyed his instructions, we are of opinion that if the fact is, as alleged by the prisoner, that the jury separated before rendering their verdict, the court was not bound under the circumstances detailed to set aside the verdict, and that the overruling of the motion for that purpose is not an error for which the judgment should be reversed and a *venire facias de novo* awarded.

But the court is further of opinion that the prisoner has wholly failed to set forth any ground for his motion. He has furnished no proof of his allegation that the jury were not kept together. He ought to have furnished evidence of the fact as the basis of his motion, in the shape of affidavits, or some other form. The allegation that he merely offered to prove it, after the court had decided the question and overruled his motion, and refused to reopen the case to hear his testimony, is not sufficient. He ought to have exhibited his testimony and embodied it in a bill of exceptions, so as to put the appellate tribunal in

possession of it, that it might judge for itself whether it established what he alleges. Upon the whole, the court is of opinion that there is no error presented by the record for which the judgment should be reversed. Let it be affirmed.

CHRISTIAN, J., dissented.

JUDGMENT AFFIRMED.

836 *Jones v. The Commonwealth.

November Term, 1878, Richmond.

1. Criminal Law—Conspiracy—Joint Indictment.*—When two persons are indicted jointly for a conspiracy to prosecute another for a larceny, neither of them is entitled to a separate trial.

2. Same—Same—Declarations of Co-Conspirators—When Admissible.†—In such a case where both are on trial the confessions of one of them in the absence of the other, made after the conspiracy charged in the indictment was completed and ended, are properly admitted as evidence. And when all the evidence has been introduced, the court should then instruct the jury,

***Criminal Law—Joint Indictment—Several Trials.**—In *Commonwealth v. Lewis & Diviney*, 25 Gratt. 942, it was held that the statute which, changing the common law, allowed persons in a joint indictment for *felony* at their election to have a joint or several trial, did not apply to misdemeanors. In *Curran's Case*, 7 Gratt. 619, 627, it was held that this statutory right of election in cases of felony is subject to the right of the commonwealth, to try the accused severally notwithstanding they may elect to be tried jointly.

†Same—Conspiracy—Admissibility of Evidence of Declaration of Co-Conspirator.—In *Hunter's Case*, 7 Gratt. 641, it was held that confessions or admissions of an accomplice in a felony, made after the commission and completion of the offence, are not competent evidence against a prisoner, even though a previous conspiracy and combination between the prisoner and the accomplice to commit the felony has been proved. In *Oliver's Case*, 77 Va. 590, it was decided that though conspiracy has been proved, statements of a conspirator made *after* the object of the conspiracy is accomplished, are inadmissible to criminate his co-conspirator. In *Sands' Case*, 21 Gratt. 871, the headnote says that upon an indictment against a person for a conspiracy to commit a felony, or for the felony so actually committed, the acts and declarations of another of the conspirators, though not in the presence of the prisoner or afterwards reported to him, are evidence against him; and this though the acts and declarations were done or made before the prisoner became a party to the conspiracy, if done or said in furtherance of the common object. In order that such evidence may be admissible, it must be shown first that the persons whose acts or declarations are sought to be made evidence, were at the time of making or doing them, themselves conspirators; and second that they were said or done in furtherance of the object of the conspiracy. See also *Williamson v. Comm.*, 4 Gratt. 547; *Danville Bank v. Waddill*, 31 Gratt. 469 and *note*; *Cain's Case*, 20 W. Va. 694; *Brown's Case*, 86 Va. 935; *Martin's Case*, 2 Leigh 745; 6 Am. & Eng. Enc. Law 571 and 867.

that, in passing upon the guilt of the other party, they must discard from their consideration the said admissions, they having been made after the conspiracy was completed and ended.

3. Same—Same—Findings Necessary for Verdict of Guilty.—In such case the jury cannot find either party guilty of the conspiracy as charged in the indictment, unless they believe from the evidence that there was an agreement of mind between the two to do and perform the matters and things as charged in the indictment.

4. Same—Appeal.—In such case, both the defendants having been found guilty, one of them applies for a new trial, which is overruled, and he obtains a writ of error. The other does not apply for a new trial, and there is a judgment against him. The judgment may be reversed as to the one who appeals, without reversing the judgment against the other, who did not apply for a new trial.

The case is fully stated in the opinion of the court delivered by MONCURE, P.

H. H. Marshall and S. M. Page, for the appellant.

The Attorney-General, for the commonwealth.

MONCURE, P., delivered the opinion of the court.

This is a writ of error to a judgment of the hustings court of Manchester, convict-
837 ing Junius E. Jones and *Royall Haxall on an indictment for conspiracy, in which indictment it was charged that the accused, on the 18th day of March, 1878, at the said city of Manchester and within the jurisdiction of the hustings court of said city, "unlawfully devising and intending one Sally Cousins to charge and convict of the larceny of a certain lot of railroad iron, the property of the Richmond and Danville Railroad Company, and to subject (and did subject) the said Sally Cousins to a criminal prosecution (wherein the said Sally Cousins was duly acquitted), did unlawfully conspire, combine, confederate and agree among themselves, and that in pursuance of and according to the conspiracy, combination, confederacy and agreement aforesaid, so as aforesaid had, they, the said Junius E. Jones and Royall Haxall, did falsely accuse the said Sally Cousins of the larceny of certain railroad iron as aforesaid, and did undertake to make and fabricate certain signs and evidences by which to convict the said Sally Cousins of the larceny aforesaid, and did then and there introduce said false evidence before his honor, the mayor of the city of Manchester, upon the trial of Sally Cousins for the larceny as aforesaid, on a warrant sworn out by said J. E. Jones in furtherance and pursuance of the conspiracy, &c., aforesaid, against the peace and dignity of the commonwealth of Virginia." The accused pleaded not guilty to the said indictment; and Junius E. Jones moved the court for a several trial thereon; which motion the court overruled. Whereupon the case was tried by a jury, which found both of the accused guilty as charged in the indictment, and assessed the fine of said Junius E. Jones at ten dollars and of the said

Royall Haxall at five dollars. The said Junius E. Jones moved the court to set aside the verdict against him and grant him a new trial; which motion the court overruled. The **838** said Royall *Haxall, by counsel, announced that he had nothing further to say. And thereupon judgment was rendered by the court against the accused according to the said verdict and for the costs expended in the prosecution. The said Junius E. Jones applied to a judge of this court for a writ of error to the said judgment; which was accordingly awarded.

There are three assignments of error in the petition for a writ of error in the case, as follows, to-wit:

1. In the court's refusing to allow the petitioner a separate trial, as objected to in bill of exceptions No. 1.

2. In admitting the illegal testimony set forth in bill of exceptions No. 2.

3. In overruling his motion for a new trial, as set forth in bill of exceptions No. 3.

We will proceed to consider the questions arising on these assignments of error in the order in which they are made.

1. In the court's refusing to allow the petitioner a separate trial, as objected to in bill of exceptions No. 1.

It is stated in that bill "that on the trial of the case the prisoner, Junius C. Jones, before pleading, moved the court to permit him to sever from the other defendant, that he might be tried separately and apart from the said other defendant for the offence charged against them jointly in the indictment, which motion the court overruled and required the defendants to go into trial jointly, as they were indicted;" to which ruling of the court the defendant, Jones, by his counsel excepted.

This question has already been expressly decided by this court in the case of *The Commonwealth v. Lewis & Diviney*, 25 Gratt. 938; in which it was held that where two persons have been indicted jointly for a misdemeanor they cannot claim any right to be tried separately. It is, therefore, only necessary, on this branch of the subject, to refer to that case,

and we are of opinion that the court **839** *below did not err in refusing to allow the petitioner a separate trial as aforesaid. See also 1 Bishop on Cr. Pr., § 963, as to the offence of conspiracy in respect to separate trial. Then as to the next assignment of error, viz:

2. In admitting the illegal testimony set forth in bill of exceptions No. 2.

It is stated in that bill "that on the trial of the case the Commonwealth introduced as witness one James B. Fitzgerald, policeman of the city of Manchester, and offered to prove by him that on the morning of the 20th of March, 1878, before 7 o'clock, while one Haxall, one of the defendants in this cause, was standing in front of the market-house, said Haxall admitted and stated to him and to others in his presence, in front of the market-house in Manchester, said Haxall being then out on bail on the charge of larceny, whilst the defendant J. E. Jones was absent, that he, said Haxall, did not steal the

iron; Mr. Jones gave it to him to put it where it was found, and gave him drinks, and promised to pay him for doing it; that he did put it where it was found, as he had promised Jones to do; and that said Haxall made this statement voluntarily, without any inducement or threat being used by the policeman or any one else. The court being of opinion that the evidence was admissible as evidence on the joint trial, and stating that the court would instruct the jury as to the force and effect of said evidence in relation to said Jones, allowed the same to be given to the jury. To the introduction of this testimony the defendant Jones, by his counsel, objected, and moved the court to reject it, said admissions or declarations not being made in his presence, but the court overruled the motion and permitted said admissions and declarations to go to the jury. To this ruling of the court the prisoner, by his counsel, excepted."

We are of opinion that the court below did not err in the said ruling. The said **840** admissions and declarations *were legal evidence in the case, because they tended to prove that the defendant who made them was guilty of the joint offence charged in the indictment against him and the other defendant, though they did not tend to prove that the other defendant was guilty of the said offence. On a joint trial of an indictment against several for the same offence any legal evidence that tends to prove the guilt of either of said defendants of said offence is admissible evidence on the said trial, though it may not tend to prove the guilt of any of the other defendants. The court can and ought to prevent any difficulty on the subject in the minds of the jury in such a case by an instruction which the court in said bill of exceptions No. 2 announced an intention to give, and which was afterwards actually given, as appears in the next bill of exceptions. Then as to the next and last assignment of error, viz:

3. In overruling the said motion for a new trial, as set forth in bill of exceptions No. 3.

It is stated in that bill "that on the trial of this case, after the witnesses had been heard and the jury had rendered their verdict, the defendant Jones moved the court to set aside said verdict as to himself, and award him a new trial upon the ground that it was contrary to the evidence; which motion the court overruled and proceeded to render judgment upon said verdict against said defendant. To which ruling the judgment of the court the said defendant excepted, and prayed the court to sign and seal the said bill of exceptions, and to certify the facts proved upon said trial, all of which was accordingly done, and the court certified that the following were the facts proved, viz:

"That the defendant Jones resides in Manchester, and is an employee of the Richmond and Danville Railroad Company; that he is a special policeman, and duly sworn in as such by the authorities of the city; **841** that on *the 18th of March, 1878, in said city, he went to one R. J. Cooper (a witness who testified in this case), and said the Richmond and Danville Railroad

Company had been losing old iron, brass, &c.; that he was anxious to catch the parties who had stolen it, and wanted some one to aid him, and asked said Cooper if he knew of any negro who would betray his color; Cooper told him of one 'Red Sam,' but said he thought Sam had gone to Richmond, but that there was a negro named Haxall, who was a great scoundrel, and that he might answer his purpose; that on the same day he went to a bar-room kept by a colored man and enquired for Haxall, and was told by the bar-keeper that Haxall was not there; that later in the day the bar-keeper seeing Jones on the street, called him, and told him that Haxall was there in his bar-room; Jones went there to see him (Haxall), and called him into the street, where they held a conversation, and afterwards came back in the bar-room and took a drink together, and then left the house together; bar-keeper did not hear any of their conversation; that afterwards said Jones and Haxall went to see the mayor of said city, and enquired if Haxall would run any risk if he assisted Jones in setting a trap to catch some thieves who were stealing old iron, brass, &c., from the Richmond and Danville Railroad Company; the mayor told them that it was not unlawful to set a trap to catch a thief, but that he was not in the habit of giving advice in such matters; the mayor further stated that Haxall seemed very uneasy and disturbed as to how far he would lay himself liable by aiding Jones; that Jones seemed possessed with a great desire to catch the thieves, and was very zealous, and seemed to think it would be something to his credit to accomplish this; that after that, at night (the night of, the same day), they were seen together on the platform near the old depot-house in 842 the company *of a Mr. Phaup, the freight agent, and the premises of Sally Cousins could not be seen from this point; and that afterwards Jones, Phaup and Haxall were seen near the old scrap-iron pile of said Richmond and Danville Railroad Company; that Haxall asked for some old samples of iron; that Jones asked Phaup for them, and Phaup gave him two old fish-plates; that afterwards, about 8½ o'clock of the 18th, Haxall went to the house of Sally Cousins, in said city, with a bag under his arm, and met Sally Cousins in her yard, and said to her, I am a man of business to-night; that he dealt in old iron, rags, brass, &c.; asked her if she had any for sale; that he made two trips to Richmond a night; she told him to go away, she had none, she never sold old rags or iron in her life; that Sally Cousins went to one Coleman's, a colored person's, a short distance from her house, and was playing in the house with a negro man; she ran out of the door into the street, and into the arms of a white man, and saw it was Mr. Jones, and exclaimed, 'I am safe now, I am in the arms of a white man'; she then saw his policeman's badge, he opening his coat and showing it; she then went to a sitting-up at the house of another colored person. It was further proved that one of the witnesses was at Sally Cousins'

all day, and went away with her that night to the sitting-up; and by that witness that she was in the yard several times during that day at the place where the iron was afterwards found, and that there was none there that day; and that Sally left with her, and she was with her all night, and she, Sally, could have had no opportunity to have placed it there after she left home with her, as they were together all the rest of the night; that they left soon after Haxall was in the yard with his bag offering to purchase old iron, &c.; that afterwards, to-wit: about 11 o'clock, of the 18th of March, at night, Jones and Haxall appeared before the mayor, and Jones 843 swore out a warrant *against Sally Cousins for stealing iron from the Richmond and Danville Railroad Company; which warrant is as follows:

"City of Manchester, to-wit:

"To all or any one of the police officers of the city of Manchester:

"Whereas J. E. Jones has this day made complaint and information on oath, before me, James A. Clarke, mayor of said city, that on the 18th day of March, 1878, at said city, Sally Cousins did unlawfully take, steal and carry away a lot of railroad iron, the property of the Richmond and Danville Railroad Company, of the value of fifty cents, from and out of the possession of the said railroad, against the peace and dignity of the commonwealth:

"These are, therefore, in the name of the Commonwealth of Virginia, to command you forthwith to apprehend and bring before me, or some other justice of the peace of said city, the body of the said Sally Cousins, to answer the said complaint, and to be further dealt with according to law. And, moreover, upon the arrest of the said Sally Cousins by virtue of this warrant, I command you, in the name of the Commonwealth of Virginia, to summon J. E. Jones and Royall Haxall to appear at the mayor's court as witnesses, to testify in behalf of the commonwealth against the said Sally Cousins, at 9 o'clock A. M. on the 19th day of March, 1878; that is to say, on the next day following the day of arrest; and have then and there this warrant, with your return thereon.

"Given under my hand this 18th day of March, 1878.

"JAS. A. CLARKE, Mayor [Seal]."

844 *The following endorsement on the back of warrant, to-wit:

"The Commonwealth v. Sally Cousins:

"Executed by arresting the within-named Sally Cousins and by summoning the within-named witnesses.

"J. B. FITZGERALD, Police No. 1.

"Witnesses for defence: Arena Hughes, Wash. Williams, Belle Allen, Louisa Winfree, Andrew Crump."

"Mayor's Office, March 19th, 1878.

"The prisoner is discharged.

"JAS. A. CLARKE, Mayor."

"That at the trial the next morning of said Sally Cousins, the said Jones and Haxall appeared as witnesses and were examined; that upon examination Haxall so contradicted himself and broke down as to cause a general laugh; that the court discharged Sally Cousins for insufficiency of evidence to sustain the charges against her; that a warrant was then issued against Royall Haxall for larceny; which warrant is as follows, to-wit:

"City of Manchester, to-wit:

"To all or any one of the police officers of the city of Manchester:

"Whereas Jas. A. Lipscomb has this day made complaint and information on oath before me, James A. Clarke, mayor of said city, that on the 19th day of March, 1878, at said city, Royall Haxall did unlawfully take, steal and carry away a certain lot of railroad iron of the value of one dollar, the property 845 of the Richmond *and Danville railroad, against the peace and dignity of the commonwealth; these are, therefore, in the name of the Commonwealth of Virginia, to command you, forthwith, to apprehend and bring before me, or some other justice of the peace of the said city, the body of the said Royall Haxall to answer the said complaint, and to be further dealt with according to law. And, moreover, upon the arrest of the said Royall Haxall by virtue of this warrant, I command you, in the name of the Commonwealth of Virginia, to summon Jas. A. Lipscomb, Wash. Williams, Belle Allen, Louisa Winfree, Andrew Crump, R. J. Cooper, John E. Reams, Arena Hughes, Sally Cousins and J. B. Fitzgerald to appear at the mayor's court as witnesses, to testify in behalf of the commonwealth against the said Royall Haxall, at 9 o'clock A. M. on the 20th day of March, 1878; that is to say, on the next day following the day of arrest; and have then there this warrant, with your return thereon.

"Given under my hand and seal this 19th day of March, 1878.

"JAS. A. CLARKE, Mayor [Seal]."

"The following endorsation on the back of warrant, to-wit:

"The Commonwealth v. Royall Haxall—warrant.

"Executed by arresting the within-named Royall Haxall and by summoning the within-named witnesses.

"J. A. LIPSCOMB, Chief of Police.

"Bail is allowed in the sum of fifty dollars, and Junius E. Jones undertook as bail.

"JAS. A. CLARKE.

846 *"Mayor's Office, March 20th, 1878.

"The prisoner, Royall Haxall, is sent on to the present term of the hustings court of the city of Manchester to be further tried for the offence with which he stands charged before me. Bail is allowed in the sum of one hundred dollars, and himself and Junius E. Jones and Joseph entered as his bail in the amount required.

"JAS. A. CLARKE, Mayor."

"And that he applied for bail, and was bailed by said Jones for his appearance before the mayor on the 20th of March; that before his trial on the warrant for larceny, to-wit: on the morning of the 20th, before his case was called, he said he did not steal the iron; that Mr. Jones gave it to him to put it where it was found, and gave him drinks and promised to pay him for doing it, and that he did put it where it was found, as he had promised Jones to do; that he was seen to have half a dollar, which was unusual for him; that said Haxall was sent on to the grand jury of the hustings court for the larceny aforesaid; that after his confession he and Jones were arrested and sent on to the same court for conspiracy. Haxall was also sent on at the same time for perjury; which warrant is as follows:

"City of Manchester, to-wit:

"To all or any one of the police officers of the city of Manchester:

"Whereas Sally Cousins has this day made complaint and information on oath before me, James A. Clarke, mayor of said city, that on the 18th day of March, 1878, at said city, Junius E. Jones and Royall Haxall did unlawfully and feloniously conspire to charge one Sally Cousins with the larceny of a 847 certain lot of railroad *iron, the property of the Richmond and Danville Railroad Company, and to subject, and did subject, the said Sally Cousins to a criminal prosecution, wherein the said Sally Cousins was duly acquitted. These are, therefore, in the name of the Commonwealth of Virginia, to command you forthwith to apprehend and bring before me or some other justice of the peace of the said city the body of the said Junius E. Jones to answer the said complaint and to be further dealt with according to law. And, moreover, upon the arrest of the said Junius E. Jones and Royall Haxall by virtue of this warrant, I command you in the name of the Commonwealth of Virginia to summon Sally Cousins, Wash. Williams, Belle Allen, Louisa Winfree, Andrew Crump, R. J. Cooper, Arena Hughes, J. B. Fitzgerald, J. E. Reams, Bartlett Davis, James White, Gilbert Murrell, Dick Baker and John Jefferson to appear at the mayor's court as witnesses, to testify in behalf of the Commonwealth against the said Junius E. Jones and Royall Haxall, at 9 o'clock on the 21st day of March, 1878; that is to say, on the next day following the day of arrest; and have then there this warrant, with your return thereon.

"Given under my hand and seal this 20th day of March, 1878.

"JAS. A. CLARKE, Mayor [Seal]."

"The following endorsation on the back of the warrant, to-wit:

"The Commonwealth against Junius E. Jones and Royall Haxall:

"Warrant executed by arresting the within named Junius E. Jones and Royall Haxall and by summoning the within-named wit-

nesses: J. B. Fitzgerald, police No. 1; Wash. Williams, Belle Allen, Louisa Winfree, Andrew Crump, R. J. Cooper, Arena Hughes.

848 *"'J. B. Fitzgerald, J. E. Reams and James H. Phaup were recognized as witnesses to appear at the present term of the hustings court to testify against the accused.

"JAS. A. CLARKE.

"The prisoner J. E. Jones is allowed bail in the sum of one hundred dollars, and James H. Phaup undertook as his bail in that sum for his appearance before the present term of the hustings court of Manchester, and the prisoner Royall Haxall is remanded to jail to be further dealt with at the same term of the court.

"JAS. A. CLARKE, Mayor [Seal].'

"It was further proven on the trial by Mr. Phaup that he was standing near the depot, when Jones and Haxall came where he was, and Jones said he wanted him (Phaup) to give Haxall some pieces of railroad iron, to be used by Haxall as samples; that Haxall had asked him for them, and he could not give them to him without his (Phaup's) consent; that Haxall refused to tell him (Jones) when he asked for the old iron whom he suspected, but that he (Phaup) left Jones at the platform; Jones asked him to stay, but he gave as his reason that it would cost the railroad company more for him (Phaup) to be detained in court as a witness than the detecting of the thief would profit the company.

"Phaup also testified that the two fish-plates found on Sally Cousins' premises, among a lot of other old iron exhibited to the jury in court (and which Haxall had confessed he put there), were exactly like those he delivered to Haxall through Jones, if they were not the same; he could not say they were the same—there were so many of them alike—but they were just like those he gave him.

"That when the Commonwealth offered to introduce in evidence the declarations 849 of Haxall, the defendant *Jones objected, but the court admitted them notwithstanding these objections; and after all the evidence had been given the court, on motion of defendant Jones, instructed the jury as follows:

"The court instructs the jury that, in passing upon the guilt or innocence of the prisoner J. E. Jones, they must discard entirely from their consideration the declarations of Royall Haxall, they having been made by said Haxall after the conspiracy charged was completed and ended; also, 'the court instructs the jury that they cannot find either party guilty of the conspiracy as charged in the indictment unless they believe from the evidence that there was an agreement of mind between the two to do and perform the matters and things as charged in the said indictment.'

"And the court certifies that the foregoing were all the facts proved on said trial.

"WILLIAM I. CLOPTON [Seal]."

There can be no doubt about the correctness of the instruction given by the court to the jury, as stated in the said certificate of facts, "that in passing upon the guilt or innocence of the prisoner J. E. Jones they must discard entirely from their consideration the declarations of Royall Haxall, they having been made by said Haxall after the conspiracy charged was completed and ended." supposing that any such conspiracy in fact existed. If no such conspiracy in fact existed, then of course the said declaration must be so discarded. On the trial of an indictment against several for conspiracy, declarations made by one defendant, out of the presence of the rest, in regard to the subject matter of the indictment, are admissible evidence of the charge against all of the defendants; provided that there was in fact a conspiracy between them as charged in the indictment, and that the said declarations

were made in the course of the conspiracy 850 or the execution of the purpose of the same. But such declarations so made are inadmissible evidence of the charge against any other defendant than the one who made them either, if in fact there was no such conspiracy at all, or if the said declarations were made after the conspiracy charged was completed and ended. 2 Russ. on Crimes, p. 697, marg.; 1 Wharton's Am. Cr. Law, § 705; *Hunter v. The Commonwealth*, 7 Gratt. 641.

The said declarations of the defendant Haxall having been properly excluded from the consideration of the jury in passing upon the guilt or innocence of the defendant J. E. Jones, the question is, whether the remaining facts certified as proved on the trial of the case were sufficient to warrant his conviction of the offence charged in the indictment?

Without repeating those facts, or making any special comments upon them in this opinion, we are decidedly of opinion that they were not. At most they make out no more than a case of suspicion against that defendant, and fall short of what is necessary to his conviction.

We are, therefore, of opinion that the court below erred in overruling the motion of the defendant Jones to set aside the said verdict as to himself, and award him a new trial upon the ground that the said verdict was contrary to the evidence.

It follows that for that error the judgment rendered against the said defendant Jones must be reversed, and the cause remanded for a new trial as to him, according to the principles hereinbefore declared.

But an interesting question yet remains to be considered and disposed of, and that is, whether in such a case a judgment can be reversed, a verdict set aside, and a new trial granted as to one defendant and not as to the other, even though that other neither obtained nor applied for any writ of error, nor complained in any way of the verdict or judgment against him.

851 *It is laid down in 2 Russ. on Crimes, p. 702, marg., that "when one of several defendants charged with a conspiracy has been acquitted, the record of acquittal is evi-

dence for another defendant subsequently tried." And in 3 Wharton's Am. Cr. Law, §§ 2339 and 2347, that "in an indictment for conspiracy against two, the acquittal of one is the acquittal of the other," and that "where two or more persons have been convicted of a conspiracy, a new trial as to one involves a new trial as to all." And in 1 Bishop on Cr. Pr. § 977, that "if, in England, all of several defendants indicted for a conspiracy are found guilty, and one of them shows himself entitled to a new trial on grounds not affecting the others, the new trial will, nevertheless, be granted as to all," (citing in Note 1, *Rex v. Gompertz*, 9 Q. B. 824. See *Rex v. Teal*, 11 East, 307; *Rex v. Askew*, 3 Maule & Sel. 9; *Rex v. Cochrane*, Id. 10, note). "If of several persons indicted jointly for a criminal offence some are convicted and others acquitted, there may be a new trial as to those who are convicted without disturbing the verdict as to those who are acquitted." See, also, 3 Rob. Pr., old ed., p. 275, and *Lithgow's case*, 2 Va. Ca. 311.

The general rule seems, therefore, to be that on conviction of several defendants on a joint indictment for conspiracy, the reversal of the judgment and award of a new trial as to one of the defendants must operate alike as to all. This may be reasonable enough as a general rule, and is no doubt the general rule. To constitute a conspiracy it must be the act of at least two persons; so that, generally, if one of them be acquitted, such acquittal takes away the foundation of the guilt of the other, who must be acquitted also.

But there may be exceptions to the rule, and this case seems to be such an exception. Here there was evidence of certain declarations by Haxall which was good evidence to prove his guilt, and were sufficient, with

852 the *other evidence in the case, to prove that he was guilty of the conspiracy charged in the indictment, but they were not good evidence to prove the guilt of his co-defendant Jones, who therefore was entitled to a new trial and to have the judgment against him reversed. Why reverse the judgment against Haxall also? May he not be again convicted on another trial, the evidence against him being sufficient to prove his guilt, and may he not be subjected on such second conviction to greater punishment than on the first? He has not brought up the case to this court, nor did he move for a new trial in the court below; but, on the contrary, there "announced that he had nothing further to say" when called upon to say why judgment should not be rendered against him. Why should we now, against his will, expose him to another trial and all its consequences? Suppose that he had confessed his guilt upon the trial, and judgment had thereon been rendered against him: could it have been then said that a new trial could not be granted to his co-defendant without granting one to him also? What difference can it make that the verdict against him was founded on his confession made out of court and before the trial? Or suppose that the two defendants had been tried separately, and one of them

had been convicted on his own confession, made out of court and before the trial, and the other acquitted because he had made no such confession, and the evidence against him was insufficient, would such acquittal of the latter prevent judgment against the former? Though the trial in this case was joint, the verdict against the defendants was in fact several, and the effect in regard to this question the same as if the trial had been several.

We are, therefore, of opinion that a reversal of the judgment as to Jones does not operate a reversal as to Haxall.

853 *The judgment was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the said hustings court did not err in overruling the motion of the defendant Junius E. Jones to permit him to sever from the other defendant, that he might be tried separately and apart from the said other defendant for the offence charged against them jointly as they were indicted, as stated in "bill of exceptions No. 1;" nor in overruling the motion of the said defendant Jones to reject the testimony as to the admissions and declarations of the defendant Haxall set out in "bill of exceptions No. 2;" this court concurring in the opinion expressed in said bill of exceptions, "that the evidence was admissible as evidence on the joint trial."

But the court is further of opinion, for reasons stated as aforesaid, that the said hustings court did err in overruling the motion of the said defendant Jones to set aside the verdict of the jury as to himself and award him a new trial, upon the ground that it was contrary to the evidence, and in proceeding to render judgment upon said verdict against said defendant, as stated in "bill of exceptions No. 3;" this court concurring in the opinion of the court below on which was founded the instructions to the jury embodied in the said bill of exceptions, "that in passing upon the guilt or innocence of the prisoner J. E. Jones they must discard entirely from their consideration the declarations of Royall Haxall, they having been made by said Haxall after the conspiracy charged was completed and ended," and also "that they cannot find either party guilty of the conspiracy as charged in the indictment, unless they believe from the evidence that there was an agreement of mind between the two to do and perform the matters and things as charged in the said indictment."

But this court being further of opinion 854 that after discarding *the said declarations as aforesaid, the other evidence before the jury on the trial of the case was wholly insufficient to warrant them in finding a verdict of guilty against the said defendant Jones; therefore it is considered that as to and against the said defendant Jones the said judgment be reversed and annulled, the verdict of the jury set aside, and the cause remanded to the said hustings court for a new trial to be had therein, according to the principles hereinbefore declared.

But the court is of opinion, for reasons stated as aforesaid, that the reversal of the

judgment against the defendant Jones does not operate as a reversal of the judgment against the defendant Haxall on the joint indictment against them aforesaid, which latter judgment is therefore to remain unaffected by the proceedings and judgment in this cause; which is ordered to be certified to the said hustings court of the city of Manchester.

JUDGMENT REVERSED.

855 *Payne v. The Commonwealth.

November Term, 1878, Richmond.

1. Evidence—Admissibility—Letter Never Received by Accused.—On a trial for a misdemeanor, proof of the contents of a letter or paper which the defendant did not receive, is inadmissible.

2. Appeal—Reversal—Irrelevant Evidence.†

—If the only objection to the evidence was its irrelevancy, and it could not possibly have prejudiced the prisoner, then the judgment ought not to be reversed for the error in not excluding it; for to authorize the reversal of a judgment for admitting irrelevant evidence, not only must the evidence be irrelevant, but it must be of such a nature as that its admission may have prejudiced the prisoner. If he may have been so prejudiced, even though it be doubtful whether in fact he was so or not, that is sufficient ground for reversing the judgment. See *Southern Mut. Ins. Co. v. Trear*, 29 Gratt. 255.

The case is stated by JUDGE BURKS in his opinion.

John S. Wise, for the appellant.

The Attorney-General, for the Commonwealth.

BURKS, J., delivered the opinion of the court.

The plaintiff in error, William Payne, was indicted in the hustings court of the city of

***Evidence—Admissibility—Letter Never Received by Accused.**—In *Cluverius' Case*, 81 Va. 787, the headnote reads: "A note addressed on the 13th in the handwriting of the deceased, from room No. 21 of the hotel in Richmond, to the accused, under circumstances indicating that it was written by the deceased to the accused in answer to a note addressed to the occupant of that room, is admissible as part of the *res gestae*, and also for the purpose of identifying that occupant with the deceased, and of showing that she was in communication with him on the day of her death." In the opinion of this case the principal case was discussed at length and distinguished. See also dissenting opinion in same case by HINSON, J. See *Trogon's Case*, 31 Gratt. 864, for an instance where a certificate was held not admissible as evidence on account of its irrelevancy.

†Appeal—Reversal—Irrelevant Evidence.—The following cases cite the principal case as authority for the rule laid down in the second headnote: *Vaughan's Case*, 85 Va. 671; *Oliver's Case*, 77 Va. 594; *Brown's Case*, 86 Va. 937; *Joyce's Case*, 78 Va. 287; *Insurance Co. v. Trear*, 29 Gratt. 255; *Kinney's Case*, 26 W. Va. 143; *Webb v. Packet Co.*, 43 W. Va. 800; *Flowers v. Fletcher*, 40 W. Va. 104; *Kerr v. Lunsford*, 31 W. Va. 675; *Taylor v. Railroad Co.*, 33 W. Va. 57, citing *Beach v. O'Riley*, 14 W. Va. 55; *Moore v. Huntington*, 8 S. E. Rep. 512.

Richmond for a violation of the provisions of section 12 and 13, chapter 194, Code of 1873, concerning lotteries.

The indictment contains three counts. The first count charges that the said Payne "unlawfully did set up and promote, and was concerned in managing and drawing a certain lottery for the division of money and other things of value by chance and 856 lot." The *second count charges that he "unlawfully did offer for sale, and unlawfully did sell, a lottery ticket for the division of money and other things of value by chance and lot;" and the third count charges that he "unlawfully did, knowingly, permit in a certain house, then and there under his control, a certain lottery for the division of money and other things of value by chance and lot."

There was a demurrer to the indictment and each count, which was overruled, and the defendant thereupon pleaded not guilty; and on the trial of the issue joined in said plea, the jury rendered a verdict by which they found the defendant guilty, and assessed his fine at twenty-five dollars.

The court entered up judgment against the defendant for the fine and costs of the prosecution, and that he be confined in jail for the term of three months, and thereafter till the said fine and costs be paid, or he be otherwise discharged by due course of law, such additional confinement not to exceed six months.

To this judgment a writ of error was awarded by one of the judges of this court.

In the course of the trial the plaintiff in error took three exceptions to rulings of the court, set out in bills, which also contain the evidence given to the jury.

Daniel Wren, a policeman, was called as a witness on behalf of the Commonwealth, and testified that he arrested Payne, the plaintiff in error, in a house occupied by him in the city of Richmond, on Franklin street, near Sixteenth; that when arrested Payne was seated at a table in a side room, with the "paraphernalia," as the witness styled it, on the table before him, which the witness thought was that of "policy," and which was identified by him and exhibited, and by him explained, as far as he had knowledge, to the jury; that he found in the room a col- 857 ored woman *(Polly Manson), whom he also arrested; and that she said she came to the house to bring a note for Payne.

After this evidence had been given, the said Polly Manson was sworn as a witness on behalf of the Commonwealth, and stated, in substance, that one John Cameron had given her a note and ten cents and told her to carry them to Payne; that she went to Payne's house to deliver them at the time she was arrested; that she did not deliver either to Payne; that at the time of her arrest she had not spoken to him; that she dropped the note in the room, or in the house, or in the street, though she seemed to think that it was dropped in the room, as it was in her lap, she

said, when she sat down; that for aught she knew Payne never heard of the note.

Thereupon, the said John Cameron, who had been sworn as a witness on behalf of the Commonwealth, and whose examination had been suspended until Polly Manson had testified, was recalled, and was asked by the attorney for the Commonwealth to "tell the jury what that note was about"; and against the objection of the plaintiff in error the witness was permitted to make his statement to the jury; to which action of the court the plaintiff in error excepted. The statement is set out in the second bill of exceptions, and, as it is short, it is here given in the language of the witness:

"I was going to Main street for a watch. At the corner of Jail alley I picked up a piece of paper with four numbers on it. I took out my blank-book and wrote the four numbers on a leaf of it. Tore out the piece with numbers on it. As I was going across Broad street I met aunt Polly Manson and told her to give the note to Mr. Payne, and I gave her ten cents to give also. The paper

858 was folded. It was Monday *morning.

I believe four numbers were on it. Don't remember numbers. I did not know where Mr. Payne lived. Last time I saw him was two years ago. He used to play for the Southern Association. His office was then on Franklin street, near Governor street. I have never been down to his place. I did not know Mr. Payne's business when I sent the note. I didn't mention policy nor nuthin to her. I told her to give the note and money to Mr. Payne. Don't know whether he got it or not. Never heard of Payne's playing since the Southern Association was broken up."

The court is of opinion that the hustings court erred in not excluding this statement from the jury. No proper foundation was laid for its introduction as evidence. The circumstances proved do not sufficiently connect the plaintiff in error with the writing or paper with figures on it called a "note" to render it admissible as evidence in this prosecution. It never reached him. There is no proof that he ever read it, or saw it, or heard of it, or knew of its existence. If it was dropped in his house by the messenger who bore it, at the time of the arrest, as stated by the witness, there is no probability that it ever came to his possession.

It does not appear that there were any words written upon it but only "four numbers" copied by Cameron from a paper picked up on the street. What else, if anything, besides the "four numbers," was written on the last-named paper, does not appear. Whether it was at the place where it was found by accident or by contrivance, the record does not enable us to say. It may be that the numbers on the paper designated corresponding numbers of a lottery ticket, and that this method was adopted to advertise and give information, without being detected, to those who might desire to

859 purchase. This may be so, and *yet

the evidence does not show that the plaintiff in error had any agency in the

matter; for Cameron says he did not know Payne's business when he sent the note.

Everything that passed between the witnesses, Manson and Cameron, touching the note and money, were, as to Payne, *res inter alias acta*. If the original note had been produced on the trial it could not have been used as evidence, and, by consequence, secondary evidence of the contents was illegal.

A letter addressed to a party cannot be admitted as proof against him unless it be proved that he received and acted on it. *Smiths v. Shoemaker*, 17 Wall. U. S. R. 630.

A written communication not received by the person for whom it is intended stands on no higher ground as evidence than a verbal declaration made not in the presence of one who is sought to be affected by it. They cannot be treated as admissions in either case. Both are hearsay.

We cannot say what effect this illegal evidence may have had on the minds of the jury. It was very well calculated to influence them. In such case the rule of this court is, that the judgment must be reversed.

It was observed by PFENDLER (president) in *Lee v. Tapscott*, 2 Wash. 276, 281, that illegal or improper evidence, however unimportant it may be to the cause, ought never to be confided to the jury; for if it should have an influence upon their minds, it will mislead them; and if it should have none, it is useless, and may at least produce perplexity. See also *Brown & Boisseau v. May*, 1 Munf. 288, 291.

The law on this subject has been recently expounded by this court. In *Southern Mut. Ins. Co. v. Trear*, 29 Gratt. 255, 259, the president, delivering the opinion of the court, speaking

of the admission of irrelevant evidence 860 *in the case, said: "If the only objection to the evidence was its irrelevancy, and it *could not possibly* have prejudiced the defendants, then the judgment ought not to be reversed for the error in not excluding it; for to authorize the reversal of a judgment for error in admitting irrelevant evidence not only must the evidence be irrelevant, but it must be of such a nature as that its admission may have prejudiced the adverse party. *If he may have been so prejudiced, even though it be doubtful whether in fact he was so or not*, that is a sufficient ground for reversing the judgment." See also *Poindexter, &c., v. Davis & als.*, 6 Gratt. 481, 493; *Preston v. Harvey*, 2 Hen. & Mun. 55, 67. A like rule is applied in determining whether a judgment should be reversed for an erroneous instruction given. *Danville Bank v. Waddill*, 27 Gratt. 448.

No error is disclosed by the first bill of exceptions, and none was assigned.

We are saved the necessity of considering the question raised by the third bill of exceptions, taken to the action of the court refusing to set aside the verdict of the jury and grant the plaintiff in error a new trial, based on the ground that the verdict was contrary to the law and the evidence, as for the error already stated the judgment must be reversed and a new trial granted.

The judgment was as follows:

This day came again as well the attorney-general on behalf of the Commonwealth as the plaintiff in error by his counsel, and the court having maturely considered the transcript of the judgment aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the said hustings court of the city of Richmond erred in not excluding from the the jury as evidence on the trial of 861 the *issue joined in this cause, the statement made by the witness, John Cameron, set out in the second bill of exceptions in the record, in response to the question of the attorney for the Commonwealth also set out in said bill; it is therefore considered and ordered that for the error aforesaid, the said judgment must be reversed and annulled, the verdict of the jury, on which said judgment was rendered be set aside, and this cause be remanded to the said hustings court for a new trial of the issue joined, and for further proceedings in conformity to the opinion hereinbefore expressed; which is ordered to be certified to the said hustings court of the city of Richmond.

JUDGMENT REVERSED.

862 *Trogon v. Commonwealth.

November Term, 1878, Richmond.

1. Criminal Law—False Pretences—Admissibility in Evidence of Other Similar Acts.*—Upon the prosecution of T for obtaining goods from M & Co. upon false pretences, evidence that the accused, in the same city and at or about the same time, purchased goods from other parties, B and O, upon the same false pretences, is admissible to show the intent of the accused in making the representations to M & Co., but not as proof that the accused had committed other offences not charged in the indictment. And this, though the statute has made the obtaining goods on false pretences larceny.

2. Same—Same—Evidence—Statements.—A statement is made by T of his partners, and the condition of the partnership, to one of the firm of M. &

***Fraud—Admissibility in Evidence of Other Fraudulent Acts.**—In *Piedmont Bank v. Hatcher*, 94 Va. 231, the court lays down the following rule: "Where fraud in the sale or purchase of property is in issue, evidence of other frauds of like character, committed by the same parties, at or near the same time is admissible. Its admissibility is placed upon the ground, that, where transactions of similar nature are executed by the same parties, and closely connected in point of time, the inference is reasonable that they proceed from the same motive. Large latitude is always given to the admission of evidence where the issue is fraud," citing the principal case and *Lincoln v. Chaffin*, 7 Wall. 132; *Butler v. Watkins*, 13 Wall. 456; *Ins. Co. v. Armstrong*, 17 U. S. 591. In *Lillienfeld v. Com.*, 92 Va. 818, in a proceeding to revoke a liquor license for selling liquor to minors it was held competent to offer in evidence a number of indictments found in the same court against the same defendant for similar offences and also to receive the evidence of a minor, that within twelve months prior to the time when the license sought to be revoked took effect, the said minor had purchased

Co., who encloses it in a letter to another member of his firm then in New York, and asks if he shall send the goods; and he receives a reply by telegraph to send them. The statement is admissible evidence.

3. Same—Same—Representations to Third Parties.—On the 15th of March, 1878, L, having received an order to send some goods to T. & Co., obtained from B a copy of the representations made to him by T on the 28th February, 1878, which were the same representations made to M. He mailed a copy to T. & Co., asking if that statement represented the true condition of their affairs? and received, by due course of mail, a letter signed T. & Co., saying that it did, and that the business was still prospering—HELD: The testimony of L, his letter to T. & Co. containing the statement, and the answer received by him, are admissible as evidence in this case to show the intent of the accused.

4. Same—Same—Guilty Knowledge—General Rule.—Whenever the intent or guilty knowledge of a party charged with crime is a material ingredient in the issue of the case, other acts and declarations of a similar character tending to establish such intent or knowledge are proper evidence to be admitted, provided they are not too remotely connected with the offence charged; and what are the limits as to the time and circumstances is for the court, in its discretion, to determine.

863 *5. Same—False Pretences—Statute.—

Although under the statute of Virginia the obtaining goods by false pretences is made larceny, and an indictment under the same for larceny is sufficient; yet every ingredient entering into the offence of obtaining goods by false pretences must be shown as fully as if the statute had not thus passed.

6. Same—Review of Evidence—Exceptions Must Be Specific.†—On the 1st of April,

intoxicating liquor of the defendant, citing the principal case. In *Wilson v. Carpenter*, 91 Va. 183, it was held that in a suit to rescind a contract for false representations, evidence of similar representations to others, about the same time, is admissible to show the bent of mind of the party making the representations. See generally, 14 Am. & Eng. Enc. Law (2nd Ed.) 196.

†Evidence—Review—Exception Must Be Specific.—In *Railroad Co. v. Ampey*, 93 Va. 126, the court said: "The motion to exclude did not specify the particular statements or answers that were deemed objectionable by the defendant. The effect of the motion was to impose a burden on the court that it was not called on to bear. It could not be expected to explore all of the testimony of the witness and ascertain and winnow out the exceptionable parts of it, when the defendant had not seen proper to object to its admission, and after it had been given did not take the pains to specify particularly what it asked to have excluded. A party who asks to have evidence excluded that has been admitted without objection must recall and point out distinctly the objectionable answers or statements, or the court may properly overrule the motion to exclude," citing the principal case and *Harriman v. Brown*, 8 Leigh 697; *Buster v. Wallace*, 4 H. & M. 82; *Parsons v. Harper*, 16 Gratt. 64; *Friend v. Wilkinson*, 9 Gratt. 31. See also *Railroad Co. v. Lacy*, 94 Va. 463, citing the principal case.

Same—Introduction of Irrelevant Documents.—On the questions involved in the holdings in the 7th headnote regarding the admissibility in evidence of irrelevant documents, see *Payne's Case*, 31 Gratt. 855 and *note*.

1878, T., the accused, filed his petition in the bankrupt court to have the concern of T. & Co., composed of himself, C. L. T. and J. W. A., adjudicated bankrupts, and they were so adjudicated on the 26th April, 1878. In the petitions and schedules filed by T. in this bankrupt record, different representations were made as to the affairs of the concern of T. & Co. on the 28th February, 1878, when the offence was alleged to have been committed, from those stated by him in some of the representations made to M. & Co. The whole record of the bankrupt court was offered in evidence by the Commonwealth, to which the accused, by counsel, objected generally, without pointing out any part of the record as objectionable. The court below admitted the whole record—**Held:** It was not error under the circumstances to do so. The statements contained in the petition and schedules in that record, made by the accused, were admissible as admissions or declarations of the facts therein stated, and while the schedules and statements made by the other partners are not evidence against the accused, he cannot by a general objection to the whole record impose upon the trying court the duty of examining every part of it to see whether, perchance, there is not something in it not admissible in evidence. It is his duty to point out to the court such portions of the record as come within the scope of his objection, and this rule applies as well in civil as in criminal cases.

7. A paper purporting to be the assessment of the property of A, one of the partners of T. & Co., and whose unincumbered real estate T had represented as worth \$3,000, in R. county, North Carolina, is certified by the register of the county as a correct transcript of the taxable property of A, as copied from the list returned by the assessor. The certificate and assessment are without date, and do not state what year the statement refers to—**Held:**

1. **Records of Other States—Admissibility in Evidence.**—In the absence of evidence that by the law of North Carolina the assessment is a record, and a copy of the record is evidence, the paper is not competent evidence against T.

864 2. **Same—Defects Making Incompetent.**—The certificate and assessment being without date, and it being uncertain what year the assessment refers to, for these defects the paper is not competent evidence.

3. **Evidence—Introduction of Irrelevant Documents.**—The original paper to which the certificate refers, referring to the property of A, and T having no connection with or interest in it, it would not be competent evidence against him.

4. **Same—Same—When Reversal Justified.**—As it is impossible for this appellate court to say that the introduction of this paper in evidence was not prejudicial to the accused, its introduction was error, for which the judgment is reversed.

8. **False Pretences—Instructions.**—The court instructs the jury "that they must believe from the evidence, beyond all reasonable doubt, that the alleged false pretences were believed by M. & Co.; that but for them they would not have parted with their goods—that is, that they had the prevailing and controlling influence of making M. & Co. part with their property." The instruction is correct.

At the June term, 1878, of the hustings court of the city of Richmond, the grand jury indicted Willard F. Trogdon for the

larceny of the goods and chattels of M. Millhiser & Co., of the value of \$496.47. Though the indictment was for larceny, the offence charged was in fact for obtaining goods on false pretences. Willard F. Trogdon was the sole managing partner of the firm of Trogdon & Co., doing business as merchants in Greensboro, North Carolina, which was composed of said Willard F. Trogdon, Cicero L. Trogdon, and I. W. Allred. On the 28th of February, 1878, Willard F. Trogdon, in the city of Richmond, purchased of M. Millhiser & Co. a parcel of goods, all of which, with the prices of the different articles, are set out in the indictment.

The trial of the prisoner took place at the same term of the court, and the jury found him guilty, and fixed the term of his imprisonment in the penitentiary at three years; and the court sentenced him in accordance with the verdict. The prisoner thereupon applied *to a judge of this court for a writ of error; which was allowed, to operate as a *supersedeas*.

On the trial of the case the prisoner took nine bills of exceptions to rulings of the court. The first three exceptions refer to the admissibility of evidence of the purchase of goods by the prisoner, about the same time, of other merchants in Richmond, and the facts are the same in the first two cases, and nearly the same in the third. The facts and the questions are stated by JUDGE STAPLES in his opinion.

After the evidence referred to in the first three bills of exception had been introduced the Commonwealth offered in evidence the record of a case in bankruptcy. This was a case in the district court of the United States for the western district of North Carolina. The petition was filed on the 1st of April, 1878. It was in the name of Willard F. Trogdon, stating himself to be of Greensboro, in the county of Guilford, in the district aforesaid, and states that Willard F. Trogdon, Cicero L. Trogdon and Isaac W. Allred, the last two of Gray's chapel, in the county of Randolph, were copartners and transacting business at Greensboro, in the county of Guilford and state of North Carolina; and he asks that he individually, and the said partners, who had carried on business as aforesaid, under the name and style of Trogdon & Co., might be adjudged bankrupts. In the schedule of debts of the firm of Trogdon & Co. filed with this petition, there is stated the debts due M. Millhiser & Co., A. Openheimer, Gardner, Carlton & Baldwin, and Lewis H. Blair, the first three dated the 28th of February, and the last on March 19th; and all these purchases had been proved to be made by the prisoner, and the whole debts on the schedule amounts to upwards of \$9,000. There was also a schedule of the property of Allred, afterwards *filed by himself in the case. The objection to the record by the prisoner was general, not specifying any part of it.

The fifth exception is to the admission of a paper purporting to be the statement by the prisoner to M. Millhiser & Co. of the names and pecuniary condition of the firm

possession of it, that it might judge for itself whether it established what he alleges. Upon the whole, the court is of opinion that there is no error presented by the record for which the judgment should be reversed. Let it be affirmed.

CHRISTIAN, J., dissented.

JUDGMENT AFFIRMED.

836 *Jones v. The Commonwealth.

November Term, 1878, Richmond.

1. Criminal Law—Conspiracy—Joint Indictment.*—When two persons are indicted jointly for a conspiracy to prosecute another for a larceny, neither of them is entitled to a separate trial.

2. Same—Same—Declarations of Co-Conspirators—When Admissible.†—In such a case where both are on trial the confessions of one of them in the absence of the other, made after the conspiracy charged in the indictment was completed and ended, are properly admitted as evidence. And when all the evidence has been introduced, the court should then instruct the jury,

***Criminal Law—Joint Indictment—Several Trials.**—In *Commonwealth v. Lewis & Diviney*, 25 Gratt. 942, it was held that the statute which, changing the common law, allowed persons in a joint indictment for felony at their election to have a joint or several trial, did not apply to misdemeanors. In *Curran's Case*, 7 Gratt. 619, 627, it was held that this statutory right of election in cases of felony is subject to the right of the commonwealth, to try the accused severally notwithstanding they may elect to be tried jointly.

†Same—Conspiracy—Admissibility of Evidence of Declaration of Co-Conspirator.—In *Hunter's Case*, 7 Gratt. 641, it was held that confessions or admissions of an accomplice in a felony, made after the commission and completion of the offence, are not competent evidence against a prisoner, even though a previous conspiracy and combination between the prisoner and the accomplice to commit the felony has been proved. In *Oliver's Case*, 77 Va. 590, it was decided that though conspiracy has been proved, statements of a conspirator made after the object of the conspiracy is accomplished, are inadmissible to criminate his co-conspirator. In *Sands' Case*, 21 Gratt. 871, the headnote says that upon an indictment against a person for a conspiracy to commit a felony, or for the felony so actually committed, the acts and declarations of another of the conspirators, though not in the presence of the prisoner or afterwards reported to him, are evidence against him; and this though the acts and declarations were done or made before the prisoner became a party to the conspiracy, if done or said in furtherance of the common object. In order that such evidence may be admissible, it must be shown first that the persons whose acts or declarations are sought to be made evidence, were at the time of making or doing them, themselves conspirators; and second that they were said or done in furtherance of the object of the conspiracy. See also *Williamson v. Comm.*, 4 Gratt. 547; *Danville Bank v. Waddill*, 31 Gratt. 469 and *note*; *Cain's Case*, 20 W. Va. 694; *Brown's Case*, 86 Va. 935; *Martin's Case*, 2 Leigh 745; 6 Am. & Eng. Enc. Law 571 and 867.

that, in passing upon the guilt of the other party, they must discard from their consideration the said admissions, they having been made after the conspiracy was completed and ended.

3. Same—Same—Findings Necessary for Verdict of Guilty.—In such case the jury cannot find either party guilty of the conspiracy as charged in the indictment, unless they believe from the evidence that there was an agreement of mind between the two to do and perform the matters and things as charged in the indictment.

4. Same—Appeal.—In such case, both the defendants having been found guilty, one of them applies for a new trial, which is overruled, and he obtains a writ of error. The other does not apply for a new trial, and there is a judgment against him. The judgment may be reversed as to the one who appeals, without reversing the judgment against the other, who did not apply for a new trial.

The case is fully stated in the opinion of the court delivered by MONCURE, P.

H. H. Marshall and *S. M. Page*, for the appellant.

The Attorney-General, for the commonwealth.

MONCURE, P., delivered the opinion of the court.

This is a writ of error to a judgment of the hustings court of Manchester, convicting Junius E. Jones and *Royall Haxall on an indictment for conspiracy, in which indictment it was charged that the accused, on the 18th day of March, 1878, at the said city of Manchester and within the jurisdiction of the hustings court of said city, "unlawfully devising and intending one Sally Cousins to charge and convict of the larceny of a certain lot of railroad iron, the property of the Richmond and Danville Railroad Company, and to subject (and did subject) the said Sally Cousins to a criminal prosecution (wherein the said Sally Cousins was duly acquitted), did unlawfully conspire, combine, confederate and agree among themselves, and that in pursuance of and according to the conspiracy, combination, confederacy and agreement aforesaid, so as aforesaid had, they, the said Junius E. Jones and Royall Haxall, did falsely accuse the said Sally Cousins of the larceny of certain railroad iron as aforesaid, and did undertake to make and fabricate certain signs and evidences by which to convict the said Sally Cousins of the larceny aforesaid, and did then and there introduce said false evidence before his honor, the mayor of the city of Manchester, upon the trial of Sally Cousins for the larceny as aforesaid, on a warrant sworn out by said J. E. Jones in furtherance and pursuance of the conspiracy, &c., aforesaid, against the peace and dignity of the commonwealth of Virginia." The accused pleaded not guilty to the said indictment; and Junius E. Jones moved the court for a several trial thereon; which motion the court overruled. Whereupon the case was tried by a jury, which found both of the accused guilty as charged in the indictment, and assessed the fine of said Junius E. Jones at ten dollars and of the said

Royall Haxall at five dollars. The said Junius E. Jones moved the court to set aside the verdict against him and grant him a new trial; which motion the court overruled. The **838** said Royall *Haxall, by counsel, announced that he had nothing further to say. And thereupon judgment was rendered by the court against the accused according to the said verdict and for the costs expended in the prosecution. The said Junius E. Jones applied to a judge of this court for a writ of error to the said judgment; which was accordingly awarded.

There are three assignments of error in the petition for a writ of error in the case, as follows, to-wit:

1. In the court's refusing to allow the petitioner a separate trial, as objected to in bill of exceptions No. 1.

2. In admitting the illegal testimony set forth in bill of exceptions No. 2.

3. In overruling his motion for a new trial, as set forth in bill of exceptions No. 3.

We will proceed to consider the questions arising on these assignments of error in the order in which they are made.

1. In the court's refusing to allow the petitioner a separate trial, as objected to in bill of exceptions No. 1.

It is stated in that bill "that on the trial of the case the prisoner, Junius C. Jones, before pleading, moved the court to permit him to sever from the other defendant, that he might be tried separately and apart from the said other defendant for the offence charged against them jointly in the indictment, which motion the court overruled and required the defendants to go into trial jointly, as they were indicted;" to which ruling of the court the defendant, Jones, by his counsel excepted.

This question has already been expressly decided by this court in the case of *The Commonwealth v. Lewis & Diviney*, 25 Gratt. 938; in which it was held that where two persons have been indicted jointly for a misdemeanor they cannot claim any right to be tried separately. It is, therefore, only necessary, on this branch of the subject, to refer to that case, and we are of opinion that the court **839** *below did not err in refusing to allow the petitioner a separate trial as aforesaid. See also 1 Bishop on Cr. Pr., § 963, as to the offence of conspiracy in respect to separate trial. Then as to the next assignment of error, viz:

2. In admitting the illegal testimony set forth in bill of exceptions No. 2.

It is stated in that bill "that on the trial of the case the Commonwealth introduced as witness one James B. Fitzgerald, policeman of the city of Manchester, and offered to prove by him that on the morning of the 20th of March, 1878, before 7 o'clock, while one Haxall, one of the defendants in this cause, was standing in front of the market-house, said Haxall admitted and stated to him and to others in his presence, in front of the market-house in Manchester, said Haxall being then out on bail on the charge of larceny, whilst the defendant J. E. Jones was absent, that he, said Haxall, did not steal the

iron; Mr. Jones gave it to him to put it where it was found, and gave him drinks, and promised to pay him for doing it; that he did put it where it was found, as he had promised Jones to do; and that said Haxall made this statement voluntarily, without any inducement or threat being used by the policeman or any one else. The court being of opinion that the evidence was admissible as evidence on the joint trial, and stating that the court would instruct the jury as to the force and effect of said evidence in relation to said Jones, allowed the same to be given to the jury. To the introduction of this testimony the defendant Jones, by his counsel, objected, and moved the court to reject it, said admissions or declarations not being made in his presence, but the court overruled the motion and permitted said admissions and declarations to go to the jury. To this ruling of the court the prisoner, by his counsel, excepted."

We are of opinion that the court below did not err in the said ruling. The said **840** admissions and declarations *were legal evidence in the case, because they tended to prove that the defendant who made them was guilty of the joint offence charged in the indictment against him and the other defendant, though they did not tend to prove that the other defendant was guilty of the said offence. On a joint trial of an indictment against several for the same offence any legal evidence that tends to prove the guilt of either of said defendants of said offence is admissible evidence on the said trial, though it may not tend to prove the guilt of any of the other defendants. The court can and ought to prevent any difficulty on the subject in the minds of the jury in such a case by an instruction which the court in said bill of exceptions No. 2 announced an intention to give, and which was afterwards actually given, as appears in the next bill of exceptions. Then as to the next and last assignment of error, viz:

3. In overruling the said motion for a new trial, as set forth in bill of exceptions No. 3.

It is stated in that bill "that on the trial of this case, after the witnesses had been heard and the jury had rendered their verdict, the defendant Jones moved the court to set aside said verdict as to himself, and award him a new trial upon the ground that it was contrary to the evidence; which motion the court overruled and proceeded to render judgment upon said verdict against said defendant. To which ruling the judgment of the court the said defendant excepted, and prayed the court to sign and seal the said bill of exceptions, and to certify the facts proved upon said trial, all of which was accordingly done, and the court certified that the following were the facts proved, viz:

"That the defendant Jones resides in Manchester, and is an employee of the Richmond and Danville Railroad Company; that he is a special policeman, and duly sworn in as such by the authorities of the city; **841** that on *the 18th of March, 1878, in said city, he went to one R. J. Cooper (a witness who testified in this case), and said the Richmond and Danville Railroad

act or representation in many cases would not be decisive, especially where the accused has sustained a previous good character. But when it is shown that he made similar representations about the same time to other persons, and by means of such representations obtained goods, all of which were false, the presumption is greatly strengthened that he intended to defraud.

One of the counsel for the accused, in a very able argument upon this branch of the case, insisted that when the accused obtains goods by falsely representing himself a man of property, the jury must infer the guilty intent; and therefore evidence of collateral facts is unnecessary and irrelevant, and can only mislead the jury.

It may be conceded that when goods are obtained by false representations of the kind mentioned—and this is the whole case—the jury may justly infer the fraudulent intent. But it frequently happens, in a large majority

of cases, there are numerous facts and 873 circumstances, sometimes *of a minute and varied character, throwing light upon the conduct and motives of the accused. It is impossible for the court to foresee what may be developed in the progress of the trial. When evidence is offered of other transactions to show the guilty intent of the accused, is the court to say the intent is already conclusively proved, and the evidence is therefore irrelevant? What would be thought of a judge who would thus pre-judge the case and invade the province of the jury? The learned counsel would hardly concede the fraudulent intent of his client upon any state of facts. In the case before us we have but a small portion of the evidence. It is, of course, impossible for us to say what testimony was adduced by the accused upon the question of his particular intent; and yet we are asked to say that the evidence set out in the three bills of exception is irrelevant, upon the assumption that without it the jury must have found the guilty intent on the part of the accused. The opinion of this court in *Walsh's case*, 16 Gratt, 541, has a strong bearing upon this question. There the distinction is plainly drawn between guilty knowledge or intent as a presumption of law, and guilty knowledge or intent as a presumption of fact—a mere inference to be drawn by the jury. In the latter case, whilst the jury may find the accused guilty upon a given state of facts, they are not bound to do so. They are to weigh all the circumstances, and draw from them such conclusion as they may think warranted by the evidence. In this class of cases it has been held that even the admission of the accused that the act was done with a fraudulent or malicious intent cannot preclude the Commonwealth from proving it by any proper evidence. *Commonwealth v. McCarthy*, 119 Mass. R. 354; *Priest v. Inhab. Groton*, 103 Mass. R. 530.

But let us see what are the authorities 874 on the question. *In civil cases the decisions are abundant which hold that on the question of intent to defraud by false

pretenses other acts or representations of a like character done at or about the same time with that in issue are admissible with a view to the *quo animo*. The case of *McKinney v. Dingley*, 4 Greenl. R. 172, is an example. There the suit was to avoid a sale on the ground of the false and fraudulent conduct of the purchaser in representing himself to be a man of good property and credit when he is not; and it was held proper for the vendor to give evidence of similar false pretenses successfully used to other persons in the same town about the same time to show a general scheme to amass property by fraud. In *Hennequin v. Naylor*, 24 New York R. 139, for the purpose of proving the fraud the vendor relied in part upon the fact that the defendant had purchased of several persons large bills of goods, the plaintiff, among the rest, just on the eve of suspension. See also *Whittier v. Varney*, 10 New Hamp. 291, 477; *Menfey v. Brace*, 23 Barb. R. 561; *Allison v. Matthew*, 3 John. R. 234; *Olmstead v. Hotailing*, 1 Hill 317; 1 Phillip's Ev. 653, 773. These decisions are directly in point, and are entitled to great weight if the rules in criminal are the same as in civil cases. That they are so in general, so far as the means of ascertaining truth are concerned, is established by a great weight of authority. 1 Bishop's Crim. Procedure, § 502; 1 Greenl. § 65; Roscoe Crim. Ev. p. 1, and the cases cited by these authors; *Grayson's case*, 6 Gratt. 712.

As, however, it may be said that the rule confining the evidence to the point in issue should be more rigidly applied in criminal than in civil cases, let us examine some of the decisions based upon criminal prosecutions. The case of *The Commonwealth v. Eastman*, 1 Cush. R. 189, was an indictment for obtaining goods or money under false pretenses. It was ably argued 875 *and carefully considered. The court in commenting upon one branch of the case, say: "Evidence of other purchases of goods than those charged in the indictment made by the defendants from other persons during the month of March, 1844, under similar circumstances with the transaction charged in the indictment, was admitted for the purpose of showing the nature of the business of the defendants and the extent of the purchasers made by them, and also as bearing upon the *bona fide* character of the dealings of the defendants with the particular individuals alleged to be defrauded.

"This species of evidence would not be admissible for the purpose of showing that the defendant had also committed other like offences, but simply as an indication of the intention in making the purchases set out in the indictment. It is analogous to the proof of the *scienter* in indictments for passing counterfeit money, by showing that the defendant passed other counterfeit money to other persons about the same time. Such evidence is always open to the objection that it requires the defendant to explain other transactions than those charged in the indictment; but when offered for the limited purpose above stated, that of showing a

criminal intent in the doing of the act charged, it has always been admissible.

This decision was followed by the case of *Commonwealth v. Tuckerman*, 10 Gray's R. 173—an indictment for embezzlement—and upon the trial evidence was admitted of other acts of embezzlement of different amounts and at different times, for the purpose of showing the fraudulent intent. The next case is that of *Commonwealth v. Jeffries*, 7 Allen's R. 548, for obtaining goods by false pretenses. In both cases the decision in *Eastman's case* was cited, commented upon and approved. And in all the cases the
876 principle governing *in prosecutions for having counterfeit money is applied to prosecutions for obtaining money by false pretenses.

The counsel for the accused in this case have cited the case of *State v. Lapage*, 57 New Hamp. R. 245; and have read extracts from the opinion of CHIEF JUSTICE CUSHING. The learned judge discusses with great force and learning the rules governing the admission of collateral facts to show the intent of the accused. And although it is obvious he is not favorably inclined to the admission of such evidence, still he concedes there are cases in which it is admissible. After enumerating these cases, he proceeds as follows: "In cases of indictment for obtaining goods under false pretenses it very often happens that the respondent has been in some kind of business of which buying and selling goods on credit makes a part, and in such a case the difficulty is to draw the line between the points where legitimate business ceases and fraud begins. In such cases a single purchase of goods on credit might happen in the ordinary course of business; but if a party should make several purchases of goods at a time when he was in failing circumstances, that fact would have some tendency to show that he knew he was in failing circumstances, and that he did not intend to pay for them. Of course the effect of such testimony would depend upon the number and amount of such purchases, the after disposition of the goods purchased, and all the other circumstances." See also *State v. Johnson*, 33 New Hamp. R. 441; *Horey v. Grant*, 52 New Hamp. 569; *Defrese v. State*, 3 Heisk. R. 53; 42 Ala. R. 532.

The case of *Wood v. United States*, 16 Peter's R. 342, is perhaps a more satisfactory authority than any cited. There, upon an information against the defendant for failing to invoice certain goods imported by him, with
877 design to evade the duties and to defraud the government, *it was decided that other invoices of articles imported into New York and assigned to the defendant was proper evidence to show the fraudulent intent. JUDGE STORY, in delivering the opinion of the court, said: "The question was one of fraudulent intent or not, and upon questions of that sort, where the intent of the party is the matter in issue, it has always been deemed allowable as well in criminal as in civil cases to introduce evidence of other acts and doings of the party of a kindred character, in order to illustrate and

establish his intention. Indeed, in no other way would it be practicable in many cases to establish such intent or motive; for the single act taken by itself may not be decisive either way, but when taken in connection with others of the like character and motive, the intent and motive may be demonstrated almost with absolute certainty." These views the learned judge illustrates and enforces by argument, and by reference to authority.

The most recent case on this subject is that of *Bielsehofshy v. The People of the State of New York*, decided by the supreme court of New York, and reported in 3 Hun. R. 46. It was a prosecution for obtaining goods upon false pretenses. It was decided to be competent to prove other offences committed by the accused, with the view to show his intent in the particular offence charged, although it might incidentally prejudice the character of the accused in the mind of the jury. Upon a writ of error to the court of appeals of New York this judgment was affirmed. So that we have the decision of the highest courts of New York upon the very points involved here. Against this array of authorities we have the case of *Reg. v. Holt*, Bell Crim. Cases 280, in which, upon an indictment for obtaining money upon false pretenses, it was held not permissible to show that the prisoner had obtained money
878 by similar false pretenses within *a week afterwards, for the purpose of establishing the intent.

As the case was not argued, and no reasons are given in the opinion of the court, it is impossible to say upon what grounds the decision was placed—possibly the subsequent pretenses were considered as too remote in point of time. The decision has not been approved by writers on criminal law. Roscoe Crim. Ev., 94. Opposed to this are the two cases of *Reg. v. Roebuck*, D. & B. p. 24, and *Queen v. Frances*, 2 Crim. Cases, Reserved Law R. 128, decided in 1872. This last case is in entire harmony with the American decisions already cited; so that the English doctrine sustains fully the view taken by the courts in this country.

It has been said, that whatever may be the rule elsewhere, under our statute obtaining goods upon false pretenses is made larceny, and upon a prosecution for larceny it is not admissible to prove other larcenies, by way of showing the intent.

Without stopping to controvert the conclusion reached by this position, it is sufficient to refer to *Anable's case*, 24 Gratt. 563, in which it was held that whilst the statute declares that the party obtaining goods by false pretenses is guilty of larceny, it is not intended to dispense with the proof requisite to show that the goods were obtained by false pretenses. Every ingredient entering into the offence of obtaining goods by false pretenses must be shown as fully as if the statute had not been passed.

My opinion, therefore, is, that the hustings court did not err in admitting the evidence set out in the three bills of exception already adverted to, such evidence not be-

ing too remote in time or place to throw light upon the intent of the accused in the main transaction. I think, however, that the court ought to have explained to the jury that this evidence was only *to be considered by them in connection with and as explanatory of such intent, and not as proof the accused had committed other offences not charged in the indictment.

Passing from this point, we come to the fourth bill of exceptions, which presents the question of the admissibility as evidence of the record in bankruptcy. And, first, it is objected there is no proof that the accused is the identical W. F. Trogdon who filed the petition and schedule in bankruptcy, and who was adjudicated a bankrupt by the district court of the United States for the western district of North Carolina. It is very true that no witness swears to the identity of the accused; but the evidence is, nevertheless, conclusive upon that point. When the accused came to Richmond in February, 1878, he represented that the concern of which he was a member consisted of himself, I. W. Allred and Cicero Trogdon, and that it was doing business at Greensboro, North Carolina, under the style of Trogdon & Co. The petition in bankruptcy is signed by W. F. Trogdon, of Greensboro, and represents that he is a member of the firm of Trogdon & Co., consisting of himself, I. W. Allred and Cicero L. Trogdon. In the list of creditors filed among the proceedings in bankruptcy are the names of Millhiser & Co., A. Oppenheimer, and Gardner, Carlton & Baldwin, whose debts are stated to have been contracted on the 28th February, 1878. It is not within the bounds of probability that there were two mercantile firms in Greensboro, North Carolina, with the same style and name, with the same number of parties, and all bearing identically the same names, and that each of these firms should be debtor in the same amount to three mercantile firms in this city for goods purchased the same day. Upon this state of *facts there can be no doubt that the proof of identity is complete.

The next enquiry is, to what extent and for what purpose is the record in bankruptcy evidence in this case?

Without entering into a discussion of the questions so laboriously argued by counsel as to the admissibility and effect of records in civil cases, upon the trial of criminal offences, I deem it sufficient to say that in my view this record is competent to show that the copartnership of Trogdon & Co., and the individuals constituting said copartnership, were on the 20th of April, 1878, duly adjudicated bankrupts by the district court of the United States. Apart from the consideration that an adjudication in bankruptcy is in the nature of a decree *in rem* as respects the status of the debtor, it plainly appears that the whole proceeding in this case was had at the instance and upon the application of the accused. The record is also competent to show the petition and schedules filed by the accused, the statements therein contained, and any other act done or declaration made by the accused in

the progress of the proceedings in bankruptcy. And this upon the plain principle that a record is always evidence against a party as containing a solemn admission, or judicial declaration, in regard to a particular fact or facts. In such case, however, it is admitted not as a judgment conclusively establishing the matter, but as a deliberate declaration or admission that the fact was so. 1 Greenl. on Ev. § 527 a.

My opinion further is, that the several schedules filed by I. W. Allred and Cicero Trogdon, also constituting a part of the record in bankruptcy, are not legal evidence against the accused. They are simply the admissions in writing of those persons. The accused had no opportunity of controverting these statements, and no particular intent in doing so.

And even though it appeared the accused *was afforded an opportunity of controverting the admissions of his copartners, it would be unjust that upon a criminal charge involving his liberty and character, he should be prejudiced by a mere default in protecting his interest in a civil proceeding. Starkie on Ev. 301. If, therefore, upon the trial in the hustings court an objection had been made to the introduction of this evidence, it would have been the duty of the hustings court to exclude it, or instruct the jury to disregard it. A difficulty, however, arises from the fact that the accused made no objection to any specific part of the record, but contented himself with a general objection to the whole. Several decisions of this court in civil cases have held that it is the duty of the objecting party to lay his finger upon the exceptionable parts of the record, so that the mind of the trying court might be brought to bear upon them instead of making a motion equivalent to the rejection of the whole record. *Harriman v. Brown*, 8 Leigh, 697; *Friend v. Wilkinson & Hunt*, 9 Gratt. 31; *Parson's v. Harper*, 16 Gratt. 64. The same rule must necessarily prevail in criminal cases. The accused cannot by a general objection to the whole record impose upon the court the duty of examining every part of it to see whether perchance there may not be something in it not admissible as evidence. It is his duty to point out such portions of it as come within the scope of his objection. I think, therefore, the objection to the entire record in this case was too broad, and the hustings court committed no error in overruling it as made.

With respect to the fifth bill of exceptions, I think the hustings court did not err in admitting as evidence the written statement therein mentioned. This statement was the same made by the accused to Samuel Hirsh, a member of the firm of Millhiser & Co., on the 28th of February, 1878. It was forwarded on the 2d of March *to another member of the firm then in the city of New York. The latter, after receiving the statement, and after making certain enquiries in New York, telegraphed to his house, in Richmond, to ship the goods purchased by the accused to him in Greensboro. This statement must be treated as a representation made to the firm, and to every member of it. It constitutes material

evidence to show the grounds upon which both partners acted, the one in selling and the other in directing the delivery of the goods to the accused.

In the further progress of the trial the Commonwealth offered in evidence what purported to be a copy of a list of real and personal estate given in by I. W. Allred to the assessor of Randolph, North Carolina, and certified as correct by the register of deeds in that county. This paper was objected to by the accused, but his objection was overruled; and this is the subject of the sixth bill of exceptions. It does not appear when the list was made out by Allred, or when it was returned by the assessor, or when the copy was certified by the register; for the assessment, the list and the certificate are all without date. The paper did not tend, therefore, in the slightest degree to show the falsity of the representations made by the accused on the 28th of February, 1878, with respect to the real estate owned by Allred in Randolph county.

But this is not all. The paper purports to be a copy of a list on file in some office or other place of deposit in North Carolina. Such a copy would not be evidence in any court, unless the original is a matter of record, or unless there is a statute making the copy evidence. We know nothing of the functions and duties of the assessor or of the register of deeds in North Carolina. All these matters are regulated not by the principles of the common law, but by North Carolina statutes, of which the Virginia courts cannot take judicial notice. If the

Commonwealth wished to rely upon a paper of this sort, it ought to have brought the North Carolina statutes here, and proved them as other facts; and it ought to have shown by these statutes that a copy of this sort is made legal evidence.

But to prevent all misapprehension on a future trial, I will say that, in my opinion, this paper, whether a copy or the original, is not legal evidence against the accused in this case for any purpose. It is nothing more than a statement of Allred's, on oath it may be, made to some North Carolina officer, of the amount and value of his real and personal property. It was not made in the presence of the accused; it was a matter in which he had no interest or concern, and no opportunity was ever afforded him of cross-examining the person who made it. It is difficult to find even a plausible ground upon which such a paper or statement can be used upon a criminal trial.

The learned counsel representing the Commonwealth here seemed to think, however, that the evidence was very immaterial, and the accused could not have been prejudiced by it. How is it possible for us to say what effect it had on the mind of the jury? The whole purpose of introducing it was to show that the accused had made a false statement to Millhiser & Co. when he represented that his copartner Allred owned \$3,000 worth of real estate in Randolph county. If the paper proved anything, it proved the falsity of that representation; and so the jury must have considered it. Besides, at the present term

this court has held, as it has held on repeated occasions, that if the accused *may have been prejudiced* by the evidence, even though it be doubtful whether in fact he was so or not, it is sufficient for reversing the judgment.

My opinion, therefore, is, that the hustings court erred in admitting the evidence set out in the ninth bill of exceptions.

884 **Payne v. Commonwealth, supra*, p. 855, and cases there cited, decided at the present term.

The next subject of enquiry is the seventh bill of exceptions, from which it appears that the hustings court, in response to an enquiry by the jury, instructed them they must be satisfied from the evidence that the alleged false pretenses were believed by Millhiser & Co.; that but for them they would not have parted with their goods—that is, that they had the prevailing and controlling influence in making Millhiser & Co. part with their property. To this instruction the accused excepted. Upon this point it is sufficient to say that the instruction is in accordance with the decision of this court in *Fay's case*, 28 Gratt. 912; and with the current of authority elsewhere.

The questions arising upon the eighth bill of exceptions have been already considered and disposed of in connection with the first, second and third bills of exception. They do not, therefore, require any further notice at our hands.

The ninth bill of exceptions and the last, is to the refusal of the hustings court to set aside the verdict and grant the accused a new trial. According to the certificate of the judge of that court, the application for a new trial was based exclusively upon the ground that the facts relating to the belief of Millhiser & Co. in the statement of the accused were insufficient to show that this statement was the cause of the predominating cause of the delivery of the goods. In other words, that Millhiser & Co. did not give entire credence to the representations of the accused, but proceeded to obtain elsewhere information upon the subject, and upon that information they relied in giving the credit. The true enquiry, as is conceded, is whether the false pretense, either operating alone or with other causes, had a

885 controlling influence, or that **without* such pretense the owner would not have parted with his goods. Upon this point the evidence is decisive. It was proved by both members of the concern of Millhiser & Co. they would not have shipped the goods but for the statements made by the accused. It may be that the information obtained in New York had some influence upon their minds; but this is perfectly consistent with the idea that they would not have given the credit without the statement. The question was peculiarly one for the jury. If they believed the witnesses, this court cannot set aside the verdict unless the finding is shown to be either in conflict with or wholly unsupported by the evidence. My opinion, therefore, is, that the hustings court did not err in overruling the motion for a new trial

upon the ground set forth in the ninth bill of exceptions. The result is that the judgment must be reserved for the errors already indicated, the verdict set aside, and a new trial awarded.

The other judges concurred in the opinion of STAPLES, J.

The judgment was as follows:

The court is of opinion, for reasons stated and filed with the record, that whilst the hustings court did not err in admitting the evidence set out in the first, second and third bills of exceptions, it ought to have instructed the jury that such evidence was only admissible for the purpose of illustrating and establishing the intent of the accused on making the representations and in obtaining the goods which are the subject of the indictment.

The court is further of opinion that the hustings court erred in admitting as 886 evidence the paper purporting *to be the assessment of I. W. Allred's property in Randolph county, North Carolina, as set out in the sixth bill of exceptions.

The court is further of opinion there is no other error in the rulings of the hustings court as set out in the fourth, seventh, eighth and ninth bills of exception. But for the errors hereinbefore mentioned, it is considered that the judgment of the hustings court be reversed and annulled, the verdict of the jury set aside, and a new trial awarded the plaintiff in error. Upon which the said hustings court is to conform to the views herein expressed.

JUDGMENT REVERSED.

887 *Thon v. Commonwealth.

November Term, 1878, Richmond.

Statute—City Ordinance—Selling Liquor on Sunday.—Ch. 44, § 13 of an ordinance of the city of Richmond provides that every hotel keeper, and keeper of a restaurant, lager beer saloon, or other place where ardent spirits, beer, cider or other drinks are sold or given away, shall close the bar where such drinks are sold or given away every Sunday during the whole day, * * * and any person violating any provision of this section shall be fined not less than ten or more than \$500. The act of March 6, 1874, ch. 83, p. 76, enacts "that no intoxicating drinks shall be sold in any bar-room, restaurant, saloon, store or other place within the limits of this commonwealth from 12 o'clock on each and every Saturday night of the week, until sunrise of the succeeding Monday morning." And the pen-

***Statute—City Ordinance—Selling Liquor on Sunday.**—See *Morganstern v. Commonwealth*, 94 Va. 789, where the holding of the principal case that the city ordinance of Richmond is not the same as the statute prohibiting the sale of liquor on Sunday, is affirmed. See also *Thon v. Com.*, 77 Va. 289.

I. INTOXICATING LIQUORS IN GENERAL.

What Liquors Are Intoxicating—Cider.—In *State v. Oliver*, 26 W. Va. 422, it was held that crab-apple cider is not included under a statute for-

alty for a violation of this act is a fine of not less than ten nor more than \$500, and at the discretion of the court a forfeiture of his license: "provided that this law shall not apply to any city having police regulations on this subject, and an ordinance inflicting a penalty equal to the penalty inflicted by this statute"—HELD: That the ordinance is not the same as the statute, either in the specification of the offence or in the penalty, so as to bring it within the proviso of the statute; and therefore a prosecution for a violation of the act may be sustained.

The case is fully stated by JUDGE MONCURE in his opinion.

J. B. Young, for the appellant.

The Attorney-General, for the Commonwealth.

MONCURE, P. This is a writ of error to a judgment of the hustings court for the city of Richmond, rendered on the 13th 888 day of May, 1878, convicting the *plaintiff in error, C. Thon, of a misdemeanor, on an indictment which had been found against him and endorsed "a true bill" by a grand jury of the said city.

It was charged in the indictment that "C. Thon, within twelve months last past, in the

bidding the sale without a license of "spirituous liquor, wine, porter, ale or beer or any drink of a like nature."

Same—Gum-Camphor.—And likewise, under this statute, the sale of gum-camphor and alcohol mixed by the seller before delivery and sold as a medicine, is not embraced in this statute. *State v. Haymond*, 20 W. Va. 18.

Same—Essence of Cinnamon.—But under this section and an auxiliary section providing that all mixtures or preparations known as "bitters" or otherwise, which will produce intoxication, shall be deemed spirituous liquors, the sale of the essence of cinnamon is prohibited. *State v. Muncy*, 28 W. Va. 494.

Same—Beer—Brandy.—In *State v. Thompson*, 20 W. Va. 674, it was held that the words "spirituous liquors or wine," as used in the 4th section of chapter 107, Acts 1877 do not embrace beer, and consequently a druggist is not authorized by said section to sell lager beer, but must have a state license as provided under the first section of the act above referred to. In *Thomas v. Com.*, 90 Va. 92, it was held that the court would take judicial knowledge of the fact that apple brandy is intoxicating.

Local Option Laws—Constitutionality.—In *Savage v. Com.*, 84 Va. 619, it was held that the statute providing for the submission of the question of liquor license to the qualified voters of the several counties, etc., of the state, was not unconstitutional as delegating a portion of the legislative power of the general assembly. In *Helfrick v. Com.*, 29 Gratt. 844, it was held that the provisions of the Moffitt Register Law directing that the cities of the Commonwealth shall be first supplied with registers and then the towns and counties, is not unconstitutional as being an unjust and partial discrimination against liquor dealers in the cities.

Same—Number of Votes Required.—In *Chalmers v. Funk*, 76 Va. 717, it was held the local option law of Roanoke county (Acts 1881-82, page 120), requires a majority of the registered votes of the

year one thousand eight hundred and seventy-eight, at the said city and within the jurisdiction of the said hustings court of the city of Richmond, in the bar-room of him, the said C. Thon, there situate, between twelve o'clock on Saturday night of the week and sunrise of the succeeding Monday morning, unlawfully did sell intoxicating drinks, against the peace and dignity of the Commonwealth of Virginia."

A summons to appear and answer the said indictment on the 23d day of April, 1878, having been duly issued and returned "executed" on the defendant, he accordingly appeared and moved the court to quash the indictment for errors apparent on its face. And the court, after taking time to consider the said motion, and considering it accordingly, on the 27th day of April, 1878, overruled the same, to which action of the court the defendant excepted, and the case was continued till the next term of the court.

At which time, to-wit: the 13th day of May, 1878 (being the same day and year first hereinbefore written), the said defendant again appeared, and being arraigned of the said offence, tendered to the court a

county to be given against license in order to prohibit the granting of license to sell liquor, and a majority of the votes cast is not sufficient.

When License Takes Effect.—In *Sights v. Yarnalls*, 12 Gratt. 292, the case was as follows: By an ordinance of the city of Wheeling, a license to keep a house of entertainment was to expire on May 1st next succeeding the date thereof. The council having in April granted such a license for the succeeding year, *held* such grant did not vest in the party to whom it was granted any absolute or vested right to such license; but the right did not become perfect until the actual emanation of the license, or until May 1st following.

License to Partners.—While a license may be granted to two persons jointly, it was held in *Com. v. Hall*, 8 Gratt. 588, that a license to one man to keep a tavern at his house in a village does not authorize another who formed a partnership with the first for the sale of spirituous liquors which the first was authorized to sell under his license, to sell liquor at a house on the same lot and within the same inclosure as that of the tavern.

Granting License—Discretion of the Judge.—Under the two early Virginia Statutes on the subject (Va. Code 1849, pages 443-4, sec. 3 and Acts 1669-70, pages 22, 239), the supreme court construed the language so as to permit the judge, in whose jurisdiction was the granting of licenses, to refuse a license at his discretion, although the applicant measured up to the qualifications required by the acts. *Ex parte Yeager*, 11 Gratt. 655; *French v. Noel*, 22 Gratt. 454.

Same—Same—The Word "May" Construed.—In *Leighton v. Maury*, 76 Va. 865, the act of 1880 (page 148) was brought before the supreme court for interpretation. This act provides that the county court *shall* grant the license if the applicant brings himself within the law and in case of refusal, the applicant may appeal, during the term, to the circuit court, which *may* grant the license. It was held that the purpose of the act was to make a departure from the former laws on the subject, as construed in previous cases, and the words "may grant the license," as applied to the circuit court mean that that court must

special plea in abatement, in writing, verified by his affidavit, and the said plea being seen and inspected, the attorney for the Commonwealth moved the court to reject the said plea, and the court sustained the said motion and rejected the said plea.

The defendant being then required to plead to the said indictment, pleaded not guilty to the same; and thereupon a jury being sworn to try the issue joined on said plea, and having heard the evidence 889 and arguments *of counsel, returned a verdict in these words: "We the jury find the prisoner guilty, and assess his fine at ten dollars."

The defendant thereupon moved the court to set aside the said verdict, on the ground that the same was contrary to the law and the evidence, and upon the ground that the court had no jurisdiction to hear and determine the cause, and also for errors apparent upon the record, and grant him a new trial; which several motions the court overruled.

The defendant then moved the court in arrest of judgment upon the said verdict; which motion the court also overruled.

Whereupon it was considered by the court

do so if the applicant brings himself within the requirements. See also *Ex parte Lester*, 77 Va. 663.

Same—Same—West Virginia Statute.—Under the West Virginia act of 1877, ch. 107, sec. 11, providing that county courts shall not authorize a liquor license "unless they are satisfied and so enter on the record, that the applicant is not of intemperate habits, the action of the county court in granting or refusing the certificate is not reviewable, and the issuance of a *supersedeas* thereon by a judge of the circuit court is *coram non jure* and of no effect; and the supreme court will grant the person injured a writ of prohibition to restrain the appellant and judge from proceeding to enforce the judgment." *Hein v. Smith*, 13 W. Va. 358.

Keeping Open Bar-Room on Sunday—Curtain.—In *Morganstern v. Com.*, 94 Va. 787, it was held that notwithstanding the facts that a curtain incloses a bar and is nailed to the floor and reaching nearly to the ceiling, and that the bar is accessible only through a side door which, when the front door is closed, is the only way the boarders have to enter the restaurant conducted by the proprietor in the same room with his bar, and that no one is present to dispense drinks, still the bar-room is opened on Sunday in violation of sec. 3804 of the Code.

Prosecution under General Act Where There Is a City Ordinance on the Subject.—In *Thon v. Com.*, 31 Gratt. 887, the court held that ordinance of the city of Richmond regulating Sunday closing of liquor saloons not being identical with the general law of the state, did not come within the proviso of the state law which reads: "Provided that the law shall not apply to any city having police regulations on the subject, and an ordinance inflicting a penalty equal to the penalty inflicted by the statute," and, therefore, a prosecution may be sustained under the act for its violation in the city. See also *Morganstern v. Com.*, 94 Ga. 787.

Social Clubs—When License Not Required.—In *Piedmont Club v. Com.*, 87 Va. 540, it was held that a *bona fide* club for social purposes and not a mere device to evade the laws, does not require a license under the statute, Act 1889-90, page 242, to legalize its practice of keeping liquor in its rooms,

that the said C. Thon pay and satisfy the said fine of ten dollars, the sum assessed by the jury in their verdict aforesaid, together with the costs of the prosecution. And it was ordered that he be committed to the jail of said city until said fine and costs be paid or he be otherwise discharged by due course of law, such confinement not to exceed six months.

Five bills of exceptions were taken by the defendant to opinions given by the court against him in the progress of the trial, which will be noticed in this opinion as far as necessary.

The defendant applied to a judge of this court for a writ of error to the said judgment; which was accordingly awarded.

The act of assembly on which the conviction in this case was had is the act approved March 6, 1874, entitled "an act prohibiting the sale of intoxicating liquors on the Sabbath day." Acts of Assembly, 1874, p. 76, ch. 83. It enacts "that no intoxicating drink shall be sold in any bar-room, restaurant, saloon, store, or other place

within the limits of this common-wealth from 12 o'clock on each and

which was served to its members and invited guests, only the members paying therefor, no profit being made and the money being used to replenish the stock. See *Lewis v. Com.*, 90 Va. 843, where the case is distinguished, and *State v. Shumate*, 44 W. Va. 490, where a contrary conclusion was reached—the different decision being explained by a difference in the language of the statutes.

Sale of So-Called Ginger by Defendant's Clerk.—In *Savage v. Com.*, 84 Va. 582, it was held that on proof that persons had bought from the clerk at defendant's hotel, liquor called ginger which, some witnesses said tasted like whiskey, but could not say whether or not it was intoxicating, a conviction could not be had as the evidence neither shows that the liquor was intoxicating nor that the clerk was authorized by the defendant to sell it.

Payment of License—Condition Precedent.—In *Sights v. Yarnalls*, 12 Gratt. 292, it was held that, the charter of the city of Wheeling authorizing it to levy a tax on innkeepers, the payment of the tax may be made a condition precedent to the issuing of the license. And, further, that where in such case a license had been ordered, though upon payment of a tax unequal, oppressive and illegal, the payment was notwithstanding a condition precedent and must be made before any right to the license will vest. Nor can the grant be considered as absolute, the condition being inseparable from it. The innkeeper must accept the whole or reject the whole.

License—Revocation by Judge.—Sec. 106, chap. 206 of Acts 1874-75, was not repealed by the act of March 30, 1877, and therefore the judge who granted the license may revoke the same. *Hogan v. Guigon*, 29 Gratt. 705. See also *Sights v. Yarnalls*, 12 Gratt. 292.

Acts Constituting Sale—Procurement for Another.—Proof of procurement and delivery of a bottle of whiskey by one person to another, at the request of the latter, is not, without more, sufficient to establish an unlawful sale. *State v. Thomas*, 13 W. Va. 848.

Joint and Several Sales.—The retailing of intoxicating liquors to two distinct persons at the same

every Saturday night of the week until sunrise of the succeeding Monday morning; and any person violating this act shall be deemed guilty of a misdemeanor, and, if convicted, shall be punished by a fine not less than ten nor more than five hundred dollars; and shall moreover, at the discretion of the court, forfeit his license: provided that this law shall not apply to any city having police regulations on this subject and an ordinance inflicting a penalty equal to the penalty inflicted by this statute."

The only defence relied on by the defendant in the prosecution was that the said law does not apply to the city of Richmond, because it has, within the true intent and meaning of the said proviso, police regulations on the subject and an ordinance inflicting a penalty equal to the penalty inflicted by the said statute.

All the bills of exception taken and made a part of the record in the case were intended to present the said defence, and they need not therefore be set out in detail. The defence was certainly presented properly, in some if not all of them.

The police regulations and ordinance re-

time and place constitutes two distinct offenses. *Com. v. Dove*, 2 Va. Cases 261. In *Lewis v. Com.*, 90 Va. 843, it was held that a single sale of liquor without license is a violation of the law which is not limited to persons engaged in carrying on the trade.

Selling Liquor to Minors—West Virginia Statute.—Contrary to the rule in many other states, in order to constitute the offense of selling to a minor without consent of his parents, etc., under the West Virginia statute it is not necessary that the seller should have knowledge or reasonable cause to believe that the buyer was a minor. If the buyer was in fact a minor the seller must prove that the sale was made on a written order as prescribed by the statute. *State v. Cain*, 9 W. Va. 559; *State v. Gilmore*, 9 W. Va. 641.

Shifts to Evade Law.—In *Richardson v. Com.*, 76 Va. 1007, it was held that a distiller, who was permitted by law to sell liquor in quantities not smaller than one gallon, was guilty of a violation of the law in selling by the gallon and delivering in parcels at different times.

Keeper of Inn—Liability to Liquor Laws.—A person licensed to keep a house of private entertainment may be convicted of the offense of retailing intoxicating liquors without license. But such person, licensed as aforesaid, is not guilty of keeping an unlicensed ordinary merely because he sells liquor to be drunk at his place of entertainment in addition to furnishing lodgings at that place. *Burner v. Com.*, 13 Gratt. 778.

Distillers—Selling at Retail.—Distillers or persons who make intoxicating liquors from the produce of their estate cannot retail such liquor to be drunk at the place where sold under the act for the regulation of ordinances, etc., (2 Rev. Code 1819, secs. 8, 13). *Clemmons v. Com.*, 6 Rand. 681. See Acts 1889-90, p. 249, sec. 18, for present law.

Druggists—West Virginia Statute.—In *State v. Cox*, 23 W. Va. 797, it was held that under the West Virginia statute, sec. 4, ch. 107, Acts 1877, there can be no lawful sale of intoxicating liquor by a druggist, without a license, except alcohol for me-

lied on in the said defence as preventing the application of the said law to the city of Richmond is the 13th section of chapter 44 of City Ordinances 1875, p. 245, the title of which said chapter is "Concerning Various Nuisances," and which said section is in the words following, to-wit:

"13. Every hotel-keeper and keeper of a restaurant, lager beer saloon, or other place where ardent spirits, beer, cider, or other drinks are sold or given away, shall close the bar where such drinks are sold or given away every Sunday during the whole day. At all times when such bar shall be open, the license under which the business is conducted shall remain posted in some conspicuous place in the bar-room. And 891 any person violating any *provision of this section shall be fined not less than ten nor more than five hundred dollars."

An ordinance in the same words, except as to the amount of the fine, had long been in force in the said city at the time of the passage of the said act of assembly. It is contained in the 13th section of chapter 46 of City Ordinances 1869, p. 239, the title of which chapter is: "Concerning Nuisances

chanical purposes and liquors for medicinal purposes upon a physician's prescription.

Same—Liability for Illegal Sale.—A person, although a druggist, may be convicted on an indictment under sec. 1, chap. 107, Act 1877 unless he can show, that as such druggist he had complied with all the requirements provided by sec. 4, chap. 107, Acts 1877; but if convicted on such indictment only the penalty prescribed for a sale without a state license could be inflicted upon him and not the heavier penalty prescribed for the unlawful sale by a druggist as such.

Presumptions When Sale by Druggist Proved—Form of Prescription.—In *State v. Bluefield Drug Co.*, 27 S. E. Rep. 350, it was held that in any prosecution against a druggist for selling alcohol, spirituous liquor, or wine, if the sale be proven, it shall be presumed that the sale was unlawful in the absence of satisfactory proof to the contrary. But this presumption may be rebutted by the production of the written prescription of a practicing physician in good standing in his profession and not of intemperate habits, complying with the requirements of sec. 6, chap. 32 of the Code. It was further held that this statute does not require that the prescription be in the form of an order and that the prescription being drawn for "Mr. Gibson," that is a sufficient statement of the patient's name. See also *State v. Berkeley*, 41 W. Va. 455, where it is held that if the person named in the prescription does not need the liquor the physician giving it violates the statute though a third person for whom the liquor is purchased really needs it.

Physician's Prescription—Liability for Want of Good Faith.—In *State v. Berkeley*, 41 W. Va. 455, it was held that under Code, ch. 32, sec. 7, if a physician gives a prescription to enable one to obtain ardent spirits as medicine from a druggist, stating that it is necessary as a medicine and is not to be used as a beverage when he believes it is not necessary, he violates the statute.

Sales—When Made or Completed.—A member of a wholesale and retail liquor firm licensed in one county visits another county and obtains an order on his firm for whiskey which is delivered in jugs to an express agent in the county in which the firm is

not in Streets." The fine prescribed by that ordinance was "not less than twenty nor more than fifty dollars." On the 23d day of March, 1874, the said ordinance was amended as to the amount of the fine, so as to make it "not less than ten nor more than five hundred dollars;" being the same amount prescribed by the said act of assembly. It seems that the said ordinance, as so amended, has since continued to be and is still in force, and that, except as to such amendment, it continued in force from the time of its first adoption—certainly from the time of the publication of the City Ordinances in 1869. It was argued that the object of the said amendment was to bring the said ordinance within the meaning of the said proviso, which is not at all unlikely.

Now, does the ordinance, as it now stands, come within the meaning of the proviso contained in the act of the assembly? That is the question, and the only question, we have now to consider.

Certainly it ought plainly to come within the meaning of the said proviso to have that effect. The body of the act is plain in its terms, and embraces in its operation the

located and shipped by rail to the county of the purchasers where it is received by them and the express charges paid and subsequently the member of the firm being again in the county of the purchasers he collects the price. *Held*, This partner cannot be indicted in the county of the purchasers for selling liquor without a license as the sales were made in the firm's county when the jugs of whiskey were delivered to the express agent. Until then there was only an executory contract for the sale of the whiskey. *State v. Hughes*, 22 W. Va. 743.

Sale on Water—United States License.—In *Com. v. Sheckels*, 78 Va. 36, it is held that without license obtained in accordance with the laws of the state liquor cannot be lawfully sold in the state either on land or on board of a vessel, although the seller may have obtained from the United States government a special stamp tax therefor, it being expressly provided by section 3243 of the U. S. Revised Statutes, that persons holding such stamps shall not be exempt from any penalty imposed by the laws of any state for carrying on the trade within its limits.

II. PLEADING AND PRACTICE.

Indictment—Sufficiency—Language of Statute.—If the indictment may be true and still the accused may not be guilty of the offence described in the statute, the indictment is insufficient, but it is sufficient to use in the indictment such terms of description, as that if true, the accused must of necessity be guilty of the offence described in the statute. The averment "without having a license therefor according to law" is not equivalent to the averment "without paying such tax and obtaining such certificate as is prescribed by the fourteenth section" which were the words of the statute. But the words "not to be drunk where sold" not being in the statute, such allegation need not be made in the indictment. *Com. v. Young*, 15 Gratt. 664. See also *Glass v. Com.*, 33 Gratt. 827 and *State v. Whittier*, 18 W. Va. 308. And it is generally sufficient, in an indictment to allege a statutory offence in the language of the statute. *State v. Boggess*, 36 W. Va. 713.

Same—Alternative Averment as to Kind of Liquor.—An indictment for selling liquor without

whole "limits of this commonwealth." It is not pretended that the accused did not commit the act described in the body of the law, and did not incur the penalty therein prescribed, unless he can be saved from the operation of the said law by means of the said proviso.

If the proviso had plainly declared that the law should not apply to any city having 892 ing police regulations and an ordinance to the same effect with the body of the law, both as to the definition of the crime and the nature and measure of the penalty, there would perhaps have been nothing unreasonable in the law, and certainly no room for doubt as to the meaning of the legislature. The plain intention in that case would have been that the same penalty should be inflicted on the commission of a like offence, whether committed in a city or in the country; but if committed in a city with such police regulations and such an ordinance, they and not the body of the act of assembly should apply to the case. There would be nothing unequal nor unreasonable in such an effect.

But if the proviso had plainly declared that the law should not apply to any city having police regulations and an ordinance not

license in which the liquors are enumerated as "rum, wine, brandy or other spirituous liquors" is good. *Morgan v. Com.*, 7 Gratt. 592; *Thomas v. Com.*, 90 Va. 92. See also *Cunningham v. State*, 5 W. Va. 508.

Same—Duplicity.—An indictment for selling spirituous liquor may properly charge the sale to two persons. *Peer's Case*, 5 Gratt. 674.

Same—Same—Keeping Open a Barroom and Selling Liquor a Charge of One Offence.—Where a statute, in defining one offence, has specified a series of acts, any one of which separately or all together may constitute the offence, and has prescribed the same penalty for the commission of one or all the acts, the commission of any two or more of them may be alleged conjunctively in the same count of an indictment, and although each act may in itself constitute an offence under the statute, yet if they are all committed by the same person, at the same time and place, they are all to be considered as parts of the same transaction and collectively constitute a single offence, and hence an indictment which charges the defendant with keeping open a bar-room and selling liquors therein at the same time charges but one offence. *Morganstern v. Com.*, 94 Ga. 787.

Same—Surplusage—Words Rejected Must Not Change Offence.—Where one is charged in an indictment with retailing intoxicating liquors without license "to be drunk at the place where sold" the proof must sustain the averment and the words in quotations cannot be rejected as surplusage and conviction had under the indictment in that form, the offence charged in the modified indictment being essentially different from that charged in the indictment in its original form. *Com v. Coe*, 9 Leigh 620.

Same—Variance.—In *State v. Berkeley*, 41 W. Va. 455, it was held that there is no variance where a prescription is described in the indictment as stating that the liquor is absolutely necessary as a medicine whereas what the prescription states is that the physician believed it to be necessary.

Same—Negative Averments—When Not Necessary.—Where an act is made unlawful with-

to the same effect with the body of the law, either as to the definition of the offense, or as to the nature and measure of the penalty, such an effect would have been very unequal and unreasonable, even if such a law would have been valid; a question which need not be here decided.

Certainly, however, it may be here laid down that police regulations and an ordinance ought plainly to come within the meaning of the proviso when the effect would be so unequal and unreasonable.

The ordinance was ordained many years before the enactment of the law, and of course without reference to the terms of the law, which was not then in existence. The law was framed without reference to the ordinance, and probably without any knowledge on the part of its framers of the terms, if not of the very existence, of the ordinance. The expressions in each are very different, both in form and substance, though both related to the violation of the Sabbath, and the prevention of intemperance and disorder on that day. The person contemplated by

the ordinance as the person on whom 893 it was intended to operate is "every hotel-keeper and keeper of a restaurant,

out regard to whether the wrongdoer had or had not a license and none could be granted authorizing such act, the indictment need not negative license; thus where by the terms of a local option law, no license could be granted in the local option district, an indictment for the violation of such law need not negative license. *Hargrove v. Com.*, 22 S. E. Rep. 314.

Same—Exceptions in Statutes—Necessity of Negative Averment.—It is probably a universal rule in all the states that where an exception is contained in the enacting clause of the statute it should be negated in the indictment and in some states it should be negated if the exception is made a part of the enacting clause by reference. *State v. O'Donnell*, 10 R. I. 472; *State v. Rush*, 13 R. I. 198. In *Com. v. Hill*, 5 Gratt. 682, however, it was held where a statute enacted that "any person other than such as are hereinafter excepted who shall, otherwise than is hereinafter expressly provided, sell, etc.," the exceptions referred to were not so incorporated into the enacting clause as to require their negation in the indictment.

Laying Venue—Averments of Place.—In an indictment for the unlawful sale of intoxicating liquor, the venue should be laid in the county where the sale was made. *State v. Hughes*, 22 W. Va. 743. Where the place is not of the essence of the offence and does not affect the degree of punishment, the place need not be particularly alleged in the indictment. *State v. Boggess*, 36 W. Va. 713; *State v. Cottrell*, 31 W. Va. 162. It is otherwise where the place is of the essence of the offence. *State v. Church*, 4 W. Va. 745. See also *Conley v. State*, 5 W. Va. 522, as to the particularity with which the place must be charged when it is of the essence of the offence. *Com. v. Head*, 11 Gratt. 819. The same rules apply to averments of the time of sale. *Arrington v. Com.*, 87 Va. 96; *Savage v. Com.*, 84 Va. 582.

Averment of Kind of Liquor Sold.—Where the statute makes it an offence to retail ardent spirits without license the indictment will be sufficient if it alleges a sale of whiskey, brandy and other liquors to

lager beer saloon, or other place where ardent spirits, beer, cider or other drinks are sold or given away," who is required by the ordinance to "close the bar where such drinks are sold or given away, every Sunday during the whole day. And it directs that at all times when such bar shall be open the license under which the business is conducted shall remain posted in some conspicuous place in the bar-room. On the other hand, the act declares that no intoxicating drink shall be sold in any bar-room, restaurant, saloon, store or other place within the limits of this commonwealth from 12 o'clock on each and every Saturday night of the week until sunrise of the succeeding Monday morning.

Now, here are several material differences between the offence prohibited by the ordinance and the offence prohibited by the act. The former offence is that of keeping open on Sunday the bar where such drinks as are enumerated in the ordinance are sold or given away; and also that of not keeping posted in some conspicuous place in the bar-room, at all times when such bar shall be open, the license under which the business is conducted. The latter offence is that of selling any intoxicating drink in any bar-room, restaurant,

the grand jurors unknown. *Tefft v. Com.*, 8 Leigh 721.

As to Name of Purchaser.—The general rule is that in an indictment for retailing intoxicating liquor without license it is not necessary to name the person to whom the liquor was sold, and the words "to persons to the jurors unknown" may be rejected as surplusage. *Hulstead v. Com.*, 5 Leigh 724. See also *Com. v. Dove*, 2 Va. Cas. 26; *State v. Ferrell*, 30 W. Va. 683; *State v. Chisnell*, 36 W. Va. 659; *State v. Pendergast*, 20 W. Va. 672. But under the act pertaining to the selling of liquor to minors without their parent's consent it was held that the offence was an injury to third persons and that the name of the minors, if known, should have been stated, and the indictment stating that the sale was made to minors whose names were unknown to the jurors, it is a fatal variance between the proof and the indictment if the evidence shows that the names of the minors were known to the jurors. *Morgenstern's Case*, 27 Gratt. 1018. See also the opinion of this case in which *Com. v. Smith*, 1 Gratt. 553 is distinguished.

Averments of Quantity of Liquor Sold.—The Precision Necessary.—The quantity of liquor need not be proved precisely as charged in the indictment. In *Brock v. Com.*, 6 Leigh 634, the indictment states that the liquor sold was one and one-half pints of whiskey and it was held that proof of selling any quantity and any kind of intoxicating liquor was sufficient to support the indictment.

Local Option District.—An allegation that the offence was committed in a local option district is not supported by proof that the liquors were sold by the defendant in the county, there being no proof identifying the district. *Morgan v. Com.*, 90 Va. 80. See also *Savage v. Com.*, 84 Va. 582. The court will take judicial knowledge of the adoption of a local option law. *Thomas v. Com.*, 90 Va. 92; *Hargrave v. Com.*, 22 S. E. Rep. 314; *Morgan v. Com.*, 90 Va. 80.

Illegal Gift on Election Day.—In charging an unlawful gift of spirituous liquor on election day, it is not necessary to state the facts constituting the person to whom the liquor was given a qualified voter,

saloon, store or other place within the limits of this commonwealth from 12 o'clock on each and every Saturday night of the week until sunrise of the succeeding Monday morning. A person may violate the ordinance by keeping open on Sunday the bar where such drinks are sold, though he does not sell a single drink. The selling of a drink is not a necessary ingredient of the offence. But a person cannot violate the statute without selling an intoxicating drink, even though he should keep open "the bar where such drinks are sold or given away, every Sunday during the whole day." The keeping open the bar, even for a single instant, is *not a necessary ingredient of the offence under the statute.

The fact obviously is that the two laws, city and state, were enacted *diverso intuitu*. The former was aimed at the offence of keeping open a bar-room on Sunday, while the latter was aimed at the offence of selling an intoxicating drink anywhere "within the limits of this commonwealth from 12 o'clock on each and every Saturday night of the week until sunrise of the succeeding Monday morning." They were obviously enacted without any reference to each other. Of course the ordi-

nor is it necessary to allege any special criminal intent. *State v. Pearis*, 35 W. Va. 320.

Manner of Sale—Necessary Allegations.—In *Boyle v. Com.*, 14 Gratt. 674, it was held that an indictment under the statute Va. Code, 1849, page 209, sec. 18, providing a fine for the retailing of wines, etc., to be drunk where sold must allege that the selling was by retail. See also *Arrington v. Com.*, 87 Va. 96. But in *Savage v. Com.*, 84 Va. 619, it was held that an indictment under the local option law providing generally for punishment for the sale of any intoxicating liquors in districts voting against license, the indictment need not charge that the liquor was sold by retail or wholesale or at any particular place.

Local Option Law—Prosecution under General Law.—In *Webster v. Com.*, 89 Va. 154, it was held that in a county where the "local option law" has been adopted, the sale of liquor without license is none the less liable to prosecution as a violation of the general liquor laws.

Same—Irrregularities in Election.—Parol evidence is admissible on an application for a liquor license in a county in which a local option election had been held, to prove that notice of the election had not been posted. *Haddox v. County of Clarke*, 79 Va. 677.

Joinder of Offences—Separate Courts—Election.—Several misdemeanors of the same nature and upon which the same or similar judgments may be rendered may be united in the same indictment under separate courts. *Mitchell v. Com.*, 93 Va. 775; *Peer's Case*, 5 Gratt. 674; *Lewis v. Com.*, 90 Va. 843. In cases of indictments charging several misdemeanors of the same general character in separate counts the prosecuting attorney will not be compelled to elect between them. *Mitchell v. Com.*, 93 Va. 775.

Information—Conviction for Second Offence.—Under the act of 1 Rev. Code 1792, which provides that persons having been convicted of retailing liquors who shall afterwards be guilty of the same offence and convicted thereof shall receive an increased punishment, a judgment as upon a second conviction should not be rendered in a case where a defendant is convicted on the same day under each of

nance was enacted without reference to the statute, which was not then in existence; and the statute defines a very different offence from that which was defined by the ordinance. The attempt now made to make the two offences substantially the same must therefore fail. It is said that the city council, by their amendment of the ordinance, made seventeen days after the enactment of the statute, intended thereby to supersede the statute. But whatever their intention may have been, they certainly had no power to supersede the statute as to the city, at least except in the very mode prescribed by the statute. That mode, evidently, was to define the same offence and prescribe the same punishment substantially in the ordinance as had been done in the statute. The council may have supposed that it was only necessary to make the penalty the same under each, and that they did so by prescribing the same amount of fine for the offence of violating the ordinance which had been prescribed for violating the statute. But did that make even the penalty the same? The statute not only prescribe a fine for the offence, but declares that the offender shall, moreover,

two informations for retailing spirituous liquor, the second information not alleging that it is for a second offence, after a conviction for a similar offence. *Com. v. Welsh*, 2 Va. Cas. 57. See also *Rand v. Com.*, 9 Gratt. 738 and *White v. Com.*, 79 Va. 611.

Omission—Presentment—Information.—In *Com. v. Chalmers*, 2 Va. Cases 76, it was held that a motion in arrest of judgment should be overruled where the information made the averment of "without license" though the presentment omitted to do so, the defendant having pleaded "not guilty" to the information and a verdict having been rendered against him after trial.

Selling Liquor to Minors—Evidence.—In a proceeding under sec. 560 of the Code, to revoke a license to sell whiskey on the charge that defendant had been guilty of selling liquor to minors, it is competent to offer in evidence a number of indictments found in the same court against the same defendant for selling liquor to minors and also to receive the evidence of a minor that, within twelve months prior to the time when the license sought to be revoked took effect the said minor had purchased intoxicating liquor of the defendant. The whole matter being heard and determined by the court it is not confined to the strict rules of evidence which obtain upon the trial of an issue before a jury, but great latitude is allowed the court that it may be satisfied whether or not it had intrusted the sale of liquor to an unfit person or whether the privilege granted has been abused. *Lillienfeld v. Com.*, 92 Va. 818.

Right of Contestant to Appeal.—In *Ailstock v. Page*, 77 Va. 386 and *Ex parte Lester*, 77 Va. 663, the court expressly overrules *Leighton v. Maury*, 76 Va. 875, so far as that case decides that the contestant is such a party in interest that he is entitled to an appeal or writ of error. In *Ex parte Lester*, 77 Va. 663, it was held that under the Act of 1882 the appellant may appeal to the circuit court or he may upon bill of exceptions taken at the trial apply to the circuit court for a writ of error and *supersedeas*; and if the circuit court also erroneously refused the license, its decision is reviewable by the Supreme court upon appeal, or writ of error and *supersedeas* as in other cases; the applicant is a party directly in inter-

at the discretion of the court, forfeit his license. If this forfeiture, at the discretion of the court, be considered *as a part of the penalty inflicted by the statute, then, clearly, the penalty inflicted by the ordinance, even as amended, is not equal to the penalty inflicted by the statute. But it is not intended, because not deemed necessary, to decide that question in this case.

Without deciding whether or not the penalties for violating the ordinance and the statute are the same, it is enough to say that the offences under each are not substantially the same; and this we think we have already shown.

But in addition to what we have said on that subject, we have further to say, that the statute embraces a period which is not embraced in the ordinance—that is, from twelve o'clock every Sunday night until sunrise of the succeeding Monday morning. No sale of intoxicating drink nor keeping open a bar during that period would be a violation of the ordinance, whereas a sale of such drink during that period at any other place than one governed by such ordinance would be a violation of the statute. This would create

est in the decision refusing the license and comes within the letter of Code 1873, ch. 178, sec. 2, but this is not true of the contestant who cannot appeal. See also *Haddox v. County of Clarke*, 79 Va. 677.

Same—Same—Present Law.—Under Acts 1883-4, 605, application for license to retail liquor must be made to the county court, and either applicant or defendant may appeal of right from the decision to the circuit court, where the application is heard *de novo*, and no appeal lies to the decision of the latter court.

Proceeding to Revoke Liquor License—It Is Not a Criminal Proceeding.—In *Cherry v. Com.*, 78 Va. 375, it was held that it was not the intention of the legislature to require in proceedings to revoke liquor licenses under sec. 106, chap. 206, Acts 1874-5, p. 244, the application of the strict and technical rules applicable to indictments, that in such proceedings the defendants are competent to testify in their own behalf, as the proceedings are not criminal in their nature. It was held further that such proceedings may be on the motion of any other person as well as the commonwealth's attorney and the defendant is not entitled to trial by jury. The object is not punishment but revocation of privilege and it is no bar to the proceedings that it is founded on some act or offence of which the defendant has been formerly convicted, citing *Davis v. Com.*, 75 Va. 944. See *Lillienfeld v. Com.*, 92 Va. 818, for what is a sufficient notice in such proceedings.

Writ of Error for Commonwealth.—In *Com. v. Scott*, 10 Gratt. 749, it was held that in a prosecution for selling liquor by retail to be drunk at the place where sold, a writ of error lies for the commonwealth from the judgment of an inferior court, the case coming within the statute, Va. Code 1887, chap. 198, sec. 4052, providing that a writ of error shall lie for the commonwealth if the case be for the violation of a law relating to the revenue.

Former Jeopardy.—Prosecution for selling liquor on Sunday contrary to Code, sec. 3804, is no bar to prosecution for selling same liquor without license contrary to Acts 1889-90, p. 242, sec. 1. *Arrington v. Com.*, 87 Va. 96.

a palpable difference and inequality in the law governing different localities of the same State, and could never have been contemplated or intended by the legislature.

There s still another reason for saying that neither the offences nor the penalties defined and prescribed by the ordinance and the statute are substantially the same; and that is, that a person may be convicted and punished under the statute for every act of selling intoxicating drinks on the same day as for a different offence; whereas he can be convicted and punished under the ordinance of only one offence for not closing the bar where such drinks are sold or given away on "Sunday during the whole day."

We have fully considered the able arguments of counsel in this case, and also the able opinion of the judge of the court below who presided at its trial, but deem
896 it *unnecessary to notice them more in

detail than we have already in effect done.

We are therefore of opinion that there is no error in the judgment of the court below, and that it ought to be affirmed.

ANDERSON and STAPLES, J's, concurred in the opinion of MONCURE, P.

CHRISTIAN and BURKS, J's, concurred in the judgment, though not in all the views presented in the opinion of MONCURE, P. They thought that the provisions of the statute and of the ordinance of the city of Richmond were substantially the same; but the penalty was not. The keeping a bar-room open one day was one offence under the ordinance, and for which only one penalty could be inflicted; whilst under the statute every sale is a separate offence, for which a separate penalty may be inflicted.

JUDGMENT AFFIRMED.

INDEX.

ACTIONS.

An attachment at law is levied on goods of the debtor, and afterwards, on the same day, another attachment is levied on the same goods and also two leaseholds, as the property of the debtor. Upon interpleader in the second attachment by a claimant of the property, the attachment is defeated; and then the first attachment is dismissed. In an action on the case by the claimant of the property against the plaintiff in the second attachment—**Held**: Though at common law action on the case was the proper remedy so far as the goods embraced in the first attachment were involved, and trespass vi et armis was the remedy as to the leaseholds which were not levied on by the first, yet as under the Virginia statute case may be brought wherever the action of trespass vi et armis could be brought, the action on the case was properly brought to recover the damages sustained as to all the property attached.

Fechheimer v. National Exch. Bank of Norfolk, 651

ADVANCEMENTS.

1. If a gift unexplained, in the lifetime of a father who dies intestate, to one of his children, is to be presumed in law to be an advancement, this presumption may be repelled by evidence.

Watkins & als. v. Young & als., 84

2. Whether a gift by a father in his lifetime to a child is an absolute gift, or an advancement, depends upon the intention of the father; and his statements or declarations made at the time of the gift, or subsequently, are competent evidence to show what was his intention in making the gift. In this case the evidence is conclusive to prove it was an absolute gift and not an advancement. *Idem,* 84

3. The only issue in the cause being whether the gift of the father was intended to be absolute or an advancement, and all the evidence having been taken with reference to that issue, it was proper for the court to decide it without reference to a commissioner to inquire and report upon the question. *Idem,* 84

ALIMONY.

1. Alimony had its origin in the legal obligation of the husband, incident to the marriage state, to maintain his wife in a manner suited to his means and his social position, and although it is her right, she may by her misconduct forfeit it; and when she is the offender, she cannot have alimony on a divorce decreed in favor of the husband. So long as he has committed no breach of marital duty he is under no obligation to

provide her a separate maintenance, for she cannot claim it on the ground of her own misconduct. *Harris v. Harris,* 13

2. According to the ecclesiastical law no alimony was allowable on a decree a vinculo matrimonii. And if under the Virginia statute the court has a discretion, upon decreeing such a divorce, to allow alimony to the wife, that discretion should be exercised upon the same principles which govern in a case of divorce from bed and board. *Idem,* 13

3. The circumstances must be very peculiar, if any such case there could be, which justifying a decree for an absolute divorce in behalf of the husband, for wilful desertion of his wife, *would at the same time warrant a decree in her behalf, that he should out of his own estate maintain her as long as she lived, although after the divorce she should become the wife of another. *Idem,* 13

4. The wife having left her husband in 1873, upon the ground that he would not control his servants and maintain her rightful authority as his wife, the husband is entitled to a decree for a divorce a vinculo matrimonii on the ground of desertion, on a bill filed by him in 1877. And the wife having left her husband without any sufficient cause, the court upon decreeing the divorce cannot allow her alimony out of her husband's estate. *Idem,* 13

5. In a suit by a wife against her husband for alimony, there is a decree in her favor for \$300 a year in monthly payments of \$25. The husband appeals from the decree, and pending the appeal dies. The appellate court affirming the decree, the wife is entitled to the allowance up to the time of his death. *Francis v. Francis,* 283

APPELLATE COURT.

1. S brings debt against W, the maker, and H and F, endorsers of a negotiable note. There is an office judgment at rules against all the defendants. At the next rules office judgment confirmed as to W and H; death of F suggested. At the next term of the court there is judgment against W and F. Afterwards scire facias issued and served on F's executrix to revive the action, and she appears and pleads nil debet, and obtains a continuance; and this is repeated. There are three trials and a verdict in her favor—**Held**: F's executrix not having made any question in the court below as to the revival of the suit against her by scire facias, she must be held to have waived the question, and she cannot make it in the appellate court.

Slaughters v. Farland's ex'x, 134

2. In a suit in equity among creditors of a corporation, one of them claims under a deed of trust, which is executed by the president and secretary in behalf of the corporation; but the deed is not in the name of the corporation, nor has it the corporate seal. No objection having been made to the deed on these grounds, in any of the pleadings or proceedings in the cause, and only in the petition for an appeal, the objection comes too late, and will not be considered in the appellate court.

Wroten's ass'nee v. Armat & als., 228

3. On an exception to the refusal of the court to set aside the verdict and grant a new trial on the ground that the verdict is contrary to the evidence, if the evidence and not the facts is certified, the appellate court will not reverse the judgment unless, after rejecting all the parol evidence of the exceptor, and giving full faith and credit to that of the adverse party, the decision of the court appears to be wrong.

Danville Bank v. Waddill's adm'r, 469

4. A decree of the court below, founded on an affidavit and statement handed to the court at the time of the decree, and to which the appellants had no opportunity to except, may be objected to by them in the appellate court.

Beckwith & wife v. Avery's adm'r & als., 533

5. In an insurance case where the case is submitted to the court, and the evidence as to the value of the property insured is conflicting, the appellate court cannot interfere with the judgment of the court below on the ground that the judgment is excessive.

Southern Mutual Ins. Co. v. Kloeber, for, &c., 739

6. In an attachment at law to subject a legacy left to the debtor in the hands of the executors of the testator, the common law court having rendered a judgment in favor of the defendant. On appeal this court will reverse the judgment and set aside the verdict, and direct that the proceedings on the garnishee summons be dismissed, but without prejudice to the right of the plaintiff to assert his claim in a court of chancery.

Whitehead's adm'r v. Coleman's ex'ors, 784

899 *7. Though an exception is taken and entered at the time, that a question asked of a witness is leading, the exceptant should bring it to the attention of the court and obtain an order for the suppression of the objectionable testimony; and if he fails to do this, the exception will not be regarded in the appellate court.

Summers v. Darne & als., 791

8. If the only objection to the evidence was its irrelevancy, and it could not possibly have prejudiced the prisoner, then the judgment ought not to be reversed for the error in not excluding it; for to authorize the reversal of a judgment for admitting irrelevant evidence, not only must the evidence be irrelevant, but it must be of such a nature

as that its admission may have prejudiced the prisoner. If he may have been so prejudiced, even though it be doubtful whether in fact he was so or not, that is sufficient ground for reversing the judgment. See Southern Mut. Ins. Co. v. Trear, 29 Gratt. 255. Payne's case, 855

ARBITRATION AND AWARD.

The County of Norfolk and the City of Portsmouth in March, 1877, enter into an agreement by which they submit all matters in dispute between them to the arbitration of R. H. Baker, of the city of Norfolk, and John R. Kilby, of Nansemond county, men of high standing as men and lawyers. The agreement states the subjects of dispute under fourteen heads, and they include suits both at law and in equity, questions of law and fact, questions in relation to land, docks, ferries, and money; and the parties waive the plea of the statute of limitations, and all other technical pleas which would interfere in any manner with the award of the arbitrators, except upon the very right and justice of the case as to all matters in controversy; the award to be entered of record in the circuit court of the county of Norfolk and the court of hustings for the city of Portsmouth. In June, 1877, the arbitrators made their award, passing upon each of the subjects submitted to them. Upon a summons to the City of Portsmouth to show cause against entering the award as the judgment of the circuit court of Norfolk county, the City of Portsmouth filed numerous exceptions to the award, which were overruled by the court. Upon appeal—Held:

1. It is manifest from all the papers in the case that the arbitrators intended to settle all matters of law and fact upon the very right and justice of the case.

City of Portsmouth v. Norfolk County, 727

2. But conceding that they intended to decide according to law, and that they have not done so in every instance, it does not follow that the award is invalid. The court does not set aside an award merely because it may differ with an arbitrator as to the law of the case. Idem, 727

3. Where the merits in law and in fact are referred to an arbitrator of competent knowledge, and there is not any question reserved by him, the court will not open the award unless something can be alleged amounting to a preverse misconstruction of the law, or misconduct on the part of the arbitrator. Idem, 727

4. Where arbitrators mean to decide according to law, and they mistake the law in a palpable material point, the award will be set aside. But their decision, upon a doubtful point of law, or in a case where the question of law is designedly left to their judgment, will generally be held conclusive. It must appear they grossly mistook the law; and the court will not interfere merely because it would have given a different decision in the particular case. Idem, 727

5. It does not appear that the arbitrators have committed any very material or palpable error in the various points decided by them. *Idem*, 727

ASSIGNMENTS.

1. An assignment to a trustee to pay 900 debts of the assignor, of a debtor's claim for money due, is valid against a subsequent attaching creditor of the assignor, though the assignment has not been recorded.

Kirkland, Chase & Co. v. Brune & als., 126

ATTACHMENTS.

1. An assignment to a trustee to pay debts of the assignor, of a debt or claim for money due, is valid against a subsequent attaching creditor of the assignor, though the assignment has not been recorded.

Kirkland, Chase & Co. v. Brune & als., 126

2. L & S carried on two stores in Norfolk on premises of which they held leases. On the 8th of May, 1866, they conveyed to F all their goods in these stores, all debts due them, and the leasehold premises, in trust to pay certain specified debts, with authority to take possession, sell the goods and collect the debts. On the 15th day of May, W sued L & S in assumpsit for \$913.30, and on the same day sued out an attachment against their effects, and this attachment was levied on all the goods and debts at the two stores, which were taken possession of by the sergeant of the city. On the same 15th of May, but two or three hours after the attachment of W was levied, the National Exchange Bank of Norfolk sued out an attachment against the property of L & S, claiming a debt of \$11,665, and this attachment was levied by the same officer upon the goods, &c., in his hands under the other attachment, and also upon the leaseholds of the two houses. In this case F interpleaded, and there was a verdict and judgment in his favor; and afterwards the suit of W was dismissed. F then sued the Bank in an action of trespass on the case for the damages he had sustained by the levy of the attachment—HELD:

1. Though at common law action on the case was the proper remedy so far as the goods, &c., embraced in the first attachment were involved, and trespass *vi et armis* was the remedy as to the leaseholds which were not levied on by the first, yet as under the Virginia statute case may be brought wherever the action of trespass *vi et armis* could be brought, the action on the case was properly brought to recover the damages sustained as to all the property attached.

Fechheimer v. National Exch. Bank of Norfolk, 651

2. F has a right to recover from the Bank all the damages he has sustained by the levy of the attachment of the Bank upon the two storehouses held under lease and the withholding the possession from him. *Idem*, 651

3. If the attaching creditors had been joint trespassers in seizing and detaining the attached effects, then they would have been jointly and severally liable for the whole amount of the damage resulting from such joint trespass. But their acts in so seizing and detaining said effects having been several, they are severally liable for the damage resulting from their several act. *Idem*, 651

4. The attachments and returns of the officer thereon showing that the property was held under both attachments, parol evidence is not admissible to prove that it was held exclusively under the first attachment. *Idem*, 651

5. If the plaintiff seeks to introduce a copy of the record in the attachment suit, to show its existence and how the case had been disposed of, it can only be done by introducing it for all the purposes for which it may be available to either party. *Idem*, 651

3. In an attachment at law by W's administrator against J, the executors of C are summoned as garnishees, and the plaintiff in the attachment seeks to subject a legacy left by C to J to the payment of his debt. A common law court has not jurisdiction to compel the executors to pay the legacy.

Whitehead's adm'r v. Coleman's ex'ors, 784

BAILMENTS.

1. If a person to whom a sum of money has been intrusted for safe-keeping is robbed of it, he is not liable to the person who entrusted him with it for the money.

Danville Bank v. Waddill's adm'r, 49

BANKS.

1. See National Banks, No. 1, 2, and *Wroten's ass'nee v. Armat & als.*, 228

2. See Negotiable Instruments, No. 3, 4, and *Crews & als. v. Farmers Bank of Va., for, &c.*, 348

CITY OF RICHMOND.

1. The city council of Richmond has authority under its charter and the constitution of Virginia to require the owner of a lot upon a street which has been graded, paved and guttered by the city, to pave the sidewalk in front of his lot, and when it is at the corner of the street to pave the sidewalk on the side of the lot. And if the owner does not have the work done within the time prescribed by the ordinance, the city may have it done and collect the money from him.

Sands, receiver, v. City of Richmond, 571

2. If the charter of the city requires that an ordinance providing for the opening, grading, &c., of streets shall be passed by a vote of three-fourths of each branch of the council, if the present ordinance was not so passed, yet if it is an amendment of a prior ordinance giving substantially the same powers to the council, the act of the council will be sustained. *Idem*, 571

3. F, who lives outside of the city limits, rents a stall in the market-house of the city of Richmond, where he carries on his business as a butcher. He prepares his meat for market at his house, and owns two carts and horses, which he uses to bring his meats from his house to his stall, and take out such of it as is not sold, and he pays a tax on these horses and carts as property in the county—**Held**: Under the charter of the city, the city council may require F to take out a license for so using his carts and horses, and to pay a tax on said license.

Frommer v. City of Richmond, 646

4. What is not a dedication of a public way over which the city authorities have control, and can authorize a railroad company to lay its track along it. See Dedication of Way, No. 1, and

Talbott v. Richmond & Danville R. Co., 685

5. Ch. 44, § 13 of an ordinance of the city of Richmond provides that every hotel keeper, and keeper of a restaurant, lager beer saloon, or other place where ardent spirits, beer, cider, or other drinks are sold or given away, shall close the bar where such drinks are sold or given away every Sunday during the whole day, * * * and any person violating any provision of this section shall be fined not less than ten nor more than \$500. The act of March 6, 1874, ch. 83, p. 76, enacts "that no intoxicating drinks shall be sold in any bar-room, restaurant, saloon, store or other place within the limits of this commonwealth from 12 o'clock on each and every Saturday night of the week, until sunrise of the succeeding Monday morning." And the penalty for a violation of this act is a fine of not less than ten nor more than \$500, and at the discretion of the court a forfeiture of his license: "provided that this law shall not apply to any city having police regulations on this subject, and an ordinance inflicting a penalty equal to the penalty inflicted by this statute"—**Held**: That the ordinance is not the same as the statute, either in the specification of the offence or in the penalty, so as to bring it within the proviso of the statute; and therefore a prosecution for a violation of the act may be sustained.

Thon's case, 887

COMMISSIONERS OF THE REVENUE.

1. By the charter of the city of Portsmouth, which was passed March 11th, 1873, commissioners of the revenue for the city were to hold their office for two years from a day named on which they should enter on 902 their office. By the act approved March 16th, 1875, ch. 206, p. 215, it is provided that there shall be commissioners of the revenue for every county and one for each city, which said commissioners of the revenue shall hold their office for four years from a day named on which they should enter upon their office—**Held**:

1. Upon a consideration of said last act, that it applies to all cities as well as counties, including the city of Portsmouth, and

was a repeal, by implication, of the provisions of the charter of the city of Portsmouth in relation to the duration of the office of the commissioners of the revenue.

Haynes v. The Commonwealth, for, &c., 96

2. That a commissioner of the revenue for the city of Portsmouth, who was elected and who qualified in 1876, was entitled to hold his office for four years, unless sooner removed. *Idem*, 96

CONSPIRACY.

1. For proceedings on a trial for a conspiracy. See Criminal Jurisdiction and Proceedings, No. 4, 5, 6, 7, and

Jones' case, 836

CONDITIONS.

1. See Conveyances—Fraudulent, No. 1, and King's ex'ors & als. v. Malone, & als., 158

CONSTITUTIONALITY OF STATUTES.

1. The act of March 25, 1873, amending § 3 of the act of March 3, 1866, so far as it authorizes the reopening of a judgment rendered since the said March 3, 1866, is unconstitutional and void, both because it is an infringement upon the powers of the judicial department of the government, and because it impairs the obligation of contracts.

Ratcliffe v. Anderson, 105

CONTRACTS.

1. As to what is and what is not a valid sale of personal chattels, and when a vendor may or may not recover the chattel, see Sales of Personal Chattels, No. 1, 2, 3, 4, and

Old Dom. Steamship Co. v. Burckhardt, 664

CONVEYANCES—FRAUDULENT.

1. M, a few days before his death, made a deed, by which, in consideration, as expressed in the deed, of \$1,000, he conveyed to his children R and E, four hundred acres of land. M's estate proved insolvent, and C and C, two of his creditors, filed a creditor's bill against R and E to set aside the deed, as made without consideration deemed valuable in law. R and E answered, insisting the deed was on valuable consideration; R claiming his father was indebted to him for services, which he states, is more than \$1,500; and E, that he owed her money loaned him at different times, more than \$500. Whilst this suit was pending R and E conveyed to their counsel J and B, one undivided third of the land in consideration of services rendered and to be rendered in said suit, with condition: "This deed is intended to pass no title whatsoever to said parties of the second part, unless they succeed in establishing the title of the said parties of the first part to the tract of land hereinbefore mentioned." The case was decided in favor of the defendants.

K, another creditor of M, then filed a bill against R and E and J and B, charging that

the deed to R and E was without valuable consideration, and was intended to defraud the creditors of M, and that the defendants had notice of the fraud. All of them deny notice of an intention of M to defraud his creditors. R and E rely upon the same grounds stated in the former case; and J and B insist that the condition on which the deed had been made to them had been performed, and they were purchasers for value. This court held:

1. That upon the evidence in this
908 *cause the deed to R and E was made without reference to any indebtedness of M to R and E, if any such existed, but upon a consideration not deemed valuable in law; and was therefore void as to creditors of M at the date of the deed.

King's ex'ors & als. v. Malone & als., 158

2. That the condition annexed to the deed to J and B was not performed by the decree in favor of R and E in the suit of C and C; but as creditors of M not parties to that suit, were not bound by the decree, the condition extended to any other suit by such creditor; and as in this case the court held the deed to R and E void as to the creditors of M, J and B had no title to the undivided third of the land under the deed to them. Idem, 158

CORPORATIONS.

1. The charter of the city of Portsmouth concerning the duration of the term of commissioners of the revenue was repealed by the act of March 16, 1875, ch. 206, § 25. See Commissioners of the Revenue, No. 1, and

Haynes v. The Commonwealth, for, &c., 96

2. See National Banks, No. 1, 2, and Wroten's ass'nee v. Armat & als., 228

3. A municipal corporation which, by its charter, has the power to lay out, improve, light and keep its streets in order, is liable in damages at the suit of an individual who sustains injury by reason of the neglect of said corporation to keep its streets in a proper and safe condition.

Noble & Wife v. The City of Richmond, 271

4. This rule applies to Municipal Corporations proper; but quære, if it applies to quasi corporations, such as counties, townships, and New England towns, unless they are so declared to be liable by some statute.

Idem, 271

5. The grant of power in the charter of a city to the council to lay out, improve, light, &c., its streets, is a grant to the corporation, and is of such a character as to prevent its exercise by any other person or body.

Idem, 271

6. The action cannot be maintained solely on the defect or want of repairs in the street or sidewalk, but the plaintiff must allege and prove that the corporation had notice of such defects (which notice may be implied), and that he was injured either in person or prop-

erty in consequence of such defects in such street or sidewalk. Idem, 271

7. In a suit by a corporation the plea of "nul tiel corporation" unaccompanied by an affidavit denying the corporate existence of the plaintiff does not put the plaintiff to the proof of its corporate existence.

Crews & al. v. Farmers Bank of Va., for, &c., 348

8. For the power of the city of Richmond to require owners of lots to pave the sidewalk, see City of Richmond, No. 1, 2, and Sands, receiver, v. City of Richmond, 571

9. For the power of the city of Richmond to require a person living outside the city limits, but doing business in the city, and using carts and horses in his business, to take out a license and pay a tax upon it, see City of Richmond, No. 3, and

Frommer v. City of Richmond, 646

COUNTY SUBSCRIPTION TO INTERNAL IMPROVEMENT COMPANIES.

1. Though the act of January 15th, 1875, Sess. Acts 1874, ch. 37, p. 29, provides a mode by which the qualified voters of a county or corporation may contest the due returns of the election or decision of the voters of said county or corporation upon the question whether the county or corporation shall subscribe to the stock of an internal improvement company, a court of equity still has jurisdiction of the question upon a bill filed by fifteen or more of the citizens and taxpayers of the county or corporation, and to enjoin the issue of the bonds of said county or corporation in payment of said sub-
904 scription *if the proceeding has not been properly conducted.

Redd v. Supervisors of Henry county, 695

2. In the proceeding under the statute, Code of 1873, ch. 61, §§ 62, 63, 64, 65, in relation to subscriptions by a county or corporation to the stock of an internal improvement company, the provisions of the law must be strictly pursued; but a literal compliance in every particular, however unessential, is not required. Substantial compliance with the law in every essential feature is all that is necessary. Idem, 695

3. The failure to comply strictly with the provisions of the statute which are not mandatory, but merely directory, will not vitiate the proceedings, so as to render the subscription invalid. Idem, 695

4. Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly, and prompt conduct of the business, and by a failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; and if the act is performed, but not in the time or in the precise mode indicated, it may still be sufficient, if that which is done accomplishes the substantial purpose of the statute. Idem, 695

5. The order of the county court directing the sense of the qualified voters to be taken,

directs the election to be held by the commissioners of election in conformity to law. Though the order does not expressly require the sheriff to act, so far as the agency of the sheriff was rendered necessary by the law, although not named in the order, he was within its operation. *Idem*, 695

6. It was not necessary, under the statute, that the commissioners of election should be designated by name in the order, as there were already commissioners legally appointed. They were appointed at the May term of the court, and though the statute directs they shall be appointed at the April term, this provision of the statute is clearly directory. *Idem*, 695

7. For other questions in relation to the appointment of the board of commissioners to examine the return, and the time when the commissioners of election shall make their returns, see the opinion of Burks, J. *Idem*, 695

8. The commissioners of election are the body to compute and ascertain the number of registered voters in the county, the number of votes cast at the election, the number voting for and the number voting against subscription. In ascertaining and reporting the number of registered voters in the county they are to be guided and controlled by the registration books. But where the register had noted on the book the death or removal of a person registered, it was proper to omit his name from the count. *Idem*, 695

9. It was for the supervisors to fix the amount of the subscription to the stock, not exceeding the sum limited by the statute. *Idem*, 695

10. The supervisors of the county having resolved to subscribe the sum of \$100,000 on condition that the town of D subscribe \$50,000, that subscription cannot subsequently be rescinded by them; and a resolution by them to this effect was invalid. And the town of D having made the subscription of \$50,000, the supervisors may carry out their subscription of \$100,000, and direct the issue of the bonds of the county therefor in the mode prescribed by the statute. *Idem*, 695

11. It was not necessary that the order of the court directing the vote upon the subscription should state that the amount to be subscribed will not require an annual tax in excess of twenty cents, or that it is not more than one-fifth the capital stock of the company. *Idem*, 695

12. There being no evidence in the record that the subscription will require a tax in excess of twenty cents on the \$100 of the taxable property of the county, and no such question made in the pleadings, the court cannot look outside of the record to take notice of the auditor's reports, and the assessor's books, to ascertain the amount of taxable property in the county. *Idem*, 695

13. The legislature may, by a subsequent

act, legalize the proceedings, if they were irregular, and so confirm the subscription. *Idem*, 695

COVENANTS.

1. E sells to J a tract of land through which a public highway runs, and conveys the land to J, with a covenant against incumbrances. The public highway is not an incumbrance which is included in the covenant, and for which J is entitled to compensation. *Jordan v. Eve, Trustee, &c.*, 1

CRIMINAL JURISDICTION AND PROCEEDINGS.

1. J was indicted for the malicious stabbing, &c., of W, with intent to maim, &c. The jury found J "guilty of unlawful cutting, as charged in the within indictment," &c. The language, "as charged in the within indictment," has reference both to the cutting and the intent, and is a sufficient finding of the intent with which the unlawful act was done, to meet the requirement of the statute. *Jones' case*, 830

2. The statute having dispensed with the necessity of keeping the jury together in prosecutions where the penalty cannot be death or confinement in the penitentiary for ten years, if the jury, in a prosecution for malicious stabbing, &c., with intent to kill, &c., find the prisoner guilty of unlawful cutting with intent, &c., upon a motion to set aside the verdict and grant a new trial on the ground of the separation of the jury before the verdict was rendered, the court is not bound to set aside the verdict for that cause, if it approved the verdict, and is satisfied it was fairly and honestly rendered, and that neither the commonwealth nor the prisoner had been damnified by the separation. *Idem*, 830

3. Upon a motion to set aside the verdict on the ground of the separation of the jury, the prisoner must prove the separation by affidavits or proof in court, and the offer to prove, which the court refuses, under the circumstances, to hear, is not sufficient to enable the appellate court to act on the question. The exception should show the proof. *Idem*, 830

4. When two persons are indicted jointly for a conspiracy to prosecute another for a larceny, neither of them is entitled to a separate trial. *Jones' case*, 836

5. In such a case where both are on trial the confessions of one of them in the absence of the other, made after the conspiracy charged in the indictment was completed and ended, are properly admitted as evidence. And when all the evidence has been introduced, the court should then instruct the jury, that, in passing upon the guilt of the other party, they must discard from their consideration the said admissions, they having been made after the conspiracy was completed and ended. *Idem*, 836

6. In such case the jury cannot find either

party guilty of the conspiracy as charged in the indictment, unless they believe from the evidence that there was an agreement of mind between the two to do and perform the matters and things as charged in the indictment.

Idem, 836

7. In such case, both the defendants having been found guilty, one of them applies for a new trial, which is overruled, and he obtains a writ of error. The other does not apply for a new trial, and there is a judgment against him. The judgment may be reversed as to the one who appeals, without reversing the judgment against the other, who did not apply for a new trial.

Idem, 836

8. On a trial for a misdemeanor, proof of the contents of a letter or paper which the defendant did not receive, is inadmissible.

Payne's case, 855

9. Upon the prosecution of T for obtaining goods from M & Co. upon false pretenses, evidence that the accused, in the same city and at or about the same time, purchased goods from other parties, B and O, upon the same false pretenses, is admissible to show the intent of the accused in making

906 *the representations to M & Co., but not as proof that the accused had committed other offences not charged in the indictment. And this, though the statute has made the obtaining goods on false pretenses larceny.

Trogdon's case, 862

10. A statement is made by T of his partners, and the condition of the partnership, to one of the firm of M. & Co., who encloses it in a letter to another member of his firm then in New York, and asks if he shall send the goods, and he receives a reply by telegraph to send them. The statement is admissible evidence.

Idem, 862

11. On the 15th March, 1878, L, having received an order to send some goods to T. & Co., obtained from B a copy of the representations made to him by T on the 28th February, 1878, which were the same representations made to M. He mailed a copy to T & Co., asking if that statement represented the true condition of their affairs? and received, by due course of mail, a letter signed T. & Co., saying that it did, and that the business was still prospering—HELD: The testimony of L, his letter to T. & Co. containing the statement, and the answer received by him, are admissible as evidence in this case to show the intent of the accused.

Idem, 862

12. Whenever the intent or guilty knowledge of a party charged with crime is a material ingredient in the issue of the case, other acts and declarations of a similar character tending to establish such intent or knowledge are proper evidence to be admitted, provided they are not too remotely connected with the offence charged; and what are the limits as to the time and circumstances is for the court, in its discretion, to determine.

Idem, 862

13. Although under the statute of Virginia the obtaining goods by false pretences is made larceny, and an indictment under the same for larceny is sufficient; yet every ingredient entering into the offence of obtaining goods by false pretences must be shown as fully as if the statute had not thus passed.

Idem, 862

14. On the 1st of April, 1878, T., the accused, filed his petition in the bankrupt court to have the concern of T. & Co., composed of himself, C. L. T. and J. W. A., adjudicated bankrupts, and they were so adjudicated on the 26th of April, 1878. In the petitions and schedules filed by T. in this bankrupt record, different representations were made as to the affairs of the concern of T. & Co. on the 28th February, 1878, when the offence was alleged to have been committed, from those stated by him in some of the representations made to M. & Co. The whole record of the bankrupt court was offered in evidence by the Commonwealth, to which the accused, by counsel, objected generally, without pointing out any part of the record as objectionable. The court below admitted the whole record—HELD: It was not error under the circumstances to do so. The statements contained in the petition and schedules in that record, made by the accused, were admissible as admissions or declarations of the facts therein stated, and while the schedules and statements made by the other partners are not evidence against the accused, he cannot by a general objection to the whole record impose upon the trying court the duty of examining every part of it to see whether, perchance, there is not something in it not admissible in evidence. It is his duty to point out to the court such portions of the record as come within the scope of his objection; and this rule applies as well in civil as in criminal cases.

Idem, 862

15. A paper purporting to be the assessment of the property of A, one of the partners of T. & Co., and whose unencumbered real estate T had represented as worth \$3,000, in R. county, North Carolina, is certified by the register of the county as a correct transcript of the taxable property of A, as copied from the list returned by the assessor. The certificate, and assessment are without date, and do not state what year the statement refers to—HELD:

1. In the absence of evidence that by the law of North Carolina the assessment is a record, and a copy of the record is evidence, the paper is not competent evidence against T.

Idem, 862

907 *2. The certificate and assessment being without date, and it being uncertain what year the assessment refers to, for these defects the paper is not competent evidence.

Idem, 862

3. The original paper to which the certificate refers, referring to the property of A, and T having no connection with or interest in it, it would not be competent evidence against him.

Idem, 862

4. As it is impossible for this appellate

court to say that the introduction of this paper in evidence was not prejudicial to the accused, its introduction was error, for which the judgment is reversed.

Idem, 862

16. The court instructs the jury that they must believe from the evidence, beyond all reasonable doubt, that the alleged false pretenses were believed by M. & Co.; that but for them they would not have parted with their goods—that is, that they had the prevailing influence in making M. & Co. part with their property. The instruction is correct.

Idem, 862

17. See *City of Richmond, No. 5*, and *Thon's case*, 887

DECREES.

1. In a suit for the administration of the estate of B, who had been the guardian of J, and had given to J his bonds for the balance due J, the commissioner classifies the debt of J among the general creditors of B, and there is a decree confirming the report and distributing a fund in court pro rata among these creditors. There were several other decrees for accounts of further debts of B, and still a fund in court to be distributed, when J makes himself a defendant in the suit and files his petition insisting that his is a fiduciary debt—**HOLD**: The decree confirming the report was an interlocutory decree, and J was not concluded from setting up his claim as a fiduciary creditor of B.

Smith & als. v. Blackwell & als., 291

2. The court having jurisdiction of a case, the validity or propriety of the decree for the sale of infants' land cannot be questioned in a collateral proceeding.

Quesenberry & al. v. Barbour, 491

3. For what is an interlocutory decree, see *Practice in Chancery, No. 16*, and

Summers v. Darne & als., 791

4. For a rehearing of a decree, see *Practice in Chancery, No. 16*, and

Idem, 791

DEDICATION OF WAY.

1. C and G owning lots in Richmond, each bounded east by Seventeenth street, and separated by what was at one time the bed of Shockoe creek, but from which the water of the creek had been diverted, enter into a deed by which they fix the boundaries of their lots, respectively, and they covenant and agree that there shall be between their lots a street thirty feet wide extending from Seventeenth street westwardly to the eastern boundary of their lots, and that said street shall be forever kept open as a highway and common for the use of the persons who may be the owners of the lots or land bounded on either side of said street. The street thus provided for did not extend west to any street or alley—**HOLD**: Looking to the whole deed and the surrounding circumstances, there was not a dedication of the street to the public generally, but only to the owners of the lots or parts of the lots spoken of in the deed; and it is not, therefore, a street

over which the city authorities have control, and can authorize a railroad company to lay its track along it.

Talbot v. Richmond & Danville R. Co., 685

2. A street of a city having been used according to a certain line from 1817 to 1847, and having been graded and paved by the city authorities, without any objection or claim by the owners of the soil on which a part of the street was laid, and public and private rights acquired with reference to it and to its enjoyment, its dedication to the public will be presumed, and the owner of the soil cannot revoke it.

City of Richmond v. A. Y. Stokes & Co., 713

DEMURRER TO EVIDENCE.

1. See *Practice at Common Law, No. 13*, and

Richmond & Danville R. R. Co. v. Anderson's adm'r, 812

DEPOSITIONS.

1. When an exception to a deposition will not be regarded in the appellate court. See *Appellate Court, No. 7*, and

Summers v. Darne & als., 791

DEVISEES.

1. L, who had been guardian of his four children, puts each of them in possession of a parcel of land and the personal property upon it, and by his will gives to each of them the land and property in his and her possession; and he requires that each of them shall execute a receipt for all claims against him, as guardian, before they shall be entitled to receive their portion under his will. These children hold the lands so in their possession, each of them selling a part of that given to him or her prior to 1873. In 1877 a bill is filed against them, and the executors, by O's administrator, to subject these lands to satisfy a judgment he had recovered against the executors of L on a bond on which he was a surety—**HOLD**: The devisees having continued to hold the land from the time they were put in possession, and having sold parts of it, they are estopped from setting up a claim to a settlement of L's guardian's accounts and holding him liable to them as their guardian, though they did not execute a release of their claim.

Lewis & als. v. Overby's adm'r, 601

2. All the parties being before the court, the executors are entitled to have the devisees to whom they paid over the proceeds of the personal property, which had come to their hands, without refunding bonds, believing L owed no debt, subjected in the first place to pay the amount to the creditor.

Idem, 601

3. The court should subject each devisee for his proportion of the debt, according to the value of the land devised to him or her, and direct a sale of his or her land not sold by him or her, in the first instance for the

payment of his or her proportion of the debt. If the land still held by one of them does not discharge his or her proportion of the debt, the balance remaining unpaid should be apportioned in like manner among the others, and the land of each sold to pay his or her proportion thereof; and so on until the whole debt is paid or the whole land sold.

Idem, 601

DIVORCE.

1. A wife having left her husband in 1863 upon the ground that he would not control his servants and maintain her rightful authority as his wife, the husband is entitled to a decree for a divorce a vinculo matrimonii on the ground of desertion, on a bill filed by him in 1877. And the wife having left her husband without any sufficient cause, the court upon decreeing the divorce cannot allow her alimony out of the husband's estate.

Harris v. Harris, 13

2. For the principles regulating the allowance of alimony to the wife upon decreeing a divorce. See Alimony 1, 2, 3, 4, and

Idem, 13

EASEMENTS.

1. In this state there may be a valid acceptance of an easement in a town without any distinct act of recognition by the corporate authorities of such town. The mere user, however, by the public of the locus in quo will not of itself constitute an acceptance, without regard to the character of the use and the circumstances and length of time under which it is claimed and enjoyed. But where property in a town is set apart for public use, and is enjoyed as such, and public and private rights acquired with reference
909 *to it and to its enjoyment, the law presumes such an acceptance on the part of the public as will operate an estoppel in pais and preclude the owner from revoking the dedication.

City of Richmond v. A. Y. Stokes & Co., 713

2. A street of the city having been used according to a certain line from 1817 to 1847, and having been graded and paved by the city authorities, without any objection or claim by the owners of the soil on which a part of the street was laid, and public and private rights having been acquired with reference to it and its enjoyment, its dedication to the public will be presumed, and the owner of the soil cannot revoke it.

Idem, 713

EQUITY JURISDICTION AND RELIEF.

1. When and what relief the court will or will not give the wife in cases of divorce a vinculo matrimonii. See Alimony, No. 2, 3, 4, and

Harris v. Harris, 13

2. In a dispute between two parties as to their relative rights to the use of the water-power taken from the same dam, held it is a case for the equitable jurisdiction of the court; and the court should proceed to ascertain, define and settle the rights of the parties

ties to the use of the said water-power. See Water Rights, No. 1, and

Hanna v. Clarke, Miller & Hall, 36

3. In an agency where there is a fiduciary relation between the parties, a court of equity has jurisdiction to settle and adjust the accounts between them.

Thornton v. Thornton, 212

4. Where a contract for the insurance of a building has been made with the agent of an insurance company having authority to issue policies, and the premium has been paid, but before the policy is issued the building is consumed by fire, a court of equity has jurisdiction to enforce the payment of the policy at the suit of the assured against the insurance company.

Woody v. Old Dominion Ins. Co., 362

5. For the grounds and principles upon which a court of equity will or will not enforce the specific execution of a contract for the sale of land. See the opinion of Burks, J.

Stearns & als. v. Beckham & als., 379

6. For the grounds and principles upon which a court of equity refusing to enforce the specific execution of a contract for the sale of land, will direct an account of the purchase-money and rents, &c. See the opinion of Staples, J.

Idem, 379

ESTOPPEL.

1. When mechanic having built a house is equitably estopped from claiming against a deed of trust upon the house and lot. See Trusts and Trustees, No. 7, and

Wroten's ass'nee v. Armat & als., 228

2. When devisees of their father, who was their guardian, estopped from claiming an account of his guardianship as against his creditors. See Guardian & Ward, No. 2, and

Lewis & als. v. Overby's adm'r & als., 601

EVIDENCE.

1. Statements and declarations of a father made at the time of making a gift to his child, are competent evidence to show whether it was intended as an absolute gift or an advancement.

Watkins & als. v. Young & als., 84

2. Congress has no power to declare by law what shall or shall not be evidence in a state court.

Crews & al. v. Farmers Bank of Va., for, &c., 248

3. In a case in which there is a charge of conspiracy, after the conspiracy has been consummated, the common purpose carried fully into effect, no subsequent declarations of any of the conspirators not made in the presence of the others are admissible as evidence against the latter.

Danville Bank v. Waddill's adm'r, 469

910 *4. A record cannot be introduced for one purpose, but if introduced it must be for all purposes for which it is available to either party.

Fechheimer v. National Exch. Bank of Norfolk, 651

5. The relation of husband and wife between colored persons in February, 1866, may be established by proof of the acts, conduct and conversation of the parties.

Francis *v.* Francis, 283

6. When parol evidence is competent to prove the consideration on which deeds were made. See Trusts and Trustees, No. 14, and

Summers *v.* Darne & als., 791

7. For what is and what is not competent evidence on a prosecution for obtaining goods by false pretenses. See Criminal Jurisdiction and Proceedings, No. 8, 9, 10, 11, 12, 13, 14, and Trogon's case. 852

EXECUTIONS.

1. The lien of an execution of fieri facias upon the debtor's choses in action, though not enforced in his lifetime, continues after his death, as against other creditors of the debtor.

Trevillian's ex'ors *v.* Guerrant's ex'ors & als., 525

EXECUTORS AND ADMINISTRATORS.

1. Under the statute, Code of 1860, ch. 131, § 25, the debt of a trustee under a will for infant children, will not, in the administration of his estate by his executor, be put in the third class of debts; but will be put in the fourth class, with the general creditors.

Price's ex'or & als. *v.* Harrison's ex'or & als., 114

2. The act of July, 1870, Code of 1873, ch. 126, § 25, which amends the former law by inserting in the third class "debts of trustee for persons under disabilities," is only prospective in its operation, and will not authorize the putting the debt of the trustee who died before its passage in the third class of debts, though his estate is not distributed until this last act went into operation.

Idem, 114

3. Bonds given by a guardian to his ward for the amount due the ward on his coming of age, held not a novation of the debt; and the debt of the guardian is a fiduciary debt, and entitled to rank as such in the administration of the guardian's estate.

Smith & als. *v.* Blackwell & als., 291

4. A case in which, from the lapse of time, the death of all the parties cognizant of the transactions, the destruction of all the records of the county and loss of papers, it was held that an account of administration of an estate could not be settled without great danger of injustice to the deceased administrator, and therefore refused.

Stamper's adm'r *v.* Garnett & als., 550

5. L, in his lifetime, put each of his four children in possession of land and the personal property upon it; and by his will gave to each of them the land and the personal property in his possession. The executors having been assured by L that he owed no debts, did not take possession of the property so in the hands of the children. Some years after the death of L a judgment is recovered against the executors upon a bond on which

L was the surety—HELD. The executors having been assured by L that he owed no debts, and they knowing of none, they will not be liable for the value of the personal property that L had in his lifetime put into the possession of his children.

Lewis & als. *v.* Overby's adm'r & als., 601

6. Executors having distributed the personal property of the testator in his possession at his death, without taking refunding bonds, they are responsible to the creditor for its value, though they knew of no debt due from their testator. Idem, 601

FISHERIES.

1. F leased from Mrs. O the land and a fishery in the Potomac river, where the tide ebbed and flowed, with all the privileges attached thereto, for five years, at a rent of \$500 a year. He built the necessary 911 buildings, and *cleaned out the fish-berth, and was largely engaged in carrying on the fishery. Pending the lease the Alexandria and Fredericksburg Railway Company, upon proceedings against O, had the land for their road-bed condemned, and paid into court the damages assessed. In building the road the company made embankments along the line of the river, pulling down some of F's buildings, throwing obstructions into the fish-berth, and materially damaging the fishery. In an action by F against the company to recover damages for the injury done to him—HELD:

1. The legislature has frequently recognized the rights of owners in their respective fisheries on the Potomac, and by various statutes has protected them in their rights, and the company could not in making their road injure the fishery of F without making just compensation for the injury.

Alex. & Fred. Railway Co. *v.* Faunce, 761

2. The assessment and payment of the damages into court does not preclude F from the recovery of damages for the injury he has sustained as lessee of the fishery.

Idem, 761

3. The court below certified the evidence in relation to the lease and what had been done by F under his lease, but certified that as to whether the road was built upon the strip of land condemned the evidence was conflicting, and the whole of that evidence is not given. The appellate court cannot set aside the judgment and verdict, though the court may not be entirely satisfied that the damages are not excessive. Idem, 761

GUARDIAN AND WARD.

1. B is the guardian of J, and upon J's coming of age B has a settlement with J of his account as guardian, and being indebted on the account in the sum of \$3,000, he executes to J his four bonds each for \$750, payable in one, two, three and four years, with interest. B pays the interest during his life, and a part of the principal, and was up

to the war able to pay the whole—**HELD**: The giving and taking these bonds was not a novation of the debt, but the debt due from B to J continued to be a fiduciary debt, and entitled to rank as such in the administration of B's estate.

Smith & als. v. Blackwell & als., 291

2. L is guardian of his children. He puts each of them in possession of land and the personal property upon it; and by his will gives it to them, and requires that they shall execute a release to him of all claim on account of his guardianship. They hold the land for several years, each selling a part of that given to him. Upon a bill filed by a party who had recovered a judgment against L's ex'ors, upon a bond on which L was surety—**HELD**: The children were estopped by their acceptance and acting under the will from setting up a claim on account of the guardianship.

Lewis & als. v. Overly's adm'r & als., 601

HOMESTEADS.

1. B conveys a house and lot to H in trust for the separate use of B's wife. M, a creditor of B, files a bill to set the deed aside as fraudulent and void as to creditors of B; and so the court decrees. B then executes a deed of homestead of the house and lot, and files his petition in the cause to be allowed his homestead. B is entitled to his homestead in the house and lot as against M, the creditor.

Boynton & als. v. McNeal & als., 456

HUSBAND AND WIFE.

1. A wife having left her husband in 1863 upon the ground that he would not control his servants and maintain her rightful authority as his wife, the husband is entitled to a decree for a divorce a vinculo matrimonii on the ground of desertion, on a bill filed by him in 1877. And the wife having left her husband without any sufficient cause, 912 the court upon decreeing *the divorce cannot allow her alimony out of the husband's estate.

Harris v. Harris, 13

2. For the principles regulating the allowance of alimony to the wife upon decreeing a divorce, see Alimony, No. 1, 2, 3, 4, and Idem, 13

3. In 1851 H and his wife E enter into an agreement by which they agree to a separation, and they unite in a deed by which certain real estate and \$900 in money is conveyed to S, in trust, for the express use, support and maintenance of the wife; and if she should die before the whole of said \$900 was paid to her, she might by will dispose of the remainder of it as she should choose. He covenants that E may live separate from him, and he will not claim any property of hers; and E renounces all claim on him for support, &c., and to his property—**HELD**:

1. Quære: Whether deeds for voluntary separation of husband and wife are valid?

Harshberger's adm'r's & als. v.

Alger & wife & als., 52

2. If such deeds are valid, the deed in this case vests the property conveyed in the trustee for the separate use of the wife. Idem, 52

3. Under the circumstances of this case the husband was not liable for any debt contracted by the wife. Idem, 52

4. If A can maintain a suit against E's administrator for services rendered to her, it must be on the ground that the remainder of the \$900 was the separate property of E the wife, charged by her in her lifetime with the payment of these services. Idem, 52

4. The liability of a married woman's separate estate for her engagements depends upon her intention to charge it. Her intention to charge it must be made to appear. Idem, 52

5. A husband is not a competent witness in favor of his wife, though the objection to his competency was not made until four questions had been put to him on his examination-in-chief.

Warwick v. Warwick & als., 70

6. See Marriage of Colored Persons, No. 1, 2, and

Francis v. Francis, 283

INCUMBRANCE.

1. A public highway passing through a tract of land is not an incumbrance, embraced in a deed conveying the land with a covenant against incumbrances.

Jordan v. Eve, trustee, &c., 1

INSURANCE.

1. S obtains from the Old Dominion Insurance Company a policy of insurance on his storehouse and stock of goods, one condition of which policy is, that there shall be no other insurance on the property without the consent of the company endorsed on its policy. Afterwards S, without the consent of the Old Dominion Insurance Company, and, in fact, in ignorance that there was such a condition in its policy, obtains from the Connecticut Insurance Company another policy of insurance upon the same storehouse and stock of goods, and in this policy there is a condition that there is no previous policy of insurance upon the property. The property having been consumed by fire, in an action by S against the Old Dominion Insurance Company upon its policy of insurance—**HELD**:

1. The condition in the first policy, that if other insurance should be effected without the consent of the company the policy should be void, related only to other valid insurance; and the fact that S attempted to effect a second insurance with the Connecticut Insurance Company, which was invalid by reason of the condition in its policy, does not avoid the first policy, and the Old Dominion Insurance Company is liable on its policy.

Sutherland v. Old Dominion Ins. Co., 176

2. The second policy must at the time of the loss be inoperative, so that no action can be maintained on it; but it is not necessary that it shall be absolutely void: it is sufficient if it is voidable. *Idem*, 176

2. It is a general principle of law, that in order to avoid a policy on account of a subsequent insurance, against an express condition therein, it must appear that such subsequent insurance is valid and can be enforced. If it cannot be enforced it is no breach of the condition of the prior policy. *Idem*, 176

3. Where the contract for the insurance of a building has been made with the agent of an insurance company having authority to issue policies, and the premium has been paid, but before the policy is issued the building is consumed by fire, a court of equity has jurisdiction to enforce the payment of the policy at the suit of the assured against the insurance company.

Woody v. Old Dominion Ins. Co., 362

4. The terms of the insurance having been agreed upon between the applicant for insurance and the agent of the insurance company, the applicant tenders to the agent the money for the premium; but the agent living in the house, and being indebted to the applicant for rent, tells him he has in his hands money belonging to him for rent, and will credit him for that amount. This was a valid payment of the premium. *Idem*, 362

5. A condition of the policy is, that any interest in property insured, not absolute, or that is less than a perfect title, must be represented to the company, and expressed in the policy. The insured has a fee-simple estate in the building, conveyed by deed reserving a lien for the purchase-money, about \$350; the house worth \$1,700. The condition has reference to the quantity of the interest or estate, which is measured by its duration. Or, if not, the words used cannot have been intended to guard against incumbrances. *Idem*, 362

6. Due diligence in giving notice of the loss of the building under all the circumstances is all that is required. *Idem*, 362

7. The assistant secretary of a life insurance company held to have authority to waive the forfeiture of a policy for the failure to pay the premiums on the day it was due, and to reinstate the policy.

Piedmont & Arlington Life Ins. Co. v. McLean, 517

8. If the application for a policy is made a part of the policy, and is a warranty and covers the applicant's interest in and title to the property, and his answer to the question "What is your title to or interest in the property to be insured?" is "fee simple"—HELD: The fact that the wife of a former owner of the property who is still alive, has a contingent right of dower in it, does not affect the applicant's interest in or title to the property. Nor is it such an incumbrance as, not being

mentioned in his answer, will be a breach of the warranty.

Southern Mut. Ins. Co. v. Kloeber, for, &c., 739

9. If in such case the application is not a warranty, the failure to mention the existence of such a contingent right of dower is not such a misrepresentation as will avoid the policy. *Idem*, 739

10. Where the case is submitted to the court, and the evidence as to the value of the property insured is conflicting, the appellate court cannot interfere with the judgment of the court below on the ground that the judgment is excessive. *Idem*, 739

11. K purchased a house and lot near Chatham, in Pittsylvania county, for \$4,060, at a sale by a trustee under a deed executed by H. In September, 1872, he applied to the Virginia Fire and Marine Insurance Company for an insurance on the dwelling-house for \$3,000. He answered the interrogatories put to him, and to one of them he gave the value of the whole property at \$10,000, and to another that there was an incumbrance by the vendor's lien of \$3,500. The policy was issued, which provided, among other things, that any misrepresentation, or concealment, or omission, to make known any fact or feature in the risk that increases the hazard, should avoid the policy, and any interest in the property not absolute, or that is less than a perfect title, must be specifically stated and expressed in the policy, or the insurance should be void. The wife of H did not join in the deed to the trustee, and though she was alive when the policy was issued and suit brought upon it, it did not certainly appear she was married to H when the deed was made—HELD:

1. The contingent right of dower in the wife of H, if she was his wife at the date of the deed, was not such an interest as shows that the assured had less than a perfect title in the property insured.

Va. Fire & Marine Ins. Co. v. Kloeber, for, &c., 749

2. Nor was it such an incumbrance as was contemplated by the parties to the contract of insurance should be disclosed by the assured on the pain of forfeiting his contract for failing to make the disclosure. *Idem*, 749

3. There is nothing in the answers of the assured which amounts to a breach of the warranty. *Idem*, 749

4. If the omission by K to state the fact of the contingent right of dower in the wife of H was fraudulent on the part of K, and it increased the hazard of the insurance, the omission would avoid the policy. *Idem*, 749

5. The question whether the omission by K to state the fact of the contingent right of dower in the wife of H was fraudulent, was a question for the jury, upon all the evidence, and depends upon the *quo animo*, the intention with which the fact was not disclosed. *Idem*, 749

6. But if K in good faith answered the interrogatories put to him at the time the policy of insurance was executed, respecting his title to the insured property, with substantial truth and accuracy, but failed, without fraudulent intent, to mention that there was probably an outstanding contingent right of dower in the wife of H, and K was not interrogated as to said contingent right of dower, and nothing occurred at the time of the contract of insurance to remind him of it, his failure to disclose it did not invalidate the contract, unless the contingent right of dower of the wife of H in the property was a fact which materially increased the actual risk of the company.

Idem, 749

JUDGMENTS.

1. See Trusts and Trustees, No. 1, and *Warwick v. Warwick & als.*, 70

2. The act of March 25, 1873, amending section 3 of the act of March 3, 1866, so far as it authorizes the reopening of a judgment rendered since March 3, 1866, is unconstitutional and void, both because it is an infringement upon the powers of the judicial department of the government, and because it impairs the obligation of contracts.

Ratcliffe v. Anderson, 105

3. R obtains a decree against his guardian and his sureties for a certain sum of money; and sues out execution, which is levied, and a forthcoming bond taken and forfeited. The court, on its chancery side, on notice to the obligors in the forthcoming bond, renders a judgment in favor of R against them; and this judgment is docketed—HELD: The judgment is a valid judgment, and having been docketed, it is notice which will affect all subsequent purchasers of land from any of the defendants in the judgment.

Redd v. Ramey & als., 265

4. When judgments are and are not liens on land in the hands of purchasers, holding under written or parol contracts. See Liens, No. 2, 3, and

Young & als. v. Devries & als., 304

5. L brings an action on a bond against B, which is on the office judgment of the court at its March term, which commences on the third of the month, and the office judgment is confirmed on the fifth, which is the last day of the term. On the first day of the same term of the court B goes into court and confesses a judgment in favor of S, no suit having been instituted against B by S—HELD:

915 *1. The judgment in favor of S is valid, though no suit has been instituted by him against B.

Brockenbrough's ex'x & al. v. Brockenbrough's adm'r & als., 580

2. That the judgment of L relates back to the first day of the term, and the law not regarding a fraction of a day, both judgments stand as of the same date.

Idem, 580

JUDICIAL SALES.

1. F conveys land to Q in trust for J, the daughter of F and the wife of Q, for her life, and then to her children. Afterwards J and her children, who are infants under fourteen years of age, by their next friend, file their bill against Q, the trustee, for the sale of the land, and there is a decree for the sale, and a sale made more than six months after the decree, and this sale is confirmed, and a conveyance to the purchaser. In an action of ejectment by the children of J, after her death, to recover the land from a vendee of the purchaser—HELD:

1. The court having jurisdiction of the case under the statute, the validity or propriety of the decree for the sale of the land cannot be questioned in a collateral proceeding.

Quesenberry & al. v. Barbour, 491

2. The sale having been made more than six months after the decree for the sale, the sale cannot be set aside, even if the decree was erroneous. Idem, 491

3. The fact that the infants were plaintiffs with their mother, instead of being made defendants, is no objection to the proceedings in the suit for the sale of the land. Idem, 491

LEGACIES.

1. See Attachments, No. 3, and *Whitehead's adm'r v. Coleman's ex'ors*, 784

LIENS.

1. See Trusts and Trustees, No. 1, 5, 6, 7, and *Warrick v. Warrick & als.*, 70
Wroten's ass'nee v. Armat & als., 228

2. Land sold and purchased under a written contract which has not been recorded, though the purchasers have paid all the purchase-money, and have been for years in possession under their contract before a judgment has been recovered against their vendor, is liable to satisfy the judgment.

Young & als. v. Devries & als., 304

3. Land sold and purchased under a parol contract, the purchasers having paid the purchase-money, and having been put in possession and holding the possession under the contract before a judgment has been recovered against their vendor, is not liable to satisfy the judgment. Idem, 304

4. The court refusing to enforce a specific execution of a contract for the sale of land, at the suit of a purchaser who has paid the purchase-money, but directing an account, if upon taking the account there is found a balance due to the purchaser it is a lien upon the land.

Stearns & als. v. Beckham & als., 379

5. The lien of an execution of fieri facias upon the debtor's choses in action, though not enforced in his lifetime, continues after his death as against the other creditors of his debtor.

Trevillian's ex'ors v. Guerrant's ex'ors & als., 525

6. A judgment confessed on the first day of a term of the court without suit, and an office judgment confirmed on the last day of the same term, stand as of the same date. See Judgments, No. 5, and

Brockenbrough's ex'x & al. v.
Brockenbrough's adm'r & als., 580

LIFE TENANT.

1. A life tenant has in her hands \$4,918 216.22, for the payment of which *at her death she is required to give bond and security. The penalty of the bond should not exceed \$6,000.

Beckwith & wife v. Avery's adm'r & als., 533

LIMITATION OF ESTATES.

1. P, by his will, gave to his four sons, George, Joseph, James and Sampson, each a parcel of land; to George and Joseph in fee, and to the other two each devise is, except as to the land devised, the same, and is as follows: 4th. I will and bequeath to my son Sampson the use and benefit of the home place which I now occupy, containing about 300 acres, during his natural life. He then says: Should my sons George, Joseph, James and Sampson, or either of them, die without issue, I direct that what has been bequeathed to them shall be equally divided between the surviving brothers—James and Sampson for their use and benefit during their natural lives—HELD:

1. That Sampson took but a life estate in the land devised to him.

Wine v. Markwood & als., 43

2. The term issue in the limitation over, under the Virginia statutes, means issue living at the death of the first taker, or born within ten months thereafter.

Idem, 43

3. If Sampson has issue living at the time of his death, or born within ten months thereafter, his issue will take the land devised to Sampson by implication.

Idem, 43

2. In a contract of marriage between B and A, made in 1807, B covenants with trustees that to provide for the issue of the marriage, on his death 10,000 pounds shall be set apart out of his estate, to be held by the trustees for the issue of the marriage, if there be any, to be held by them, if there be more than one, as tenants in common with benefit of survivorship; the said A to share the profits of said fund during her life, she taking a child's part. B made his will in 1841, in which he referred to and confirmed the contract, and bequeathed his estate equally among his children. He died in 1841, and A in 1843, leaving seven children of the marriage. Five of the children died before the estate of B was ready for distribution—HELD:

1. Looking to the deed and the will, that the intention of B was an equal distribution among his children; and this intention is not defeated by the use of the words "with benefit of survivorship."

Brown v. Brown's adm'r & als., 502

2. On the death of A the interest vested in the children, and the fund is to be divided among them and the children of those who have since died. Idem, 502

LIMITATIONS—STATUTE OF.

1. If the right of action exists in the lifetime of a person against whom the claim is, the statute of limitations begins at that time, and will not cease to run by his death.

Harshberger's adm'r & als. v. Alger & wife & als., 52

2. When a debtor who resides in the state removes, after contracting the debt, to another state, the removal is itself an obstruction to the prosecution of a suit by the creditor to recover the debt, and the statute of limitations will not run against the debt whilst the debtor resides out of the state.

Ficklin's ex'or v. Carrington, 219

3. L, about a year before his death, in 1866, put each of his four children into possession of land with the personal property upon it, but did not convey it. About the same time he made his will, and by it gave to each of the children the land and property in his and her possession. In 1873 a judgment was recovered by O's administrator against L's executors upon a bond on which he was a surety; and in 1877 O's administrator filed his bill against the devisees to subject the real estate—HELD: That neither under the act of L putting them in possession of the land, nor under the devise to them, are the devisees entitled to the protection of the statute, Code of 1873, ch. 146, § 16, which 917 provides *that no gift, &c., which is not on consideration deemed valuable in law, shall be avoided, either in whole or in part, for that cause only, unless within five years after it is made suit be brought for that purpose, &c.

Lewis & als. v. Overby's adm'r & als., 601

LOANS.

1. In the absence of C in a foreign country, F sent to Mrs. C a check for \$500, which was collected by her. In the absence of all evidence bearing upon the intention of F in sending the check, the presumption is the intention was, not a gift to Mrs. C, but a loan on the credit of her husband C.

Ficklin's ex'or v. Carrington, 219

2. As to loans by national banks secured by deed of trust or mortgage on real estate. See National Banks, No. 1, 2, and Trusts & Trustees, No. 7, and

Wroten's ass'nee v. Armat & als., 228

MARRIAGE OF COLORED PERSONS.

1. The act of February 27th, 1866, to legalize the marriage of colored persons living together as husband and wife at the time the act was passed, includes and applies to colored persons so living together, though they were born free.

Francis v. Francis, 283

2. It is not necessary that there shall be evidence of an actual agreement to take each

other as husband and wife, but the relation may be established by proof—by the acts, conduct and conversation of the parties.

Idem, 283

MECHANICS' LIENS.

1. See Trusts & Trustees, No. 7, and Wroten's ass'nee v. Armat & als., 228

NATIONAL BANKS.

1. The act of congress of the 3d of June, 1864, Rev. St. of U. S. §§ 5136, 5137, under which the bank of F was organized, does not imply a negation of the corporate power of the national banks which might be organized under it to make a loan of money on real estate: does not annul any loan made by any such bank; or release or discharge any deed of trust or mortgage on real estate taken by the bank to secure the payment of such loan.

Wroten's ass'nee v. Armat & als., 228

2. If the act of Congress plainly prohibited a bank organized under it to take a deed of trust or mortgage on land to secure a loan in any case, or made it penal to do so, such a provision could only have been intended for the benefit of the government, which might or might not, at its pleasure, enforce the forfeiture; and it could not be avoided by a borrower or his creditors.

Idem, 228

NEGLIGENCE.

1. A case in which a railroad company was guilty of culpable negligence in the conductor on the train putting the car in motion before M, a passenger, who was to get off at the station, had gotten off, and in not cautioning M not to attempt to get off until the train was stopped. Instead of this the agent told him to get off, and the train immediately commenced backing.

Richmond & Danville R. R. Co. v. Morris, 200

2. It was also in fault in not having stationary lights at the place, it being in the night when the car stopped at the station, there being but two lights, of which one was in the hands of the conductor, and the other in the hand of a servant of the company.

Idem, 200

3. Though M might have got off on the stationary platform whilst the car was stopped for a minute before it began to back, or even whilst it was in motion, he did not; but went to the back end of the car and jumped off on the track, and was injured by the car—HELD: That whilst the injury sustained by M is directly traceable

918 *to the culpable negligence of the company, the negligence or absence of ordinary prudence or caution on the part of M contributed to his injury; and he is not entitled to recover of the company damages for the injury he sustained. Idem, 200

4. One who by his negligence has brought an injury upon himself, cannot recover damages for it. Such is the rule of the common and civil law. A plaintiff in such cases, is entitled to no relief. But where the defend-

ant has been guilty of negligence also in the same connection, the result depends on the facts. The question in such cases is: 1. Whether damage was occasioned entirely by the negligence or improper conduct of the defendant; or, 2. Whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary care and caution, that but for such negligence or want of ordinary care and caution on his part the misfortune would not have happened. In the former case the plaintiff is entitled to recover. In the latter he is not. See Railroad Co. v. Jones, 95 U. S. R. 439.

Idem, 200

5. When municipal corporations are liable for failing to keep their streets and sidewalks in good repair, whereby a person has suffered an injury. See Corporations, No. 3, 4, 5, and Noble & wife v. City of Richmond, 271

6. The plaintiff, in an action for negligence, cannot succeed if it is found by the jury that he has been guilty of any negligence or want of ordinary care which contributed to cause the accident.

Richmond & Danville R. R. Co. v. Anderson's adm'r, 812

7. But though the plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him.

Idem, 812

8. For circumstances under which a railroad company will not be held liable for the killing, by one of its trains, of a person on its track, see opinion of Burks, J.

Idem, 812

NEGOTIABLE INSTRUMENTS.

1. The certificate of the notary that he gave notice of protest of a note for non-payment, sent by mail to the place of residence of the endorser, whilst there was a mail communication between the place of starting and the residence, though not by the direct route, held to be sufficient evidence of notice.

Slaughters v. Farland's ex'x, 134

2. In an action against the endorsers of a negotiable note bearing date the 25th August, 1865, they plead "nil debet," and file an affidavit that at the time the note was endorsed and when it was protested it was not stamped, as required by the act of congress of July 1st, 1862, but that it had been since altered by the collector of the United States revenue putting a stamp upon it—HELD:

1. The affidavit not denying the signatures, it was not necessary for the plaintiff to offer proof before introducing the note.

Crews & al. v. Farmer's Bank of Va., for, &c., 348

2. The act of July 1st, 1862, was not in force when this note was made and endorsed. The act of congress of 1864 as amended by the act of March 3d, 1865, which was then in force, authorized the

subsequent affixing of the stamp, and of this the endorsers were bound to take notice; and therefore the fixing the stamp subsequent to the endorsement and protest was not an unauthorized alteration of the note.
Idem, 348

3. The stamps having been put upon the note by the collector of the revenue more than a year after its being made, could only be done upon the payment of the penalty of \$50; the payment of the penalty does not tend to show that the failure to affix the stamp when the note was made was with intent to evade the law.
Idem, 348

3. A bank having ceased to carry on its banking operations in a city, to
919 *wind up its affairs in that place puts its notes, &c., falling due at that place in the hands of P, a private banker of that city, for collection, and makes his office its office of discount and deposit, and of this the maker and endorsers of a note had notice. A presentation and demand of payment at the office of P was a sufficient presentation.
Idem, 348

4. A bank having in pursuance of the act of February 12th, 1867, conveyed all its property to trustees for the purpose of closing up its affairs, a suit may be brought in the name of the bank for the benefit of the trustees, upon a note discounted by the bank prior to the execution of the deed. Code of 1873, ch. 56, § 31, p. 843.
Idem, 348

NEW TRIALS.

1. As a general rule a new trial of an issue in chancery or a cause at common law, will not be granted on the affidavits of jurors.

Steptoe v. Flood's adm'r, 323
Danville Bank v. Waddill's adm'r, 469

NOTICE.

1. What sufficient notice of protest by mail. See Negotiable Instruments, No. 1, and

Slaughters v. Farland's ex'x, 134

2. To affect a purchaser for value of land with notice of an unrecorded deed of trust, the evidence must be sufficient to prove him guilty of a fraud. The mere fact that he was a witness to the deed is not sufficient.

Vest v. Michie, 149

3. A judgment on a forfeited forthcoming bond, rendered in a chancery court, if docketed, is notice to subsequent purchasers of land from any of the defendants in the judgment.

Redd v. Ramey & als., 265

NOVATION.

1. When giving bonds by a guardian to his ward on his coming of age, for the amount due the ward, is not a novation of the debt. See Guardian & Ward, No. 1 and

Smith & als. v. Blackwell & als., 291

2. When releasing a lien and taking another deed of trust and other bonds for the

debt secured is not a novation of the debt
See Trusts & Trustees, No. 13, and
Summers v. Darne & als., 791

PARENT AND CHILD.

1. H and his wife E agreed to a separation, and united in a deed conveying land and \$900 to a trustee for her support, with power of disposition of so much of the \$900 as remained at her death; and each renounced all claim on the property of the other. E survived H and lived until 1871, having been helpless for the last year of her life, and unable to do any but very light work for two or three years previous. During this period she is nursed and attended by her daughter A. E dies without disposing of the remainder of the \$900, amounting to about \$600, which is paid to H's administrator. In 1877 A sues H's administrator for compensation for services rendered E in her lifetime—HELD:

1. Under the circumstances of this case the husband was not liable for any debt contracted by the wife.

Harshberger's adm'r & als. v. Alger & wife & als., 52

2. If A can maintain this suit, it must be on the ground that the remainder of the \$900 was the separate estate of E the wife, charged by her in her lifetime with the payment of the services. Idem, 52

2. As between parent and an adult child, whenever compensation is claimed in any case, by either against the other for services rendered, or the like, it must be determined from the particular circumstances of that case whether the claim should be allowed or not. There can be no fixed rule governing all cases alike. In the absence of direct proof of any express contract, the question always is, Can it be reasonably inferred that pecuniary compensation was in the view of the parties at the time the services were rendered? and that depends upon all the
920 circumstances of the case; *the relation of the parties being one of them.

Idem, 52

3. In this case, there having been no express contract proved, and so far as appears, no claim or mention of such compensation by either mother or daughter during the mother's life, and the services having been such as any child prompted by filial affection and impelled by a sense of duty, might be expected, under the circumstances, to render cheerfully to an aged mother, a contract cannot be implied; and A cannot recover.

Idem, 52

4. If A had a valid claim to compensation for her services it accrued in the lifetime of E, and the statute of limitations then began to run; and this suit not having been brought until 1877, the statute is a bar to it.

Idem, 52

5. Whether a gift by a father to his child in his lifetime is an absolute gift or an advancement. See Advancements, No. 1, 2, and

Watkins & als. v. Young & als., 84

PAYMENTS.

1. Though payment of an ante-war debt is made in Confederate money in a controversy between creditors, the payment is not to be scaled. See *Trusts and Trustees*, No. 1, and *Warwick v. Warwick & als.*, 70

PENALTIES AND FORFEITURES.

1. The act, Code of 1849, ch. 16, § 18, Code of 1873, ch. 15, § 13, which provides that if by a new law, repealing a former law, any penalty, forfeiture or punishment be mitigated by any provision of the new law, such provision may, with the consent of the parties affected, be applied to any judgment pronounced after the new law takes effect, applies to forfeitures in civil as well as criminal cases.

Mosby v. St. Louis Mutual Ins. Co., 629

2. Although the statute of usury, at the time a contract was made, declares the contract to be null and void, if at the time of the decree in the case the statute has been amended and only avoids the contract for the interest, the decree should be for the principal loaned, with interest from the time of the decree. *Idem*, 629

PRACTICE—AT COMMON LAW.

1. Quære: Whether in an action of debt against three, after a judgment at rules against the three, and at next rules judgment confirmed against two, and death of the other suggested; and at the next term of the court there is judgment against the two survivors, the action can be revived by scire facias against the executrix of the deceased. See *Appellate Court*, No. 1, and

Slaughters v. Farland's ex'x, 134

2. In debt upon a bond by C's administrator against S's administrator, profert of the bond is excused on the ground that it was lost by accident. S's administrator pleads special pleas in which he avers that the bond was not lost or destroyed by accident; but was destroyed by the obligee in her lifetime, with the intention and for the purpose of releasing S from the payment of the debt; and this he is ready to verify; and issues are made up on these pleas. On the trial of the cause the defendant insists the plaintiff shall first prove to the satisfaction of the court the original existence of the bond and its loss; and it is agreed that all the evidence in the cause shall be heard, and the defendant may move to exclude it; and on his motion all the evidence is excluded—*HOLD*:

1. Every pleading is taken to confess such traversable matter on the other side as it does not deny. The pleas, therefore, confess the original existence of the bond as described in the declaration, and its destruction. There was, therefore, no necessity on the plaintiff to prove to the satisfaction of the court the original existence and loss of the bond before receiving testimony as to its contents.

Colley's adm'r v. Sheppard's adm'r, 312

921 *2. If the pleas put in issue the loss of the bond, then that issue must be

tried by the jury; and if there was evidence introduced before the jury bearing on the question of the loss of the bond, it was for the jury to decide upon the sufficiency of the evidence to establish the loss; and it was error in the court to exclude it.

Idem, 312

3. If it was incumbent on the plaintiff to prove the original existence and loss of the bond before proving its contents, the evidence was sufficient in this case.

Idem, 312

3. See *Practice in Chancery*, No. 7, 8, 9, and

Stephoe v. Flood's adm'r, 323

4. What affidavit filed with plea of "nil debet," is not sufficient to put the plaintiff upon proof of the making of the note. See *Negotiable Instruments*, No. 2, and

Crews & al. v. Farmers Bank of Va., for, &c., 348

5. Congress has no power to declare by law what shall or shall not be evidence in a state court.

Idem, 348

6. In a suit by a corporation the plea of "nul tiel corporation" unaccompanied by an affidavit denying the corporate existence of the plaintiff, does not put the plaintiff to the proof of its corporate existence.

Idem, 348

7. Special pleas which only raise questions which are involved in the plea of nil debet, under which the defendant may rely upon the same matters in evidence which are set out in the pleas, are properly excluded.

Idem, 348

8. If an instruction is given to the jury without objection at the time, and no exception, or notice of exception, is taken or given before the verdict is rendered, the giving the instruction cannot be a ground for setting aside the verdict and granting a new trial of the cause.

Danville Bank v. Waddill's adm'r, 469

9. In an action of assumpsit to recover a sum of money in gold which had been delivered by the plaintiff to the defendant for safe-keeping, the only plea is non assumpsit. There was no question as to the delivery of the gold to the defendant, but the defence was that he had been robbed of it, and the effort of the plaintiff was to prove a fraudulent appropriation of it by the defendant conspiring with another person *HOLD*:

1. Evidence of the general character of the defendant by him is not admissible, and therefore the failure to produce it is not any ground for an inference unfavorable to his integrity. *Idem*, 469

2. The counsel for the plaintiff in his argument before the jury having relied on the fact that the defendant had introduced no proof of his character, after the argument was concluded the court properly, of its own motion, instructed the jury that the character of the defendant, as a party to the suit, was not involved in the issue to be tried; that he had no right to

introduce proof of his general character, and that the jury should disregard all argument made before them by the plaintiff's counsel based upon the failure of the defendant to introduce such evidence.

Idem, 469

10. A new trial will not be granted on the affidavit of two of the jurors that they had misapprehended an instruction of the court.

Idem, 469

11. Before evidence of the acts or declarations of one who is claimed to have been a conspirator with another to commit any offence, or actionable wrong, the judge must be satisfied that, apart from them, there are *prima facie* grounds for believing in the existence of the conspiracy. *Idem*, 469

12. In such a case, after the conspiracy has been consummated, the common purpose carried fully into effect, no subsequent declarations of any of the conspirators, not made in the presence of the others, are admissible as evidence against the latter.

Idem, 469

13. On a demurrer to evidence, the demurrant must be considered as admitting the truth of his adversary's evidence, and all just inferences which can be drawn therefrom by a jury, and as waiving all of his own evidence *which conflicts with that of his adversary, and all inferences, it would seem, from his own evidence (though not in conflict with his adversary's) which do not necessarily result therefrom.

Richmond & Danville R. R. Co. v.

Anderson's adm'r, 812

PRACTICE IN CHANCERY.

1. E sells to J a tract of land which had been conveyed to him by H by deed duly recorded on the 31st of December, 1866. At that time there were judgments docketed against H to the amount of \$9,845; but nearly all of them were against H as surety, and the principals in two, amounting to more than \$6,000, were good for the money. H had land in the county after the conveyance to E valued at \$140,000. Upon a bill by E against J to subject the land under his vendor's lien for the payment of \$4,800 of the purchase-money then due—*Held*: The court may decree a sale of the land, reserving the power to dispose of the proceeds of sale so as to protect purchasers.

Jordan v. Eve, trustee, &c., 1

2. The only issue in a cause being whether a gift by a father to his daughter was intended to be absolute or an advancement, and all the evidence having been taken with reference to that issue, it was proper for the court to decide it without a reference to a commissioner to enquire and report upon the question.

Watkins & a's. v. Young & als., 84

3. Upon a bill to enjoin the proceeding in an action at law founded on mutual accounts between the parties, and asking for a settlement of the accounts, if the injunction is granted *quære*, if it should not be without requiring the plaintiff in equity to confess a judgment in the action at law.

Thornton v. Thornton, 212

4. If it was proper to require a confession of judgment, it should expressly provide that the judgment so confessed was thereafter to be dealt with as the chancery court might direct. *Idem*, 212

5. Although there is no such express provision in the order granting the injunction, the court, if of opinion that the bill should be dismissed for want of jurisdiction, should, in the order of dismissal, direct that the judgment at law be set aside. *Idem*, 212

6. What is an interlocutory decree. See *Decrees, No. 1.* and

Smith & als. v. Blackwell & als., 291

7. On the trial of an issue out of chancery the plaintiff in the issue relies upon a receipt to which there is an attesting witness, but both the witness and the principal are dead. The plaintiff having proved the handwriting of the witness; the defendant may introduce the testimony of witnesses to prove that the name of the principal to the receipt is not in his handwriting.

Stephoe v. Flood's adm'r, 323

8. There being great conflict of opinion among the witnesses as to the genuineness of the handwriting of the principal to the receipt, the verdict of the jury against it will not be disturbed. *Idem*, 323

9. It is the general rule in ordinary trials that a verdict will not be disturbed upon the affidavits of jurors; and this is so in the case of an issue out of chancery, especially.

Idem, 323

10. For the grounds and principles upon which a court of equity refusing to enforce a specific execution of a contract for the sale of land will direct an account of the purchase-money and rents, &c. See the opinion of *Staples, J.*

Stearns & als. v. Beckham & als., 379

11. Upon a bill by the purchaser of land against the heirs of the vendor for the specific execution of the contract, the court upon the evidence will not enforce or rescind the contract. It seems in such a case the court will direct an account of the purchase-money paid in Confederate currency, by the vendees, and of the rents and profits, though a large portion of the purchase-money was paid when the vendor was wholly incompetent to act. *Idem*, 379

12. If upon taking the account there is a balance found due it is a lien upon the land, and may be enforced in equity. But the heirs of the vendor are not responsible personally for such balance. *Idem*, 379

13. On a bill by A's administrator with the will annexed, brought in 1849, to have the directions of the court as to paying over money to the life tenants, N and M, they are directed to give bond and security for the repayment of the money at their death; which they do. M dies, and the money received by her is paid over to N under an order of the court made in 1853, upon N giving bond and security. Nothing further is done in the case until 1874, when on the motion of the remain-

dermen upon a rule upon N to show cause, N is required to give a new bond with security, on the ground that the former sureties are insolvent—HOLD: The object of the suit by A's administrator having been accomplished so far as he was concerned, and the parties in remainder not having been parties in that suit, after the long lapse of time since anything had been done in the case, it was improper to proceed by a rule upon N; but the remaindermen should file a supplemental bill in the cause.

Beckwith & wife v. Avery's adm'r & als., 533

14. A case in which the court will not decree an account of administration of an estate, under the circumstances of the case. See Executors and Administrators, No. 4, and

Stamper's adm'r v. Garnett & als., 550

15. How land in the possession of devisees is to be sold to satisfy a judgment recovered against the executors of their testator. See Devisees, No. 2, 3, and

Lewis & als. v. Overby's adm'r & als., 601

16. In a suit in a county court by S, a judgment creditor, to subject lands of his debtor, the question was, whether a second deed of trust held by N had released the first, also held by N. The county court having made a decree in the cause, holding that the second deed released the first deed of trust, and giving priority to the judgments, N appealed to the circuit court, and that court affirmed the decree of the county court. At the same term N filed his petition for a rehearing of the decree of the county court, which was allowed. About the same time parol evidence was filed by the claimant under the deed—HOLD:

1. If the deeds alone are to be considered it was a proper case for the rehearing of the decree.

Summers v. Darne & als., 791

2. There is no rule of law which precludes the party from taking new evidence after interlocutory decree, even before a rehearing is obtained. The introduction of such evidence depends on the sound discretion of the court, and all the circumstances of the particular case. Looking to this evidence certainly the rehearing was proper.

Idem, 791

3. The decree of the county court, after declaring that the judgment liens have priority over the deed of trust, directs the sale of the land at public auction or at private sale, on credits stated, and that the commissioners should report their proceedings; and that a commissioner should ascertain and report the several liens on the land and their priorities. This is an interlocutory decree.

Idem, 791

4. Under the act, Code of 1873, ch. 178, § 25, so soon as the appeal from the decree of the county court was allowed and perfected, the cause was at once transferred to the circuit court, and became a pending cause in that court. It was therefore not affected by the act of March 3, 1873, which

applied only to causes then pending in the county court

Idem, 791

5. The petition for a rehearing of the decree of the county court having been presented and allowed to be filed at the same term at which that decree was affirmed by the circuit court, that court had complete control during that term of its decree, and might modify or review it at its pleasure.

Idem, 791

6. Though the petition was for a rehearing of the decree of the county court, and the order for a rehearing was confined to that decree, the circuit court acted upon the idea that the whole case was before it, in the exercise of its original jurisdiction, and that it had the same control of all the decrees and proceedings as the county court would have had if the cause had remained in that court. The circuit judge, in giving leave to file the petition, must necessarily have intended to suspend the operation of the decree affirming the decision of the county court, and the petition and order was intended to apply to both decrees.

Idem, 791

PRIORITIES OF DEBTS.

1. Under the act, Code of 1860, ch. 131, § 25, the debt of a trustee for infants did not rank in the third class of debts in the administration of his estate. But by the act of July, 1870, Code of 1873, ch. 26, § 25, it is placed in this class.

Price's ex'or & als. v. Harrison's ex'or & als., 114

2. A judgment confessed on the first day of the term of a court without suit, and an office judgment confirmed on the last day of the same term should stand as of the same date. See Judgments, No. 5, and

Brockenbrough's ex'x & al. v. Brockenbrough's adm'r & als., 580

RAILROAD COMPANIES.

1. For the grounds and principles on which railroad companies will or will not be held liable for injuries inflicted by their cars. See Negligence, No. 1, 2, 3, 4, 6, 7, 8, 9, and

Richmond & Danville R. R. Co. v. Morris, 200

Same v. Anderson's adm'r, 812

2. For the proceedings in the case of a county subscription to the stock of a railroad company. See County subscriptions to Internal Improvement Companies, passim, and Redd v. Supervisors of Henry county, 695

3. When railroad company liable for damages to a fishery. See fisheries, No. 1, and

Alex. & Fred. Railway Co. v. Faunce, 761

REGISTRY OF DEEDS, &c.

1. The words "goods and chattels," in §§ 4, 5, 6, of the registry acts, Code of 1873, p. 897, do not include a mere chose in action,

as a debt or claim on another for money due; and the assignment of such debt or claim for value, though not recorded, will be good against a subsequent attachment upon such a debt or claim.

Kirkland, Chase & Co. *v.* Brune & als., 126

2. The words "goods and chattels," in §§ 4, 5, 6, of the registry act, refer to and only include personal property, which is visible, tangible and movable. *Idem*, 126

SALES OF PERSONAL CHATTELS.

1. Where a vendee obtains possession of a chattel with the intention by the vendor to transfer both the property and possession, although the vendee has committed a false and fraudulent misrepresentation in order to effect the contract and obtain the possession, the property vests in the vendee until the vendor does some act to disaffirm the transaction. And the legal consequence is, that if before the disaffirmance the fraudulent vendee has transferred either the whole or a partial interest in the chattel to an innocent transferee, the title of such transferee is good against the vendor. Quoted by Christian J., with approbation.

Old Dominion Steamship Co. *v.* Burckhardt, 664

2. Upon a sale of a chattel, to be paid for on delivery, if possession is delivered without the payment, and before the vendor claims the chattel it is sold by the vendee to an innocent purchaser and paid for, the vendor cannot recover the chattel from the innocent purchaser. *Idem*, 664

925 *3. But if there has not been a contract of sale, but only a transfer of possession, to become a contract of sale when payment is made, the person in possession has no title to the chattel, and can therefore convey none to an innocent purchaser, and the owner may recover the chattel. *Idem*, 664

4. In this case held there was a contract of sale as well as delivery, and though the vendee failed to pay, the vendor could not recover the chattel from an innocent purchaser for value. *Idem*, 664

SEPARATE ESTATE.

1. The liability of a married woman's separate estate for her engagements depends upon her intention to charge it. Her intention to charge must be made to appear.

Harshberger's adm'r & als. *v.* Alger & wife & als., 52

SET-OFFS.

1. S as principal, and H as his surety, executed their bond to E. E owes S and N, partners, an account, and N assigns it to S. E becomes bankrupt and S proves the account before a register in bankruptcy, and he afterwards became a bankrupt. The assignee in bankruptcy of E sues H on the bond, and H pleads the account as a set-off—*Held*: Under the Virginia statute of set-off, Code of 1873, ch. 168, § 4, the account is a

valid set off for H in the action against him on the bond.

Edmunds' assignee *v.* Harper, 637

SPECIFIC PERFORMANCE OF CONTRACTS.

1. For the grounds and principles upon which a court of equity will or will not enforce the specific execution of a contract for the sale of land. See the opinion of Burks, J.

Stearns & als. *v.* Beckham & als., 379

2. For the grounds and principles upon which a court of equity refusing to enforce a specific execution of a contract for a sale of land will direct an account of the purchase-money and rents, &c. See the opinion of Staples, J. *Idem*, 379

3. When such accounts will be ordered, and for what the land will be liable. See Practice in Chancery, No. 11, 12, and *Idem*, 379

4. Specific performance of a contract for a sale and purchase of land will only be decreed as a matter of favor, where the vendor is not prepared to comply with his covenants until the hearing; and such favor will only be granted in cases where it can be granted without prejudice to the rights of the vendee. This indulgence will not be granted when the defect to be remedied was known to the vendor or his attorney at the time of the contract, and was concealed from the purchaser. And more especially will such an indulgence be denied when beside the failure to disclose the existence of incumbrances, an account is necessary to ascertain the state of the title, the extent, nature and amount of such incumbrances.

Kenny *v.* Hoffman & als., 442

5. A purchaser of land buys with a view of immediately removing his family to it, and is assured it is free from incumbrances except one deed of trust to secure a specific debt. Soon after the purchase he ascertains it is covered by several deeds of trust, and by a number of judgments against a prior owner, of unascertained amounts—*Held*: He is well justified in refusing to carry out the contract; and specific performance will not be enforced against him, though in a suit brought by the vendor, after two years he has had the liens ascertained, and they may be paid out of the purchase-money. *Idem*, 442

STATUTES.

1. The act, Code of 1873, ch. 105, § 12, in relation to divorce, construed in Harris *v.* Harris, 13

2. The act of March 16th, 1875, ch. 206, p. 215, in relation to commissioners of the revenue construed in

Haynes *v.* The Commonwealth, for, &c., 96

926 *3. The act of March 25, 1873, in relation to reopening judgments, declared unconstitutional in

Ratcliffe *v.* Anderson, 105

4. The act, Code of 1860, ch. 131, § 25, and the act, Code of 1873, ch. 126, § 25, in relation to the dignity of debts, construed in
Price's ex'or & als. v. Harrison's ex'or & als., 114

5. The act, Code of 1873, ch. 114, §§ 4, 5, 6, in relation to registry of deeds, &c., construed in

Kirkland, Chase & Co. v. Brune & als., 126

6. The act, Code of 1873, ch. 45, § 20, in relation to limitations of actions, construed in
Ficklin's ex'or v. Carrington, 219

7. The act of Congress of 3d of June, 1864, Rev. St. U. S., §§ 5136, 5137, concerning national banks, construed in

Wroten's ass'nee v. Armat & als., 228

8. The act, Code of 1873, ch. 185, §§ 2, 3, in relation to forthcoming bonds, construed in
Redd v. Ramey & als., 265

9. The act, Code of 1873, ch. 104, § 13, in relation to the marriage of colored persons, construed in

Francis v. Francis, 283

10. The act, Code of 1873, ch. 104, § 13, in relation to the winding up of the banks, construed in

Crews & al. v. Farmers Bank of Va., for, &c., 348

11. The act, Code of 1873, ch. 172, §§ 21, 22, and the act of April 2, 1877, Sess. Acts of 1866-67, ch. 256, in relation to witnesses, construed in

Reynolds' ex'or v. Callaway's ex'or, 436

12. The act, Code of 1849, ch. 188, §§ 3, 4, Code of 1873, ch. 184, §§ 3, 4, in relation to the lien of a fi. fa., construed in

Trevillian's ex'ors v. Guerrant's ex'ors & als., 525

13. The act, Code of 1873, ch. 146, § 16, in relation to the limitation of bills to set aside voluntary deeds, construed in

Lewis & als. v. Overby's administrator & als., 601

14. The act, Code of 1849, ch. 16, § 18, Code of 1873, ch. 15, § 13, in relation to penalties, &c., construed in

Mosby v. St. Louis Mutual Ins. Co., 629

15. The act, Code of 1873, ch. 168, § 4, in relation to offsets, construed in

Edmunds' assignee v. Harper, 637

16. The act, Code of 1873, ch. 178, § 25, in relation to appeals from the county court to the circuit court, construed in

Summers v. Darne & als., 791

SUNDAY STATUTE AND ORDINANCE

1. See City of Richmond, No. 5, and Thon's case, 887

TAXES AND TAXATION.

1. For the authority of the city of Richmond to require the owners of lots in the city to pave the sidewalks in front of their lots, see City of Richmond, No. 1, and

Sands, Receiver, v. City of Richmond, 571

2. For the authority of the city of Richmond to tax carts used in the city though the owner lives outside of the city limits, see City of Richmond, No. 3, and

Frommer v. City of Richmond, 646

TRUSTS AND TRUSTEES.

1. D and J, in 1858, sold and conveyed to W a tract of land for \$42,000, payable in fifteen years, with interest payable annually; and on the same day W conveyed the land and another tract called R, in trust to secure the payment of the debt, and it was provided in the deed that when \$15,000 of the principal of the debt was paid the lien on R should cease and be released. In 1862, W having ascertained that J, the holder of his bond, would receive Confederate money in payment of his debt, sold land he held as trustee of his wife and children, and paid J \$21,000.

One payment of \$2,900 was made by W 927 on the 2d of *May, 1863, on the principal of the debt out of the trust fund of his wife and children. Between the recording of the deed of trust and said payment by W, four judgments had been recovered against W—HELD:

1. For the payment of the principal of the debt made by W out of the trust fund of his wife and children, there is an implied trust in their favor on the tract called R.

Warwick v. Warwick & als., 70

2. This implied trust refers back to the date of the trust deed to secure the payment of the debt, and has priority over the judgment creditors, though the judgments were recovered before the money was paid. Idem, 70

3. The trust extends to the interest as well as the principal of the payment made out of the trust fund, and the interest commences from the time of the payment.

Idem, 70

4. Though the payment by W was made in Confederate money, yet it having been received by J at par for his good debt, the payment is not to be scaled. Idem, 70

5. W is not a competent witness to prove his payments of the debt out of the trust fund of his wife and children; and this, though the objection to his competency was not made until four questions had been put to him on his examination-in-chief. Idem, 70

2. P, who is a trustee under a will for the benefit of infant children, died in June, 1865, indebted to the trust, and his executor pays to the other trustee in the will a part of that debt. Upon the settlement of P's estate in 1877, it appears that he was largely indebted for more than his assets—HELD:

1. Under the statute in force at the time of P's death his debt as trustee was not embraced in the third class of creditors provided for in the act; but must be placed in the fourth class with the general cred-

itors of P; and his executor is not entitled in his administration account for the amount of the trust debt he had paid. See Code of 1860, ch. 131, § 25.

Price's ex'or & als. v. Harrison's ex'or & als., 114

2. The act of July, 1870, Code of 1873, ch. 126, § 25, which amends the former law by inserting in the third class "debts of trustee for persons under disabilities," is only prospective in its operation, and will not authorize the placing of P's debt as trustee in the third class, though the estate is not distributed until this last act went into operation. Idem, 114

3. V, one of the witnesses to an unrecorded deed of trust upon land to secure debts, afterwards became the purchaser of the land from the grantor in the deed of trust, and paid the purchase-money. Upon a bill to enforce the deed of trust, charging V with notice of the deed of trust, which he denied—HOLD: The mere fact that he had attested the deed is not sufficient to affect him with notice of the deed of trust.

Vest v. Michie, 149

4. To affect a purchaser for value of land with notice of an unrecorded deed of trust, the evidence must be sufficient to prove him guilty of fraud. Idem, 149

5. The act of congress of the 3d of June, 1864, Rev. St. of U. S. §§ 5136, 5137, under which the bank of F was organized, does not imply a negation of the corporate power on the part of the national banks which might be organized under it, to make a loan of money on real estate, does not annul any loan made by any such bank, or release or discharge any deed of trust or mortgage on real estate taken by the bank to secure the payment of such loan.

Wroten's ass'nee v. Armat & als., 228

6. If the act of congress plainly prohibited a bank organized under it to take a deed of trust or mortgage to secure a loan in any case, or made it penal to do so, such a provision could only have been intended for the benefit of the government, which might or might not, at its pleasure, enforce the forfeiture; and it could not be avoided by the borrower or his creditors.

Idem, 228

928 *7. A hotel company borrows \$10,000 from the Bank of F to complete its building, and execute a deed of trust upon it to secure the loan. The hotel company then enter into a written contract with W, a builder, to complete the building, and contract to give him a deed of trust upon the property, subject to the first deed, to secure any balance due him when the work is completed. He puts the contract on record to secure the mechanics' lien. The company pay him \$8,000 out of the money borrowed from the bank, and when the work is done they execute a deed of trust to secure the balance due him—HOLD:

1. W having contracted to complete the building with a full knowledge of the

means which had been used to raise the money to pay for the work, and having received \$8,000 of said money, is equitably estopped from claiming against the deed of trust executed to secure the money loaned. Idem, 228

2. The contract between W and the hotel company having been made and recorded after the deed to secure the loan to the bank, his mechanics' lien was posterior and subordinate to the lien of the bank under the deed to secure it, and was in fact merged in the lien by deed of trust afterwards taken by him to secure the same debt, in which the prior lien of the bank was expressly recognized.

Idem, 228

3. The lien of the bank under its deed of trust extended to the whole property as it was when it was sold under the decree of the court, and was not confined, as against the mechanics' lien, to the property as it was when the deed was made.

Idem, 228

8. A deed of trust is given in 1870 to secure a bona fide debt of \$10,000, evidenced by four notes, payable in one, two, three and four years, and conveys a tract of land, with the crops then upon or thereafter grown upon said land until said notes are fully paid, all stock of horses, mules, cattle, sheep and hogs, with the increase of the same, then on the said land and thereafter placed on the same, and all farming implements used in the cultivation of the said land—HOLD:

1. The deed is not fraudulent on its face. Brockenbrough's ex'x v. Brockenbrough's adm'r & als., 580

2. Quære: If the crops thereafter grown upon the land, or the increase of the stock, or other stock, or implements put upon the land, pass by the deed, and will be protected against subsequent execution creditors. Idem, 580

9. Pending a suit by judgment creditors to set aside the deed as fraudulent, the grantor makes a deed of quit claim to his creditor of all the property conveyed in the deed; but the notes are not given up, nor is the deed of trust released—HOLD: That whether the trust is released depends upon the intention or the creditor; and in this case it was held upon the evidence there was no such intention. Idem, 580

10. A deed of trust to secure certain debts conveys certain real estate, and the grantor reserves in it, to himself and his family, all exemptions and property allowed by the constitution of Virginia and all laws passed in pursuance thereof, and in addition thereto all exemptions allowed under the bankrupt law—HOLD: The reservation is legal and valid.

Idem, 580

11. The Alexandria and Fredericksburg Railway Company was chartered in February, 1864, with authority to construct and operate a railroad from the terminus of the Washington, Alexandria and Georgetown railroad, in the city of Alexandria, to the

most eligible point on the road from Aquia creek to Fredericksburg; and the company when organized as provided had authority to borrow \$1,000,000. The bonds were issued, and by deed, dated June 1, 1866, which was duly recorded, the company conveyed all its franchises and property acquired, or which might be acquired, to trustees in trust to secure the payment of these bonds, principal and interest. By an amendment of the charter in June, 1870,

929 *the company was authorized to extend their railway to some point on the Potomac, and to bridge said river; and under this authority they extended the railway to the Long bridge. In September, 1873, F recovered a judgment against the company, and issued a fieri facias thereon—HELD: In a contest between the trustees in said deed and F, as to a sum of money in the hands of the court derived from the use of the road between Alexandria and the Long bridge, by another railroad company, this part of the road is not embraced in the deed, and F is entitled to it under the lien of his fieri facias.

Alex. & Fred. Railway Co.'s Trustees v. Graham & als., 769

12. In January, 1856, N. sold and conveyed to J. W. & R. H. Darne a tract of land, and at the same time they conveyed the land to trustees to secure the purchase-money. In 1866 the trustees and R. H. Darne and wife released and conveyed the land to J. W. Darne. This deed bears date August 1st, 1866, and was acknowledged before justices on the 2d of November, 1866, and was received at the clerk's office for record on the 14th of the same month. By deed bearing date on 31st of October, 1866, J. W. Darne and wife conveyed the land to a trustee to secure a debt to N. This deed was acknowledged by J. W. Darne on the 2d of November, and by his wife on the 7th, and was received at the clerk's office on the 14th of November. In 1860 S. recovered judgments against J. W. Darne, which were docketed in 1865. On a suit in equity by S. to subject the said land to satisfy his judgments—HELD: That though the deeds bear different dates, yet as they were acknowledged on the same day and received for record on the same day, it is fairly to be presumed that the two deeds were delivered on the same day, and that they were intended to take effect at the same time.

Summers v. Darne & als., 791

13. The second deed or trust does not show that the debt secured thereby is the same as that secured by the first deed, but it is proved by parol evidence that all of the principal money secured by the first deed and a considerable amount of interest remained unpaid in 1866, and R. H. Darne being of opinion that he could not pay his part of it, at the request of said R. H. and J. W. Darne, N. agreed that the whole land might be conveyed to J. W. and he should give his notes for the amount, principal and interest, to be paid in two and three years, and give a deed of trust to secure them; and to carry out this arrangement the deed from the trustees and

R. H. Darne and wife to J. W. Darne and his deed of trust to secure the debt was executed—HELD:

1. Parol evidence is competent to prove the consideration on which these deeds were made. Idem, 791

2. The facts stated do not constitute a novation of the debt; but it is still a debt due for the purchase-money of the land, and has priority over the judgments.

Idem, 791

USURY.

1. Though the statute of usury, at the time a contract was made, declares the contract to be null and void, if at the time of the decree in the case the statute has been amended, and only avoids the contract for the interest, the decree should be for the principal sum loaned with interest from the date of the decree.

Mosby v. St. Louis Mutual Ins. Co., 629

VENDOR AND PURCHASER.

1. E sells to J a tract of land through which a public highway runs, and conveys the land to J with a covenant against incumbrances. The public highway is not an incumbrance which is included in the covenant, and for which J is entitled to compensation.

Jordan v. Eve, trustee, &c., 1

2. The land was conveyed by H to E, and the deed was recorded on the 31st of December, 1866. At that time there were judgments docketed against H to the amount of \$9,845; but nearly all of them were against H 980 as surety, and the principals in two *of them, amounting to more than \$6,000, were good for the money. H had land in the county after the conveyance to E valued at \$140,000. Upon a bill by E against J to subject the land under his vendor's lien for the payment of \$4,800 of the purchase-money then due—HELD: The court may decree a sale of the land, reserving the power to dispose of the proceeds of sale so as to protect the purchaser. Idem, 1

3. S sells land to M in fee. Upon bill by the assignee of S of one of M's bonds, to subject the land to its payment, it is determined that S had but a life estate in the land—HELD: M must elect to give up the land, or take such title as S can give him.

Wine v. Markwood & als., 43

4. V, one of the witnesses to an unrecorded deed of trust upon land to secure debts, afterwards became the purchaser of the land from the grantor in the deed of trust, and paid the purchase-money. Upon a bill to enforce the deed of trust, charging V with notice of the deed of trust, which he denied—HELD: The mere fact that he had attested the deed is not sufficient to affect him with notice of the deed of trust. Vest v. Michie, 149

5. To affect a purchaser for value of land with notice of an unrecorded deed of trust, the evidence must be sufficient to prove him guilty of a fraud. Idem, 149

6. Land sold and purchased under a written contract which has not been recorded,

though the purchasers have paid all the purchase money and have been for years in possession under their contract before a judgment has been recovered against their vendor, is liable to satisfy the judgment.

Young & als. *v.* Devries & als., 304

7. Land sold and purchased under a parol contract, the purchasers having paid all the purchase-money, and having been put in possession, and holding the possession under the contract before a judgment has been recovered against their vendor, is not liable to satisfy the judgment. *Idem*, 304

8. See Equitable Jurisdiction & Relief, No. 5, 6, and Practice in Chancery, No. 10, 11, 12, and

Stearns & als. *v.* Beckham & als., 379

9. A contract for the sale of land which provides that the vendor shall convey to the purchaser a clear title entitles the purchaser to a conveyance of the land with general warranty and free from incumbrances.

Kenny *v.* Hoffman & als., 442

WATER RIGHTS.

1. For many years E owned a grist-mill, and H a saw-mill, both of which were propelled by water-power, the water taken from the same dam; and when there was not sufficient water in the dam to propel both, the grist-mill had the preference in the use of it. In 1851, E sold the grist-mill, with the preference to a certain quantity of water, to C; and C changed it into a paper-mill, and changed the water-wheels from breast to over-shot wheels, which required the taking the water from the dam on a higher level. Soon after fitting up the paper-mill, C filed his bill, alleging that H was running his saw-mill so as to interfere with the work of his paper-mill, and asking for an injunction; and H replied that C was using more water than was used by the grist-mill—*Held*:

1. That the relative rights of the respective proprietors of the grist-mill and saw-mill to the water-power continued the same after the sale to C that it was before that sale.

Hannah *v.* Clarke, Miller & Hall, 36

2. C had a right to convert his grist-mill into a paper-mill, and was entitled to the same priority over the owner of the saw-mill in the use of the water-power for the operations of the paper-mill to which he was previously entitled in the use of the water-power for the operation of the grist-mill, but to no greater extent.

Idem, 36

3. The case is one for the equitable jurisdiction of the court; and the court should proceed to ascertain, *define and settle the rights of the parties to the use of the said water-power.

Idem, 36

WITNESSES.

1. A husband is not a competent witness in a case in which his wife is interested in her behalf; and this though four questions had been put to him on his examination-in-chief, before the objection to his competency was made.

Warwick *v.* Warwick & als., 70

2. R's executor brought an action of debt upon a bond against the executor of C. C was one of four obligors on the bond, all of whom were dead but T, and T was a discharged bankrupt. The only issue in the case was on a plea of payment—*Held*:

1. That T having been released from the payment by his discharge in bankruptcy, was a competent witness at common law for the defendant, to prove payment of the debt.

2. The statute, Code of 1873, ch. 172, §§ 21, 22, was intended to remove incompetency in certain cases, and not to create it in any case, and T being a competent witness at common law, is not rendered incompetent by the statute. And this especially since the act of April 2, 1877, Sess. Acts of 1876-77, ch. 256, amending the former act, which though passed after the suit was brought, was in force at the time of the trial, and therefore governs the case.

Idem, 436

